NYSBA FALL 2016 | VOL. 30 | NO. 2

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

www.nysba.org/LocalandStateGovernment

Message from the Chair

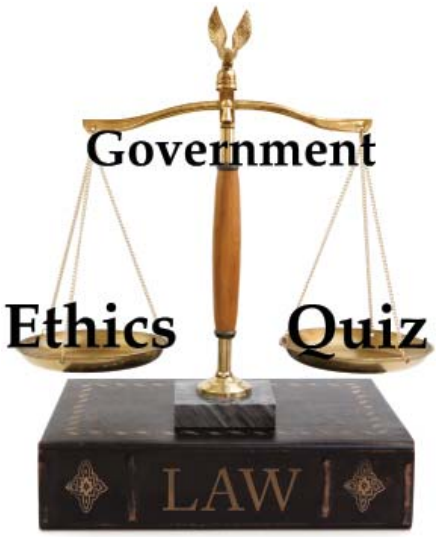
Carol L. Van Scoyoc

I am delighted to report to you the tremendous success of our Section's very well attended Fall Meeting Program held on October 21 and 22, 2016 at the Embassy Suites Hotel in breathtaking downtown Saratoga Springs! Program Co-Chairs Bernis Nelson, Esq., Natasha E. Phillip, Esq., of the New York State Department of State, and Spenser Fisher, Esq., of the New York City Law Department, Division of Legal Counsel and former Committee on Attorneys in Public Service (CAPS) Executive Committee member, deserve our praise for their tenacious and creative energy in developing a dynamic and appealing agenda covering a number of topics of interest to both local government attorneys and State attorneys. After the welcoming and gracious remarks from New York State Bar President-Elect Sharon Stern Gerstman, Esq., Adam Wekstein, partner of the law firm of Hocherman Tortorella & Wekstein, LLP, opened the Friday session by offering a rousing summary of the latest and most interesting decisions of the United States Supreme Court and the New York Court of Appeals impacting municipalities, State agencies and all municipal practitioners. Many thanks are also accorded to Noelle C. Wolfson, Esq., an associate of the firm, for her assistance with the presentation. Jessica Bacher, Esq., an attorney with the Land Use Law Center of the Elisabeth Haub School of Law at Pace University, followed with a thoughtful and comprehensive review of the strategies and best practices for developing a clear, thorough and enforceable solar permitting and regulatory framework, offering sample provisions for permitted uses, dimensional standards, development standards and definitions, and including a discussion of the New York State Model Solar Law and State Unified Solar Permit.

Andrea Fastenberg, Esq., of the New York City Office of Corporation Counsel, and Spencer Fisher, Esq., and Matthew Grieco, Esq., of the New York State Attorney General's Office, concluded the first day's program with a captivating segment entitled, "From Smoking to Soda and Back Again: Agency Authority under the Evolving *Boreali* Doctrine," in which they provided an in-depth analysis of recent cases involving challenges to regulatory initiatives of both New York City and New York State, concerning infringement by administrative agencies upon the role of legislative bodies in light of the New York Court of Appeals case in *Boreali v. Axelrod*, 77 N.Y.2d 1 (1987). The session was designed to furnish attendees a primer on the case law and how to tackle agency authority in response to those cases.

The Saturday morning session opened with a scintillating and timely presentation by Provost for the Graduate and Professional Divisions of Touro College and previous Dean and Professor of Law, Patricia Salkin, Touro College, Jacob D. Fuchsberg Law Center, and Jessica Vogele, a third-year

...continued on page 4



Sponsored by the Section's Ethics and Professionalism Committee

Q *Hypothetical:* A town board member, Reinhold Niebuhr, owns a law firm, Niebuhr & Associates, that will be merging with another law firm, Barth, Bultmann & Buber ("BB&B"). BB&B has bid on a town contract to provide legal services. Must the town board member resign from the town board? If so, at what point? Must he take any other action in regard to the contract?

Answer and analysis on page 7

Table of Contents

Save the Date!

January 26, 2017 (NYSBA Annual Meeting)
The Local and State Government Law Section Meeting
Held at New York Hilton Midtown, NYC

For registration and more information on the above event,
please visit www.nysba.org/StateandLocalGoverment

honors law student at Touro College, Jacob D. Fuchsberg Law Center, entitled, "Municipal Regulation and the Compassionate Care Act—Preemption or Local Control?," exploring such issues as Municipal Home Rule Law, preemption and local zoning control in connection with the siting and operation of marijuana dispensaries in New York State. The next segment, entitled "*Annus Stultus*: The Year in Ethics," hosted by Mark Davies, Esq., former Section Chair and now retired Executive Director of the New York City Conflicts of Interest Board, and Steven G. Leventhal, Esq., partner at Leventhal, Cursio, Mullaney & Blinkoff, LLP, meticulously reviewed recent developments in state and local government ethics laws, including the United States Supreme Court decision in *McDonnell v. United States*, and noteworthy New York State court decisions, and New York's legislative response to the recent high profile ethics scandals. The session included a discussion of hypotheticals crafted to sharpen the skill of attendees in analyzing controversial and problematic government ethics issues.

The program closed with a segment grappling with a subject of concern to all municipal attorneys, which was presented by Mark Stevens, Esq., of the Local Government Law Unit, Division of Legal Services, of the Office of State Comptroller. Mr. Stevens delved into the recent statutory amendments and case law relating to New York State General Municipal Law Section 103, including an animated discussion on the use of "best value" and the "piggybacking" exception.

Please save the date and join us for the Section's Annual Meeting to be held on Thursday, January 26, 2017, at the New York Hilton in New York City. Katie Hodgdon, Associate Counsel, Association of Towns of the State of New York; Michael Kenneally, Executive Director, New York State Municipal Workers' Compensation Alliance, and Richard Zuckerman, Esq., partner of the law firm of Lamb & Barnosky, LLP, are serving as co-chairs and are in the process of finalizing the program. The issues to be addressed at the Annual Meeting include the following: defense and indemnification of municipal employees; regulating short-term rentals (*i.e.* Airbnb), municipal regulation of drones, an analysis of the newly enacted zombie property and foreclosure law, and a session on municipal ethics. If any member would like to propose any subject matters of interest for future programs, please let me know. Your suggestions are always welcome.

I am very excited to declare at the time of writing this column that our Section has added one hundred twenty-four (124) new members since January 1, 2016! A special thanks to State Bar staff members Pat Wood, Lori Nicoll, and Beth Gould for all of their time and ideas in promoting the great benefits our Section has to offer all attorneys involved in the practice of government law. Please continue in your efforts to encourage other members of the State Bar Association to join us so that they will not miss out all the activities for our newly enhanced Section. I also continue to urge all members of the Section to visit and contribute to the On-Line Community, a very useful tool for networking and for gaining knowledge about the law and for breaking news items in the field of municipal law. Please also sign up to join our newly formed Committees, including, State Counsel, Administrative Law Judiciary (ALJ), Awards, Publications, and Public Contracts and Bidding.

As you may recall, in the Chair's message in the *Municipal Lawyer's* Spring/Summer 2016 edition, I discussed the State Bar's President's Committee on Access to Justice's (PCAJ) original proposal for a Pro Bono Policy and Procedures for Government Attorneys and noted that there were many intricate and thorny issues regarding such a policy, particularly for local government attorneys, given the restrictions placed on local governmental entities by the New York State Constitution, ethics codes, and other state law provisions on the use of public property for private uses, coupled with the scarce resources allocated to municipal counsel offices and the heavy workloads of the attorneys in those government offices.

As an update to members of our Section regarding the Model Pro Bono Policy and Procedures, the State Bar's PCAJ, while excluding local government attorneys from the reach of such a policy based on our Section's objections to same, did present a Model Pro Bono Policy and Procedures for State and Federal government agency attorneys, to the State Bar's House of Delegates at the June 2016 meeting in Cooperstown.

At the meeting, the House of Delegates considered two reports authored by me as Chair of the Section, on behalf of the Section's Executive Committee. The initial report expressed our support of the concept of encouraging government attorneys to provide pro bono services, but pointed out our Section's reservations in its ability to fully analyze the impact of the model pro bono policy and procedures for attorneys in State government, since our Section only recently welcomed the addition of State attorneys in October of 2015, when our Section voted to become the Local and State Government Law Section. At the request of NYSBA President Claire Gutekunst for more specific objections, a supplemental report was subsequently

issued which recommended four (4) modifications to the proposed Model Pro Bono Policy and Procedures concerning: (1) restricting the use of agency resources for pro bono activities absent executive or legislation action; (2) eliminating agency approval for organizations for which pro bono services are provided; (3) defining "attorney," for the purposes of Policy and Procedures; and (4) limiting pro bono services to non-litigation activities (similar to the policy developed by the New York State Attorney General's Office).

The Model Pro Bono Policy and Procedures that the House of Delegates was requested to approve was eventually amended to address two of the four issues raised by our Section. Michael Kenneally, Esq., a delegate from our Section, moved to table the vote on the Model Pro Bono Policy and Procedures to allow further examination of the two concerns our Section raised that were not dealt with by the House of Delegates—eliminating agency approval of organizations to receive pro bono services and limiting services to non-litigation. While the motion was subsequently defeated, the House of Delegates did approve the amended Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies. Many thanks must be given to Michael Kenneally; A. Thomas Levin, former NYSBA President; Mark Davies; Sharon Berlin, partner at Lamb & Barnosky LLP; Richard Zuckerman, and Ira Goldenberg, Esq., Section liaison, for their wisdom and assistance with this matter. As I previously stated in the 2016 Spring/Summer edition of the *Municipal Lawyer*, more volunteers from the Section, particularly those working as local government attorneys, are invited to participate in the development process. Please let me know if you are interested and would like to participate in the endeavor of forging a pragmatic and workable model policy and procedures that may be implemented by local governments.

Have a great winter and see you at the Annual Meeting in January!

Letter from the Editors


Sarah Adams-Schoen


Rodger Citron


Michael Lewyn

With this issue of *Municipal Lawyer* we are pleased to introduce you to new colleagues and to welcome back familiar friends.

And, indeed, Touro Law Professor Michael Lewyn is in a sense both a new colleague and a familiar friend. Stepping up to try something new, Mike has graciously accepted an offer to join us as a co-editor of the *Municipal Lawyer*, and we are confident he will be a great addition to the editing team. Mike teaches Property, Environmental Law, Land Use and related courses at Touro Law, and we expect his prolific scholarship on smart growth, land use, and related topics is already familiar to many of you.

Additionally, with gratitude for their tireless service, we have bid adieu to Municipal Law Fellows (student editors) Paige Bartholomew and Brian Walsh, who have graduated and moved on to the practice of law. And, we are pleased to be introducing two new Municipal Law Fellows: Michael Spinelli and Stephen Weinstein. You can read more about Michael and Stephen on page 22.

As is so often the case, this issue of the *Municipal Lawyer* is brimming with contributions from familiar voices, from the Ethics Quiz on page 2 to the Land Use Law Update on page 35.

We are pleased to welcome back contributing authors Adam Wekstein and Noelle Wolfson, who have written a thorough primer on SEQRA, examining in particular a variety of issues that are still unsettled under SEQRA case law—such as (1) whether agencies can refuse to draft an environmental impact statement (EIS) because of a project's minimal environmental impact and later reject the project on environmental grounds; (2) whether agencies can deviate from findings made in an EIS or environmental assessment; (3) if an action exempt from SEQRA review is somehow associated with a larger project that requires environmental review under SEQRA, whether the action can be completed before SEQRA review of the larger project is finished; and (4) issues related to ripeness for judicial review.

Karen Richards, who has published more than ten articles in the *Municipal Lawyer* covering a wide range of topics of concern to those in local and state government law practices, has submitted another timely and important piece—this time, examining issues relating to employee use of employer-owned email systems. She first addresses CPLR § 4548 (which provides that communications do not waive any privilege merely because they are made over email). However, because this statute does not mean that employee emails are automatically privileged, Karen then discusses the variety of factors that courts weigh in determining whether an employee has a reasonable expectation of privacy in such communications. Finally, Karen addresses the relationship between labor laws and email systems, discussing the National Labor Relations Board's holding that employees may use their employers' email systems to communicate with other employees about union-related issues.

Although new to the chorus of voices in the *Municipal Lawyer*, Phillip Oswald is not new to publishing with the NYSBA. Indeed, his article on a 2016 case that expanded the protections for conservation easements under New York law was published earlier this year in the *New York Environmental Lawyer*. We bring it to you here as an important update on an intersection of property, land use and environmental law. *Argyle Farm & Properties, LLC v. Watershed Agricultural Council of the N.Y. City Watersheds, Inc.* upheld the dismissal of a motion for declaratory judgment interpreting the easement in a manner that permits a septic system in a certain location, largely on the basis of protections afforded conservation easements under the Environmental Conservation Law (ECL). As Phillip explains, "[t]he Third Department's decision is groundbreaking in New York because it executes and gives effect to the important conservation policies of the state. Specifically, the decision substantially expands the protections that are afforded to conservation easements under the ECL, and strictly limits declaratory-judgment actions that seek an interpretation of these easements."

Finally, we wrap up this issue with a report from the NYSBA Committee on the New York State Constitution. Our last issue included the Committee's report on Home Rule and this issue includes the Commit-

tee's Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV). Among other things, the report endorses the Constitution's "forever wild" clause in its current form, suggests simplifying other parts of Article XIV, and explores whether New York should amend Article XIV to include an enforceable "Environmental Bill of Rights" to address contemporary environmental challenges. The Report and Recommendations were adopted by the Committee on August 3, 2016, and approved by the House of Delegates on November 5, 2016, in anticipation of the 2017 statewide referendum on whether a constitutional convention is warranted.

To continue to provide a range of content consistent with the breadth of local and state government law practices, we welcome contributions from old voices and new. Submissions can be on any legal topic relevant to the practice of local or state government law, and may vary in form from short, sparsely footnoted updates to lengthy, heavily footnoted primers and articles. To contribute to the next issue, please contact any of us by email (rcitron@tourolaw.edu, mlewyn@tourolaw.edu, or sadams-schoen@tourolaw.edu) before March 15. We look forward to hearing from you.

Rodger Citron

Michael Lewyn

Sarah Adams-Schoen

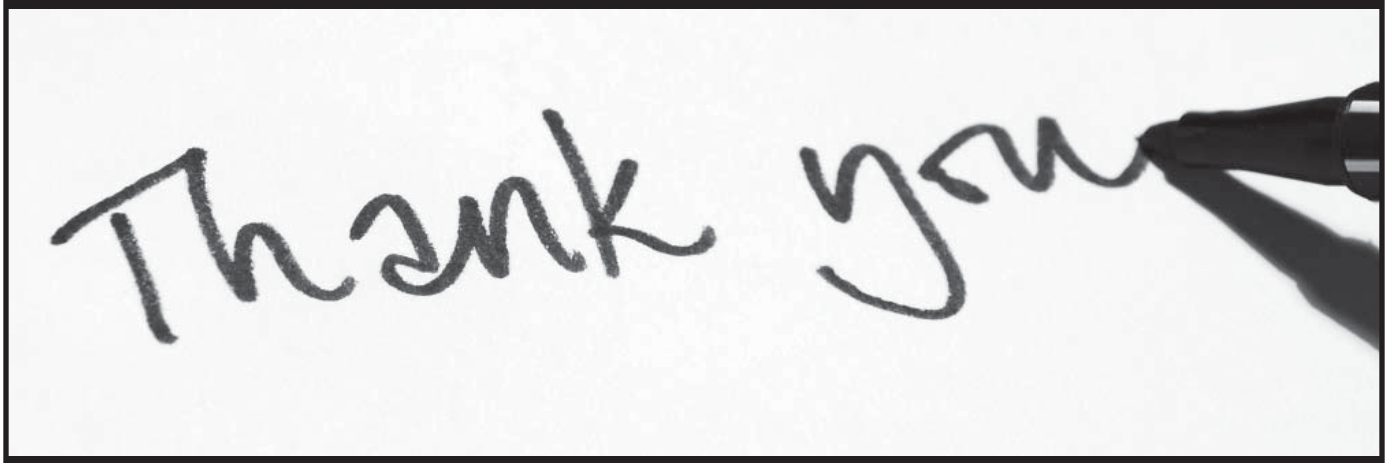
* * * * * * * * * * *

Answer to Government Ethics Quiz

A Yes. If BB&B wins the legal services contract before the merger, Niebuhr must resign either from the town board or from BB&B before the contract is finalized. He must also publicly disclose his potential interest in the contract and recuse himself from discussing or voting on its award to BB&B. If BB&B wins the legal services contract after the merger, Niebuhr's recusal will not cure the ethics violation.

Analysis: Since BB&B has not yet won the legal services contract, no contract exists with the town. Therefore, the provisions of Gen. Mun. Law §§ 800-804, which prohibit a municipal official from having an interest in a contract with his or her municipality if the official has any control over that contract, are not yet implicated. But if the contract is awarded to BB&B, the town board member will have a prohibited interest in the contract after the merger, pursuant to Gen. Mun. Law §§ 800(3) and 801, since a firm in which he is a member (BB&B) will have a contract with the town and, as a town board member, he has the authority to approve payments to the firm under that contract. Recusal from having anything to do with the contract or payments under the contract, either on behalf of the firm or the town, will not cure the violation. In addition, if Niebuhr fails to resign from the town board or BB&B, the legal services contract will automatically be null and void and, if he acted knowingly and willfully, Niebuhr will have committed a misdemeanor. Gen. Mun. Law §§ 804, 805. If he were not an owner but only an employee of BB&B, then, by fully recusing himself and declining any remuneration as a result of the contract, Niebuhr would fall within Gen. Mun. Law § 802(1)(b), which permits a municipal official to work for a firm that has an interest in a contract with the official's municipality where the official has no ownership interest in the firm, fully recuses himself or herself from the contract, and receives no rumination as a result of the contract. Note further that Niebuhr must immediately and publicly disclose to the town board his future interest in BB&B's proposed contract with the town pursuant to Gen. Mun. Law § 803(1). Unlike § 801, which applies only to an existing interest in an existing contract, § 803(1) applies where the municipal official "will have" an interest in any "proposed contact." A knowing and willful failure to disclose is also a misdemeanor. Gen. Mun. Law § 805. Furthermore, he should recuse himself from discussing or voting on awarding the contract to BB&B since otherwise he will be acting to benefit a firm in which he will have an interest, even though he does not yet have an interest; failure to do so may constitute a common law ethics violation, invalidating the contract. *See Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo*, 69 A.D.2d 320 (2d Dep't 1979); *Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dep't 1985); *Schweichler v. Village of Caledonia*, 45 A.D.3d 1281 (4th Dep't 2007), *app. den.*, 10 N.Y.3d 703 (2008).

NEW YORK STATE BAR ASSOCIATION



As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Claire P. Gutekunst
President

NYSBA

Taking a Hard(er) Look at SEQRA

By Adam L. Wekstein and Noelle C. Wolfson

Adam L. Wekstein

Noelle C. Wolfson

I. Introduction[1]

In the 40 years since its enactment the State Environmental Quality Review Act ("SEQRA")[2] has spawned an extensive body of case law, administrative decisions and guidance, treatises and articles. Nonetheless, numerous issues remain regarding the substantive analysis under and the procedural requirements of SEQRA for which there are neither satisfactory nor consistent answers. The principles putatively governing such topics are, of course, still evolving, but the fact remains that as to a number of significant issues case law and administrative guidance leave the practitioner with no clear answers, provide rules which have logical flaws or that contribute to expense and inefficiency of the environmental review process or establish procedures that are contrary to the manner in which SEQRA is typically applied by governmental agencies. This article attempts to discuss but a handful of these topics—a selection of those subjects which the authors have found to arise on a regular basis or to be either particularly vexing or intriguing, with liberal citation to recent case law where appropriate.

II. Is There Justification for Inconsistency Between an Agency's Negative Declaration and Its Denial of a Permit on Environmental Grounds?

The implications of a negative declaration under SEQRA on subsequent permit decisions present both logically and legally vexing questions. Can a lead agency find that an action has no potential for significant environmental impacts and then deny an approval based on environmental criteria set forth in the underlying permitting scheme? The logical answer would seem to be "no," but logic and law do not always coincide.

Of course, to issue a negative declaration under SEQRA—that is, a determination that no Environmental Impact Statement ("EIS") is required—a lead agency must determine that an action will result in no environmental effects or that the identified environmental effects will not be significant.[3] Conversely, an EIS must be prepared under SEQRA when an action "*may* have a significant effect on the environment."[4] Based on this statutory and regulatory language and the policies underlying SEQRA, controlling authority makes clear that there is a low threshold for requiring preparation of an EIS.[5]

Notwithstanding such authority, courts have upheld the denial of a substantive approval on environmental grounds following the issuance of a negative declaration in connection with review of the application for that approval. A prime example of such an approach is *MLB, LLC v. Schmidt*.[6] Therein, the Appellate Division, Third Department, considered the issuance of a negative declaration by a planning board in connection with review of an application for subdivision approval and that board's subsequent denial of that application solely on environmental grounds.

"The Third Department held that the issuance of the negative declaration, at least on the facts before it, did not preclude denial of the underlying application on environmental impact grounds."

The application at issue in *MLB, LLC* sought to subdivide the petitioner's property into three residential lots. At a public hearing on the application, the applicant's engineer testified that any drainage impacts could be mitigated through the use of dry wells and the village's engineer, with caveats, generally agreed. Members of the public objected to the subdivision based on their alleged personal observation of the existing poor drainage conditions in the neighborhood and contended that the application should be denied because the proposed development would exacerbate the existing problem.[7] The planning board, as lead agency, issued a negative declaration, which, as noted above, equates to a determination that the subdivision would not have any significant environmental impacts.[8] Nonetheless, the planning board denied final approval based on the seemingly contrary conclusion that the subdivision would exacerbate already bad drainage conditions in the neighborhood.[9]

In the litigation, the applicant attacked the denial by relying on the opinion of its engineer before the planning board that any drainage impacts of the proposed action could be mitigated, the village engineer's general concurrence in that view[10] and, most significantly, the planning board's negative declaration, to establish that the board's action was arbitrary and capricious. The Third Department held that the issuance of the negative declaration, at least on the facts before it, did not preclude denial of the underlying application on environmental impact grounds. It reasoned as follows:

> we note that the Board's issuance of a negative declaration is not wholly inconsistent with its denial of petitioner's application. In its SEQRA determination, the Board acknowledged the potential adverse effects associated with drainage and flooding problems, yet simply did not find them to be so significant in their impact as to require a positive declaration. *Thus, since the Board's SEQRA determination was that no significant adverse impacts would result from the proposed subdivision, but that there could be adverse effects associated with the drainage and flooding problems, we do not find the Board's SEQRA determination to be incompatible with its subsequent denial of petitioner's application for approval of the subdivision.*[11]

"Notably, when it has suited the court, the Appellate Division, Second Department, has relied on a negative declaration to annul denial of a site plan approval."

In response to the petitioner's related claims that the denial was improper because it was based on generalized community opposition, the court held that the testimony of the neighboring property owners did not constitute "generalized community objections," but rather found the concerns of the neighbors to be "specific and based upon personal experience and observations."[12] In reaching its conclusion, the decision did note that the record presented a close case where evidence could have supported a contrary outcome, but that as there was a rational basis for the board's determination it had to be upheld.[13]

It is submitted that an agency should not be allowed to deny an approval on environmental grounds where it has found that all environmental impacts would be insignificant by issuing a negative declaration. However, the Third Department is not alone in sanctioning what at least on its face would appear to be inconsistency between a negative declaration and an associated land use denial. For example, in *Chadwick Gardens Associates, LLC v. City of Newburgh Zoning Board of Appeals*,[14] which is arguably more illogical than *MLB, LLC*, the Second Department upheld the denial of an area variance. The court stated: "Contrary to the appellant's contention, a negative declaration under [SEQRA] with respect to a proposed development is not dispositive of the issue of that development's impact on a neighborhood and the ZBA may deny an area variance on other grounds… ."[15] The authors contend that while the latter statement is true, the former—that a negative declaration can be consistent with a finding that there is an unacceptable impact on a neighborhood—is wrong and ignores the fact that the term "environment" under SEQRA is quite broad. As defined in the SEQRA statute and regulations, it includes not only what one would intuitively consider to be the environment, such as water, air, wildlife and vegetation, but encompasses "existing patterns of population concentration, distribution or growth, [and] *existing community or neighborhood character*… ."[16] Accordingly, it is difficult to understand how a finding that an action will have a negative impact on a neighborhood can be consistent with a SEQRA conclusion that an action will generate no significant environmental effects.

Notably, when it has suited the court, the Appellate Division, Second Department, has relied on a negative declaration to annul denial of a site plan approval. In *SCI Funeral Services of New York, Inc. v. Planning Board of the Town of Babylon*,[17] the court decided that denial of an application for site plan approval, based on traffic grounds, was arbitrary and capricious in light of two traffic studies in the record and the planning board's own negative declaration which was consistent with such studies.[18] The court stated: "The Planning Board acted in an arbitrary and capricious manner when it ignored its own SEQRA finding and denied the application due to traffic considerations."[19]

"If the lead agency in a coordinated review issues a negative declaration it is binding on all involved agencies in that it ends the SEQRA review of the proposed action."

Finally, the *SEQRA Handbook*, The New York State Department of Environmental Conservation (3d Edition 2010) (the "*SEQRA Handbook*"), also addresses the necessity of consistency between a negative declaration and subsequent permit decisions by posing the following question: "Can a project be denied after a negative

declaration?" and providing the following straightforward response:

> Yes, but the basis for denial must be based on the failure of the project to meet specified technical or numerical standards not relating to the environmental significance of the project, or for reasons other than general environmental impacts.[20]

Unfortunately, the New York State Department of Environmental Conservation ("DEC") muddies what should be a clear principle (perhaps relying on *MLB, LLC*), by immediately thereafter presenting as an example of appropriate regulatory behavior the issuance of a negative declaration by a zoning board of appeals followed by denial of an area variance under the statutory criteria precisely because of environmental impacts—e.g., transient traffic, impact on the residential nature of the neighborhood, and probability for litter and more noise degrading the neighborhood.[21]

"When the lead agency undertakes a full EIS review and issues a favorable findings statement in connection with granting approval, it prevents further SEQRA review by involved agencies, although each involved agency is required to issue its own findings statement."

III. Impact of a Negative Declaration by a Lead Agency on Permitting Decisions of Involved Agencies

A different, although less troubling, issue is presented when a lead agency adopts a negative declaration and an involved agency subsequently denies a permit on environmental grounds. Of course, if the lead agency in a coordinated review issues a negative declaration it is binding on all involved agencies in that it ends the SEQRA review of the proposed action.[22] Some of the same conceptual difficulty that applies when an agency deviates from its own negative declaration in a permitting decision exists when an involved agency makes a foray into environmental analysis after the lead agency has issued one. A major difference is that as SEQRA does not change the existing jurisdiction between or among state and local agencies,[23] each involved agency is entitled to rule on its own permit or approval and, consequently, the courts have held that an involved agency is not constrained by the lead agency's negative declaration in its analysis of environmentally related permit criteria. An example of this principle is provided by *Albany-Greene Sanitation, Inc. v. Town of New Baltimore Zoning Board of Appeals*.[24] Therein the Appellate Division reversed the lower court's annulment of a special permit. It held that issuance of a permit and negative declaration by the DEC for a solid waste transfer station did not control a local zoning board's consideration of an application for a special use permit for that use. The court stated the following:

> petitioner relies exclusively upon findings of DEC, the Department of Transportation and the Department of Parks, Recreation and Historic Preservation, which were made in connection with the SEQRA review and the issuance of the solid waste management facility permit, and the continued applicability of government regulatory controls as assurance that the project will not be injurious to the district. Because local land use matters are within the exclusive responsibility of the Zoning Board, however, DEC's negative declaration was in no way binding on the Zoning Board's determination…Indeed, SEQRA requirements do not change the existing jurisdiction between or among State and local agencies (*see, ECL 8–0103* [6]; *6 NYCRR 617.3*[b]).[25]

IV. The Implications of a Lead Agency's Findings Statement on Involved Agencies' Substantive Determinations and Procedures

When the lead agency undertakes a full EIS review and issues a favorable findings statement in connection with granting approval, it prevents further SEQRA review by involved agencies, although each involved agency is required to issue its own findings statement.[26] An involved agency should have greater leeway to deviate from conclusions in the lead agency's findings than from a lead agency's negative declaration, because unlike a negative declaration, favorable findings are not required to determine that no significant environmental impacts will be generated, but rather are to include a balancing of relevant environmental, social, economic and other considerations.[27] Not surprisingly, case law provides that the involved agency's own permitting decision may be inconsistent with the findings of the lead agency; however, a very recent decision may severely circumscribe the information an involved agency can consider in making its determination.

In *Troy Sand & Gravel Co., Inc. v. Town of Nassau*,[28] ("*Troy Sand & Gravel I*") the court, in a long running dispute which has spawned numerous judicial deci-

sions, held that DEC's statement of findings, adopted in connection with its issuance of a mined land reclamation permit, prevented the town board, as an involved agency, from undertaking "its own or any de novo SEQRA review,"[29] but did not control the outcome of that board's review of a special use permit for the quarry. The decision reads as follows:

> DEC's SEQRA determination did not…predetermine the Town's decision on plaintiff's permit application. Likewise, the SEQRA findings did not bind the Town to issue the requested special use permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations, including the environmental and neighborhood impacts of the project…
>
> Thus, while the SEQRA process is concluded and the Town is bound by DEC's SEQRA determination, the Town remains entitled to independently review plaintiff's application for the special use permit in accord with the standards contained in its zoning regulations, … *The Town, in its review of, among other things, the environmental impact of the proposed quarry under its zoning regulations, will necessarily take into consideration and abide by DEC's SEQRA determination and mining permit approval, but these DEC determinations do not displace local special use permit review.*[30]

Interestingly, while the decision made clear that the involved agency retained its full permitting jurisdiction, the italicized portion of the quoted language could be read to suggest that lead agency findings constitute a greater constraint on an involved agency's freedom to draw conclusions under SEQRA than might be gleaned from the regulations.

"Troy Sand & Gravel circumscribed the involved agency's ability to gather or rely on additional environmental information in issuing SEQRA findings and acting on the substantive permit."

Troy Sand & Gravel's judicial odyssey continued in another appeal which strengthened the potential constraints on the involved agency's actions posed by a lead agency's SEQRA review. In 2015, in *Troy Sand & Gravel Company, Inc. v. Town of Nassau*[31] ("*Troy Sand & Gravel II*"), the Third Department reviewed the denial of the special permit for quarrying following remittal to the town board from its decision in *Troy Sand & Gravel I*. The court reconfirmed that the town: (1) was not bound by DEC's SEQRA findings; (2) was required to make its own SEQRA findings; and (3) may make an independent review of the special permit application under the standards and criteria of the local zoning ordinance. However, the decision circumscribed the involved agency's ability to gather or rely on additional environmental information in issuing SEQRA findings and acting on the substantive permit. After noting that the local special permit regulations allowed the town to consider issues including environmental impacts, the Third Department limited the town's ability to do so in the following passage:

> we did not say [in *Troy Sand & Gravel I*] that the Town's independent review includes the ability to now gather additional environmental impact information beyond the full SEQRA record. Rather, in conducting its own jurisdictional review of the environmental impact of the project, the Town is required by the overall policy goals of SEQRA and the specific regulations governing findings made by "involved agencies" to rely on the fully developed SEQRA record in making the findings that will provide a rationale for its zoning determinations.[32]

In *Troy Sand & Gravel II,* the town contended that even though it was bound by the EIS record compiled by the lead agency in making its own SEQRA findings, it nonetheless was free to gather new information or conduct its own analysis regarding environmental concerns relevant to its permitting decision. The Appellate Division dismissed that position, justifying its conclusion based on SEQRA's policies requiring consideration of environmental factors "at the earliest time possible" and making sure the review is "carried out as efficiently as possible."[33] It stated that allowing the town to gather additional information regarding environmental issues in the face of the full SEQRA record, covering thousands of pages…"would vitiate the efficiency and coordination goals of SEQRA…"[34] The decision reads as follows:

> Although the Town is entitled to conduct an independent review whereby it applies the standards and criteria found in its zoning regulations, its review of the environmental impact of the project is necessarily based on the EIS record because its zoning determinations must find a rationale in its SEQRA findings (*see 6 NYCRR 617.11*[d][3])…

> In short, the EIS "fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action"…While the Town maintains its jurisdiction over the zoning determinations and, as we have previously held, its SEQRA findings may differ from DEC's findings…*the Town "must rely upon the [final EIS] as the basis for [its] review of the environmental impacts that [it is] required to consider in connection with subsequent permit applications"*…[35]

The court's conclusion in *Troy Sand & Gravel II* means that involved agencies should attempt to become actively engaged in the EIS process as early as possible if they want to maximize the probability that environmental issues encompassed by the criteria of the permit(s) or approval(s) over which they have jurisdiction are analyzed to their satisfaction.

V. Treatment of a Type II Action That Is Part of a Larger Project

When a Type II Action, one requiring no environmental review,[36] is part of or associated with a larger project that is undergoing SEQRA review, does the completion of the SEQRA review for the whole action have to take place before the Type II activity may proceed? The prototypical hypothetical which this question contemplates is demolition of an existing structure in anticipation of a larger project which is undergoing SEQRA review, where issuance of the demolition permit itself is strictly ministerial and, consequently, a Type II action.[37] Of course, one of SEQRA's strictures disfavors and, in most instances proscribes, segmentation[38] of an action into smaller component parts.[39] So the inquiry with respect to the example remains: if the municipality issues the landowner the demolition permit and/or landowner destroys the structure prior to completion of the SEQRA review of the development, has impermissible segmentation occurred? The answer is "probably not."

"Other courts have also held that evaluation of a Type II action separately from the environmental review of a broader action of which it is a part does not constitute improper segmentation."

The majority of case law provides that authorizing a Type II activity separately from and in advance of completion of the SEQRA review of the remainder of the proposed action is either not segmentation or constitutes permissible segmentation. For example, *Rodgers v. City of North Tonawanda*[40] addressed whether demolition of a boathouse, which was required for a project that included the replacement of a storm sewer and construction of a park and building complex, was impermissible prior to SEQRA review of the entire set of activities. The Fourth Department found it was not, reasoning as follows:

> We reject petitioner's contention that the court erred in segmenting the storm sewer outlet replacement project from the other aspects of the Gateway Point Park Project. The storm sewer outlet replacement project is specifically exempted from review under SEQRA as a Type II action (see 6 NYCRR 617.5[a], [c][2] ... Thus, that project was properly segmented from the remainder of the Gateway Point Park Project that is subject to SEQRA review.[41]

In *Settco, LLC v. New York State Urban Development Corporation*,[42] a landowner challenged the utilization of eminent domain to acquire its property for use as a convention center, based on a claim that the sale of the former convention center to serve as the site of an Indian Casino was impermissibly segmented from that acquisition. The Fourth Department determined that the casino project was exempt from environmental review under SEQRA, among other things, as a ministerial action[43] and as an act of the Legislature and Governor of the State of New York.[44] It held that "[g]iven the exemption of the casino project from environmental review under SEQRA, the respondents properly considered the impacts of the acquisition of the subject property and the relocation of the convention center activities apart from the impacts of the casino project." [45] Other courts have also held that evaluation of a Type II action separately from the environmental review of a broader action of which it is a part does not constitute improper segmentation.[46]

"The vast majority of cases addressing the topic have found that interlocutory challenges to SEQRA determinations are premature and that judicial review of such determinations must await a decision on the underlying substantive application."

DEC, however, does not appear to subscribe to the prevailing judicial interpretation of SEQRA with respect to independent treatment of the Type II ministerial acts which are associated with a larger project. Specifically, the *SEQRA Handbook* makes a distinction

between the issuance of a permit for a Type II segment of a larger action and the ability of the project sponsor to proceed in accordance with that permit. The *SEQRA Handbook* reads as follows:

> A ministerial permit can be issued while the SEQR review is ongoing if the permit can otherwise be issued. However, the activity allowed in the permit may not be undertaken because the SEQR regulations [6 NYCRR 617.3(a)] state that no physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQR have been complied with. The issuing official should notify the project sponsor of this prohibition. This would be particularly applicable to the issuance of demolition permits associated with a subsequent development action subject to review under SEQRA.[47]

VI. When Does a SEQRA Claim Become Ripe for Judicial Review?

Neither the text of SEQRA nor its implementing regulations specify when a cause of action claiming errors in the environmental review process is ripe for judicial review. To fill this void, the courts have uniformly adopted a rule of ripeness that is articulated with ease, but often applied with difficulty. A SEQRA claim is ripe for judicial review when the decision-making body has adopted a definite position that inflicts a concrete injury on the petitioner and that injury may not be prevented by further administrative action.[48] Because fulfilling SEQRA's mandates is often a preliminary step in the land use approval process, challenges to SEQRA determinations, even determinations with significant ramifications for an applicant (financial, temporal or otherwise), are typically not ripe for judicial review until a decision is made on the underlying action. However, the courts stress that there is no "bright-line rule" of ripeness, and that in the right circumstances challenges to SEQRA determinations may be ripe before the underlying action is decided.[49]

The vast majority of cases addressing the topic have found that interlocutory challenges to SEQRA determinations are premature and that judicial review of such determinations must await a decision on the underlying substantive application. The rationale for the principle is that until a determination on the action is made, further administrative steps could prevent the perceived injury to the petitioner and that policy considerations favor allowing the permit review process to proceed unrestrained by interlocutory judicial review, which would delay the already lengthy process.[50]

Unremarkably, in late 2014 in *Ranco Sand and Stone Corp. v. Vecchio*,[51] the Second Department followed the trend, holding that a challenge to a positive declaration issued in connection with a rezoning petition was premature until the decision-making process was complete. The Second Department expressly acknowledged that a positive declaration mandating an EIS requires the expenditure of considerable time and expense and, therefore, imposes an obligation which in some cases might inflict an actual concrete injury, but stated that the Court of Appeals suggested that "the need to expend time and money in preparing and circulating a DEIS, *standing alone*, is not determinative."[52] The Court of Appeals granted leave to appeal and in March of 2016 affirmed the Second Department's decision that Ranco's SEQRA challenge was not ripe for review.[53]

"The Court reasoned that the claim was ripe because even if petitioners were successful on their application, they would not be able to recoup the time, effort and expense to prepare an EIS which was required by an involved agency lacking jurisdiction to do so under SEQRA."

In affirming the Second Department's decision, the Court of Appeals agreed that the respondent Town Board's positive declaration imposed an obligation on Ranco by mandating that it prepare an EIS and complete the environmental review process. It likewise concurred that the positive declaration did not constitute a final action that could not be ameliorated by further administrative action. Specifically, the Court rejected the petitioner's argument that because the substantial costs and the time entailed in completing the EIS process could never be recovered, its injury would not be ameliorated or eliminated by further administrative proceedings. The Court's rejection of the environmental review costs as a basis for meeting the second prong of the ripeness standard was explained as follows:

> Of course that may be true, but it is insufficient, without more, to distinguish Ranco's case from any other preliminary administrative action. Indeed, Ranco's approach would lead to convergence of the two requirements set forth in *Gordon* by reducing the analysis to whether a petitioner will incur unrecoverable costs. The inevitable result would be that every positive declaration requiring the creation of a DEIS would be ripe for review because the preparation of a DEIS by its nature carries financial costs that generally

> cannot be recouped, regardless of the outcome of the SEQRA process and the ultimate determination on a petitioner's zoning application. However, courts should seek to avoid this type of "piecemeal review of each determination made in the context of the SEQRA process [which] would subject it to 'unrestrained review…result[ing] in significant delays in what is already a detailed and lengthy process'."[54]

To the extent uncertainty exists with respect to SEQRA ripeness jurisprudence, it was initiated in large measure by Third Department decisions in the 1990s and early 2000s which held SEQRA claims to be ripe notwithstanding that they were brought prior to the issuance of any substantive decision on the underlying approval. *See, e.g., Ziemba v. City of Troy*[55] (adoption of negative declaration ripe for review); *Cathedral Church of St. John the Devine v. Dormitory Authority of State of New York*[56] (adoption of negative declaration ripe for review); *McNeill v. Town Board of the Town of Ithaca*.[57] This trend gained further momentum in 2003 when the Court of Appeals decided *Gordon v. Rush,*[58] and *Stop-the-Barge v. Cahill*,[59] both holding that interlocutory SEQRA determinations were ripe for review.

In *Gordon v. Rush,* the Court of Appeals held that an involved agency's adoption of a positive declaration was ripe for judicial review, because that determination of significance was contrary to the negative declaration adopted by the lead agency during a coordinated review of the action. The Court reasoned that the claim was ripe because even if petitioners were successful on their application, they would not be able to recoup the time, effort and expense to prepare an EIS which was required by an involved agency lacking jurisdiction to do so under SEQRA. In *Gordon* oceanfront property owners who wanted to install certain measures to prevent dune erosion applied to the Administrator of the Town's Coastal Erosion Hazard Area Law (the "Administrator") and to the DEC for the necessary permits. The Administrator advised the DEC that it did not wish to be lead agency in the coordinated review of the action. The DEC, acting as lead agency, ultimately adopted a negative declaration and issued a tidal wetlands permit.[60]

Following DEC's approval, the Administrator denied petitioners an amended application. The petitioners appealed the Administrator's determination to the Town's Coastal Erosion Hazard Board of Review (the "Board"). The Board, claiming that it did not have an adequate opportunity to participate in the DEC's environmental review, asserted jurisdiction to conduct a new SEQRA review and ultimately adopted a positive declaration.[61] In the Article 78 proceeding challenging the Board's actions, the Court of Appeals rejected the argument that the petitioners' claims were premature since no decision had yet been made on the permit application. Its decision reads as follows:

> Here, the decision of the Board clearly imposes an obligation on petitioners because the issuance of the positive declaration requires them to prepare and submit a DEIS. Conducting a "pragmatic evaluation" of these facts and circumstances, the obligation to prepare a DEIS imposes an actual injury on petitioners as the process may require considerable time and expense…Here, the Board issued its own positive declaration for the project after the DEC had conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate… In addition, further proceedings would not improve the situation or lessen the injury to petitioners. Even if the Board ultimately granted the variances, petitioners would have already spent the time and money to prepare the DEIS and would have no available remedy for the unnecessary and unauthorized expenditures.[62]

In *Stop-the-Barge,* the Court was asked to determine the timeliness of a challenge to the New York City Department of Environmental Protection's ("DEP") review of a proposal to install a power generator on a floating barge in Brooklyn. The DEP, as lead agency, adopted a conditioned negative declaration which became final on February 18, 2000 (the "CND"). Exactly ten months later, the DEC granted the applicant an air permit for the power facility. On February 20, 2001—one year after the CND became final and two months and two days after the air permit was issued—the petitioners commenced an Article 78 proceeding claiming that the DEP's issuance of the CND and the DEC's issuance of the air permit were arbitrary and capricious and issued in violation of SEQRA. The Court held that the CND was a final action and thus any SEQRA challenge was time-barred under the four-month statute of limitations which began to run on February 18, 2000, not on December 18, 2000 when the air permit was issued by DEC. Accordingly the petition was dismissed as untimely.[63]

The ramifications of *Stop-the-Barge* were unclear and left practitioners unsure of when SEQRA claims became ripe for review. Perhaps recognizing this unintended consequence of *Stop-the-Barge*, the Court of Appeals addressed the question again in 2006 in *Eadie v. Town Board of the Town of North Greenbush.*[64] In *Eadie,* the Town Board, at the culmination of its Generic

EIS review of a rezoning, adopted findings on April 28, 2004. On May 13, 2004 it adopted the underlying rezoning. On September 10, 2004—more than four months after the issuance of the SEQRA findings, but less than four months after the rezoning was enacted—the petitioners commenced the Article 78 proceeding challenging, among other things, the adequacy of the SEQRA review of the rezoning.[65] The respondents argued that petitioners' claims were time-barred, citing *Stop-the-Barge* for the proposition that that the statute of limitations for challenging the SEQRA findings commenced upon their adoption, not when the rezoning legislation was approved.[66]

The Court disagreed, finding that *Stop-the-Barge* did not create a bright-line rule of ripeness and reconfirmed the holding in an earlier case, *Save the Pine Bush v. City of Albany*,[67] that the statute of limitations for challenging the SEQRA review of legislation is four months from the date that the legislation is enacted, *unless other specific considerations apply*. It distinguished *Stop-the-Barge* by virtue of the fact that the CND was essentially the DEP's last approval of the action therein and, thus, not subject to correction by that agency. It also distinguished *Stop-the-Barge* because it involved the SEQRA review of an administrative permit and not the adoption of legislation (although the court does not explain why the type of underlying action should have any bearing on when a challenge to the SEQRA review of the action becomes ripe). Additionally, in distinguishing the holding in *Stop-the-Barge*, the Court took great care to eschew a bright-line rule of ripeness. Rather, it recognized that under some sets of facts, not before it, an intermediate SEQRA determination could cause harm to the petitioner that cannot be corrected by further administrative action, which, as a consequence, would render the interim decision ripe for review.[68]

At least some "post-*Eadie*" decisions have found challenges to intermediate SEQRA determinations to be ripe for review, particularly those in which the reviewing agency exceeded its authority under SEQRA. For example, in *Center of Deposit, Inc. v. Village of Deposit*,[69] the Third Department held, among other things, that the petitioner's challenge to a planning board's positive declaration was not premature because the positive declaration was devoid of a reasoned elaboration. Therein the planning board considered an application for subdivision approval, essentially to bisect the property to place two existing buildings on their own separate lots. The planning board, as lead agency, adopted a positive declaration under SEQRA, which, of course, required the petitioner to engage in a full environmental review process, that, in turn, would significantly increase the time and expense of processing its application.[70] To support its positive declaration the planning board found that the application had potential to, among other things, impact water quality and air quality negatively.[71] The Third Department held that the lead agency failed to provide a reasoned elaboration as to how the proposed action—the legal division of the lot into two lots entailing no development or other physical alteration to the property—had the potential to cause the enumerated environmental impacts. Consequently, the court annulled the positive declaration and remitted the application to the planning board.[72]

Similarly, in 2015 the Supreme Court, Westchester County, held that a petitioner's challenge to a positive declaration, which required a supplemental EIS to study an environmental impact that had already been addressed as part of a completed environmental review of a related action, was not premature. In *Toll Land v. Limited Partnership v. Planning Board of the Village of Tarrytown*,[73] the petitioner was seeking site plan approval to develop a lot in a recently approved subdivision. A condition of final subdivision approval was that the owner of each lot would be required to obtain site plan approval before developing the lot. The lot that was the subject of the litigation was improved with what was characterized as an architecturally significant stone house dating back to the early 20th century. As described by the court, the historical and archeological nature of the stone house and the subdivision's impacts thereon were addressed as a part of the environmental and substantive review of the subdivision itself, and the removal of the house was approved.[74] Nonetheless, during the site plan review process for the salient lot various parties urged the planning board to reconsider the impacts to the stone house and to take steps to preserve it. Purportedly in response to these concerns, the planning board adopted a positive declaration and directed the petitioner to prepare a supplemental EIS.[75] Rather than preparing the SEIS, the petitioner sued to set aside the positive declaration. The court denied the planning board's motion to dismiss the petition and held that the petitioner's SEQRA claim was ripe for review, reasoning that the planning board was impermissibly trying to "reopen" the already completed SEQRA review of the subdivision. Thus, it found that the time and expense of preparing and processing a supplemental EIS constituted concrete harm to the petitioner sufficient to render the claim ripe.[76]

Although the law is not settled on this topic, it appears that the pattern emerging from the cases is that courts will find claims challenging intermediate SEQRA determinations ripe for review only in circumstances in which the reviewing agency has overstepped its authority or is without jurisdiction under SEQRA. *Ranco Sand and Stone Corp.*[77] supports this trend. Nonetheless, whether a claim is ripe for review remains a fact-specific inquiry and practitioners should be wary and should err on the side of caution, risking a dismissal for prematurity, rather than untimeliness, in bringing SEQRA claims, even when facts suggest that an intermediate

SEQRA determination has caused a party real injury that cannot be mitigated by further agency action.

VII. The Troubling Interaction Between the "Complete Application" and the Timing of Hearings and Default Approval

Authority applying the Town Law and/or SEQRA in arguably the literally correct fashion to determine when an application for a land use approval is "complete" and when the public hearing can move forward, presents practical problems in the subdivision approval process and requires a sequence of events during SEQRA review that is contrary to common practice. In the authors' experience, most local land use boards open the requisite public hearing on applications for approval prior to issuing a negative declaration. *Kittredge v. Planning Board of the Town of Liberty*[78] and other authority indicate that such an approach is wrong and renders invalid an approval that has been granted without adherence to the order of steps required by SEQRA and the Town Law.

In *Kittredge*, the Third Department held, among other things, that when a planning board acts as lead agency under SEQRA in reviewing an application for subdivision approval it cannot hold the public hearing on the preliminary plat before adopting the negative declaration. The landowner in *Kittredge* sought to subdivide a 143.2-acre property into 27 lots for single-family homes. Before issuing a determination of significance under SEQRA, the planning board held a public hearing on the preliminary plat, during which the public commented regarding environmental issues. In response to the comments, and even after the public hearing was closed, the planning board required the applicant to prepare studies and continued to review the subdivision. Ultimately, the planning board adopted a negative declaration. One month later, without holding another public hearing, it granted preliminary plat approval.

The Appellate Division began its analysis of the approval's validity by relying on Town Law § 276(5)(d)(i), which reads, in pertinent part, as follows:

> The time within which the planning board shall hold a public hearing on the preliminary plat shall be coordinated with any hearings the planning board may schedule pursuant to [SEQRA], as follows:
>
> (1) If such board determines that the preparation of an environmental impact statement on the preliminary plat is not required, the public hearing on such plat shall be held within sixty-two days *after the* receipt of a complete preliminary plat by the clerk of the planning board.[79]

The court stated that the central issue was whether the quoted provision requires that the public hearing be held only *after* receipt of a complete preliminary plat or merely constitutes a deadline allowing the public hearing to proceed at any time prior to the end of 62 days, regardless of whether the hearing occurs before or after the application is complete. The decision reasoned that while in isolation the provision might be viewed as simply providing a deadline, when read with the other salient provisions of the Town Law and SEQRA, the mandated conclusion is that the hearing must occur only after the application is complete. It relied on § 276(5)(c)[80] of the Town Law stating:

> In circumstances where no draft environmental impact statement (hereinafter EIS) is required, Town Law § 276(5)(c) provides that "[t]he time periods for review of a preliminary plat shall begin upon filing of [a] negative declaration." Common sense dictates that a hearing not be held on the preliminary plat until the plat is deemed complete, which occurs when a negative declaration is filed (*see Town Law § 276*[5][c]). Notably, where, unlike here, a planning board has determined that an EIS is required, any public hearing on the draft EIS must be held jointly with the required public hearing on the preliminary plat (*see Town Law §276*[5][d][i][2]), and the notice period for the public hearing on the preliminary plat depends upon whether a hearing will also be held on an EIS (*see Town Law §276*[5][d][ii])—all of which necessarily implies that the planning board must make an initial SEQRA determination before the public hearing is held.[81]

Employing a similar approach, the Appellate Division also found support in the facts that: (1) under SEQRA public hearings are not contemplated until after the determination has been made that a draft EIS is complete[82] and, therefore, are not part of the initial phase of SEQRA review; and (2) the purposes of public hearings under SEQRA are different from those of a public hearing on subdivision approval—the former is intended to address solely environmental concerns (*see generally* ECL 8–0101) while the latter "is intended to ensure that individual lots…are properly and safely laid out and sufficiently improved with necessary facilities and amenities."[83]

The court concluded that because the law requires that a public hearing on preliminary approval be held

after a lead agency has completed its initial review pursuant to SEQRA, the public hearing which the planning board held prior to the negative decision was never legally held and the approval was invalid.

In a procedurally convoluted context, *Center of Deposit, Inc. v. Village of Deposit* ("*Center of Deposit, Inc. II*"),[84] utilized the same principle to reject an argument that the applicant for subdivision of its approximately 3-acre parcel into two lots was entitled to default subdivision approval under Village Law § 7-728(6)(d). The planning board held a public hearing on the preliminary plat in October, 2009, *prior* to making a determination of significance under SEQRA. Thereafter, the planning board issued a positive declaration, which was annulled by the Appellate Division in 2011.[85] On remittal from the Third Department's earlier decision, the planning board issued a negative declaration in March 2012, held a further public hearing and denied the application. On the second appeal, from the denial, the applicant argued that as 62 days had passed since the October 2009 public hearing and after the Appellate Division's previous invalidation of the positive declaration, it was entitled to approval. In its 2013 opinion, the court disagreed in the following analysis:

> Petitioner contends that, because the Board held a public hearing on the application in October 2009, it lacked any authority to conduct additional hearings, and the time within which the Board was required to issue a determination on the subdivision application began to run when this Court set aside the initial positive declaration. We do not agree. Pursuant to *Village Law § 7–728(6)(c), a public hearing on the subdivision application must follow the filing of the negative declaration under SEQRA … Thus, the hearing held in October 2009—prior to the issuance of the negative declaration—could not satisfy the hearing requirement under the Village Law,* and the Board had 62 days after the issuance of the negative declaration in March 2012 to hold a public hearing, and an additional 62 days after the hearing to render a decision on the application. …[86]

It held that as the board acted within the required time frame after the March 2012 negative declaration, the petitioner was not entitled to default approval.

Early in 2015, *Lucente v. Terwilliger*[87] again used the approach embodied by *Kittredge*, in perhaps a more troubling manner, to deny an application. The court found that because the version of the subdivision for which the negative declaration had been issued evolved, the final iteration of the plat could not obtain default approval. In *Lucente*, the Town of Ithaca Planning Board issued a negative declaration in 2006 and granted preliminary subdivision approval one month later. Once the applicant applied for final subdivision approval, the Town enacted a moratorium which inhibited further processing of the application for in excess of two years. The final plat, the processing of which was allowed to proceed after the expiration of the moratorium, ultimately employed a different stormwater management control plan with an associated change in the shape and size of three lots. Nearly five years following the expiration of the moratorium, with the planning board having failed to act, the applicant demanded default approval from the Town Clerk under Section 276(8) of the Town Law. That provision, provides among other things: "in the event a planning board fails to take action on a preliminary plat or a final plat within the time prescribed therefor after completion of all requirements under the state environmental quality review act…such preliminary or final plat shall be deemed granted approval." The court held that the 62-day default period never started to run because the final plat differed from the one for which the negative declaration had been issued and the SEQRA review of the final plat required by the modifications to the subdivision was not completed—that is, there was no valid negative declaration and, consequently, never a complete application for the final plat.

"It is submitted that employing the remedy prescribed by the SEQRA Handbook *would hinder the policy of integrating SEQRA into the underlying approval process by, in one instance, suggesting addition of an added set of hearings or, alternatively, encouraging municipal boards to retreat from previously issued negative declarations in the face of public pressure."*

Lucente was a case in which the changes between preliminary and final plat were substantial and the applicant appears to have conceded that the changes to the subdivision triggered the need for further SEQRA review. It, however, may raise questions in instances where the changes in the subdivision plat are more modest, as to whether an earlier SEQRA determination has implicitly been reopened by the modification, thereby requiring a new SEQRA determination.

Importantly, it is not just the state enabling legislation for subdivision approval that presents the issue of when an application can move forward through the hearing process. The SEQRA regulations themselves provide the following:

(c) An application for agency funding or approval of a Type I or Unlisted action will not be complete until:

(1) a negative declaration has been issued; or

(2) until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. When the draft EIS is accepted, the SEQR process will run concurrently with other procedures relating to the review and approval of the action, if reasonable time is provided for preparation, review and public hearings with respect to the draft EIS.[88]

DEC has at least recognized the conflict between the actual practice of land use boards (and perhaps common sense) regarding complete applications and the opening of public hearings before the issuance of the determination of significance and what the regulations appear to require. The *SEQRA Handbook* addresses the question in the following manner:

> Historically, municipal boards used the public hearing forum to do fact finding on whether to require a draft EIS. At the same time, the public hearing ordinarily follows the determination that an application is complete. Because no application is complete until a negative declaration has been issued or the municipal board has accepted a draft EIS, where necessary, municipal boards can hold a separate public hearing on whether to require a draft EIS or accept public comment on its determination to require or not require a draft EIS at the hearing held subsequent to determining that the application is complete. If public input reveals new information or indicates errors in the characterization of the action that call the issuance of a negative declaration into question, the negative declaration can be rescinded and an EIS required.[89]

It is submitted that employing the remedy prescribed by the *SEQRA Handbook* would hinder the policy of integrating SEQRA into the underlying approval process by, in one instance, suggesting addition of an added set of hearings or, alternatively, encouraging municipal boards to retreat from previously issued negative declarations in the face of public pressure. In contrast, the traditional approach of allowing public comment at a hearing prior to the issuance of a negative declaration would further the interests of allowing public participation in and integrating SEQRA into the process at the earliest practicable time, as well as rendering the process more efficient. Perhaps one way to accommodate the technicalities of the holdings in the cited cases, and the SEQRA regulations themselves, is to open the hearing on, for example, preliminary subdivision approval, but to make sure that it remains open for at least one full session following the negative declaration (or in the case of an EIS process, following the acceptance of the DEIS).

One other item of note regarding the "complete application" principles under SEQRA is brought into focus by the same section of the *SEQRA Handbook* cited above. The section states that the complete application rule and associated consequences do not apply to adoption of local laws and ordinances "since neither involves an 'application'."[90] The distinction advanced by DEC is troubling in that the private applicant needs to reach a significant stage in the SEQRA process before public review even begins, whereas a governmental entity can theoretically complete the hearing process on a zoning enactment and release the EAF and issue a negative declaration thereafter, immediately before taking its substantive vote. It also begs the question of what rule applies where the zoning amendment results from a petition by a landowner or is initiated in connection with a specific project. In such instances it would seem there is an "application" within the meaning of SEQRA that needs to be complete before the hearing process commences.

Adam L. Wekstein is a founding partner of Hocherman Tortorella & Wekstein, LLP. His practice concentrates on land use, zoning, environmental, and constitutional law and he has handled numerous complex litigation matters. He appears regularly before municipal agencies and boards seeking land use approvals and environmental permits, and has lectured and/or written articles regarding various zoning, environmental law, property rights, and constitutional issues for the Municipal and Environmental Law Sections of the New York State Bar Association, Lorman Education Services, the Practicing Law Institute, The New York Zoning Law and Practice Report, *The Urban Lawyer* and the former Municipal Law Resource Center of Pace University. He is a member of the Executive Committee of the Local and State Government Law Section of the New York State Bar Association. Mr. Wekstein graduated from Cornell University and the State University of New York at Buffalo Law School, *cum laude*, where he was an editor of the *Law Review*. He served as a law assistant at the New York State Supreme Court, Appellate Division, Third Department.

Noelle C. Wolfson is an associate in the law firm of Hocherman Tortorella & Wekstein, LLP. Her practice focuses on land use, zoning and environmental law. She is a 2001 graduate of Siena College and a 2006 graduate of *Pace University School of Law*, where she was a Research and Writing Editor of the *Pace Environmental Law Review* and an Honors Fellow with the Land Use Law Center.

Endnotes

1. A version of this article was originally published in the New York Zoning Law & Practice Report, vol. 16, issue 4 (Jan./Feb. 2016). The article is reprinted here with permission.
2. "SEQRA" collectively refers to Article 8 of the Environmental Conservation Law and 6 NYCRR Part 617.
3. 6 NYCRR 617.7(a)(2).
4. Environmental Conservation Law ("ECL") § 8-0109(2) (emphasis added).
5. *See, e.g., Prand Corp. v. Town Board of Town of East Hampton*, 78 A.D.3d 1057, 1059-1060, 911 N.Y.S.2d 468, 470 (2d Dep't 2010), *lv. denied*, 17 N.Y.3d 703, 929 N.Y.S.2d 93 (2011); *S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564, 739 N.Y.S.2d 164 (2d Dep't 2002), *lv. denied*, 98 N.Y.2d 615, 752 N.Y.S.2d 211 (2002) ("Because the operative word for triggering an EIS is 'may', there is a relatively low threshold for the preparation of an EIS."). In fact, a lead agency *must* prepare an environmental impact statement if there is the potential for even a single significant environmental impact. *Omni Partners, L.P. v. County of Nassau*, 237 A.D.2d 440, 442, 654 N.Y.S.2d 824, 826 (2d Dep't 1997).
6. 50 A.D.3d 1433, 856 N.Y.S.2d 296 (3d Dep't 2008).
7. *MLB, LLC*, 50 A.D.3d at 1434, 856 N.Y.S.2d at 297.
8. *Id.*
9. *Id.*
10. While the village engineer agreed with the proposition that the proposed dry wells would mitigate stormwater flow, he noted that any drywells can be overstressed and flood in certain conditions. *Id.* at 1436, 856 N.Y.S.2d at 298.
11. *Id.* at 1434-1435, 856 N.Y.S.2d at 297-298 (emphasis added).
12. *Id.* at 1435, 856 N.Y.S.2d at 298; *but see Kinderhook Development, LLC v. City of Gloversville Planning Board*, 88 A.D.3d 1207, 931 N.Y.S.2d 447 (3d Dep't 2011) (annulling planning board's denial of special permit based on purported concerns over stormwater runoff following that board's issuance of negative declaration), *lv. denied*, 18 N.Y.3d 805, 940 N.Y.S.2d 214 (2012). The *Kinderhook* court's analysis is reflected in the following passage:

    > [T]he engineering evidence submitted established that the project would reduce the preexisting runoff problems and, indeed, respondent relied upon that evidence in issuing its negative declaration for purposes of SEQRA. Even assuming, as respondent argues, that its own negative declaration was not binding upon it in rendering its ultimate determination, the fact remains that the only evidence respondent thereafter received on the runoff issue consisted of the conclusory opinions of neighbors opposed to the project. Moreover, it is apparent that respondent relied upon those concerns in denying petitioner's application, with one of respondent's members flatly stating that "people living in a particular neighborhood know more about the physical conditions of where they live than any experts brought in by an applicant." Inasmuch as respondent thus relied upon "generalized community objections" rather than the unchallenged empirical evidence in denying petitioner's application, we agree with Supreme Court that the determination was not supported by substantial evidence. 88 A.D.3d at 1208, 931 N.Y.S.2d at 449.

13. *MLB, LLC*, 50 A.D.3d at 1435, 856 N.Y.S.2d at 298.
14. 273 A.D.2d 232, 709 N.Y.S.2d 450 (2d Dep't 2000).
15. *Id.* at 232, 709 N.Y.S.2d at 450.
16. ECL § 8-0105; 6 NYCRR 617.2(l) (emphasis added); *see Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986).
17. 277 A.D.2d 319, 715 N.Y.S.2d 744 (2d Dep't 2000).
18. In *Colohan v. Cummings*, 2006 WL 6647631 (Sup. Ct. Westchester Co. 2006), the court invalidated [constructive] denial of subdivision approval as arbitrary and capricious and split the proverbial baby by citing *Chadwick Gardens Associates*, and *SCI Funeral Services*, for the proposition that while a lead agency's "SEQRA determination is not dispositive…it is a factor to be considered…" in reviewing that agency's substantive action.
19. *SCI Funeral Services*, 277 A.D.2d at 320, 715 N.Y.S.2d at 744.
20. *SEQRA Handbook*, p.86.
21. *Id*.
22. 6 NYCRR 617.6(b)(3)(iii); *see Gordon v. Rush*, 100 N.Y.2d 236, 244, 762 N.Y.S.2d 18, 23 (2003).
23. 6 NYCRR 617.3[b].
24. 263 A.D.2d 644, 692 N.Y.S.2d 831 (3d Dep't 1999), *lv. denied*, 94 N.Y.2d 752, 700 N.Y.S.2d 425 (1999).
25. *Id.* at 646, 692 N.Y.S.2d at 832 (citations omitted).
26. 6 NYCRR 617.11(c).
27. *See* 6 NYCRR 617.11(d)(2) and (4).
28. 101 A.D.3d 1505, 957 N.Y.S.2d 444 (3d Dep't 2012).
29. *Id.* at 1507, 957 N.Y.S.2d at 447.
30. *Id.* at 1508, 957 N.Y.S.2d 447-48 (citations omitted; emphasis added).
31. 125 A.D.3d 1170, 4 N.Y.S.3d 613 (3d Dep't 2015).
32. *Id.* at 1172, 4 N.Y.S.3d at 615-616.
33. *Id.*, 4 N.Y.S.3d at 616.
34. *Id.* at 1173, 4 N.Y.S.3d at 616.
35. *Id.*, 4 N.Y.S.2d at 616-617 (citations omitted; emphasis added); *see also Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1537, 902 N.Y.S.2d 710, 713 (3d Dep't 2010) ("all involved agencies must rely upon the FEIS as the basis for their review of the environmental impacts that they are required to consider in connection with subsequent permit applications (*see 6 NYCRR 617.6*[b][3][iii])").
36. *See* 6 NYCRR 617.3(f); 617.5(a).
37. *See* 6 NYCRR 617.5(c)(19).
38. Under SEQRA, segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." 6 NYCRR 617.2(ag).
39. *See* 6 NYCRR 617.3(g).
40. 60 A.D.3d 1379, 875 N.Y.S.2d 409 (4th Dep't 2009).
41. *Id.* at 1379-1380, 875 N.Y.S.2d at 410 (citations omitted).
42. 305 A.D.2d 1026, 759 N.Y.S.2d 833 (4th Dep't 2003), *lv denied*, 100 N.Y.2d 508, 764 N.Y.S.2d 385 (2003).
43. 6 NYCRR 617.5(c)(19).
44. 6 NYCRR 617.59(c)(37).
45. *Settco, LLC*, 305 A.D.2d at 1027, 759 N.Y.S.2d at 835.
46. *See also New York City Coalition For Preservation of Gardens v. Giuliani*, 175 Misc. 2d 644, 670 N.Y.S.2d 654 (Sup. Ct. N.Y. Co. 1997) (rejecting a claim of segmentation in the context of proposed development at 27 sites as part of a program entailing the construction of affordable homes on city-owned property because the developments individually were Type II actions—the replacement or reconstruction of a structure or facility, in kind, on the same site under 6 NYCRR 617.5(c)(2)—and recognizing that while in reviewing Type I and unlisted actions an agency cannot ignore the combined impact of a development with closely related multiple phases or deliberate division of developments into smaller parts, the "rule seems to apply only to non-Type II actions"), *aff'd*, 666 N.Y.S.2d 918 (1st Dep't 1998);

Beekman Delameter Properties LLC v. Village of Rhinebeck Zoning Board of Appeals, 44 Misc. 3d 1227, 998 N.Y.S.2d 305 (Sup. Ct. Dutchess Co. 2014) (holding that as the grant of individual setback variances in connection with a proposed spa and hotel project is a Type II action under 6 NYCRR 617.5(c)(12), the variances were properly considered separately from the remainder of the approvals for the project); *Booth v. Planning Board of Village of Perry*, 2013 WL 1401264 (Sup. Ct. Wyoming Co. 2013) ("generally, determinations on 'type II actions' may properly be segmented from review of other actions...").

47. *SEQRA Handbook*, p. 170.
48. *See Gordon v. Rush*, 100 N.Y.2d 236, 762 N.Y.S.2d 18 (2003) (*citing Essex County v. Zagata*, 91 N.Y.2d 447, 672 N.Y.S.2d 281 (1998)).
49. *See Gordon*, 100 N.Y.2d 236, 762 N.Y.S.2d 18.
50. *See, e.g., Guido v. Town of Ulster Town Board,* 74 A.D.3d 1536, 902 N.Y.S.2d 710 (3d Dep't 2010) (dismissing the petition of adjoining land owners to invalidate the EIS and the lead agency's findings regarding applications for approval of a residential subdivision, holding that it was premature, because the respondents had not yet made a determination on the substance of the land use applications); *Patel v. Bd. of Trustees of Inc. Vil. of Muttontown,* 115 A.D.3d 862, 864, 982 N.Y.S.2d 142, 144 (2d Dep't 2014) ("issuance of a SEQRA findings statement did not inflict injury in the absence of an actual determination of the subject applications for a special use permit and site-plan approval and, thus, the challenge to the adoption of the findings statement is not ripe for adjudication"); *Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 655 N.Y.S.2d 172 (3d Dep't 1997) (DEC's designation of itself as lead agency in an environmental review was not ripe for review since it was a preliminary step in the decision-making process), *lv. denied,* 90 N.Y.2d 803, 661 N.Y.S.2d 179 (1997); *Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation,* 260 A.D.2d 920, 688 N.Y.S.2d 842 (3d Dep't 1999) (DEC's decision to require a supplemental EIS was not ripe for review since it constituted a preliminary SEQRA step), *lv. denied,* 93 N.Y.2d 815, 697 N.Y.S.2d 562 (1999); *Rochester Telephone Mobile Communications v. Ober*, 251 A.D.2d 1053, 674 N.Y.S.2d 189 (4th Dep't 1998) (adoption of a positive declaration is not ripe for review); *Young v. Board of Trustees of Village of Blasdell,* 221 A.D.2d 975, 634 N.Y.S.2d 605 (4th Dep't 1995) (adoption of negative declaration is not ripe for review), *aff'd*, 89 N.Y.2d 846, 652 N.Y.S.2d 729 (1996); *Southwest Ogden Neighborhood Ass'n v. Town of Ogden Planning Bd.*, 43 A.D.3d 1374, 844 N.Y.S.2d 530 (4th Dep't 2007) (challenge to negative declaration was not ripe for review), *lv. denied,* 9 N.Y.3d 818, 852 N.Y.S.2d 14 (2008); *Air Energy TCI, Inc. v. County of Cortland*, 39 Misc.3d 234, 955 N.Y.S.2d 769 (Sup. Ct. Cortland Co. 2012) (challenge to a determination that DEIS was incomplete was not ripe for review).
51. 124 A.D.3d 73, 87, 998 N.Y.S.2d 68 (2d Dep't 2014), *lv. to appeal granted,* 25 N.Y.3d 902 (2015).
52. *Id.* at 84, 998 N.Y.S.2d at 77 (emphasis added).
53. *Ranco Sand and Stone Corp. v. Vecchio*, 27 N.Y.3d 92, 29 N.Y.S.2d 873 (2016).
54. *Id.* at 100, 29 N.Y.S.3d at 878 (citations omitted).
55. 295 A.D.2d 693, 743 N.Y.S.2d 199 (3d Dep't 2002).
56. 224 A.D.2d 95, 645 N.Y.S.2d 637 (3d Dep't 1996), *lv. denied,* 89 N.Y.2d 802, 653 N.Y.S.2d 279 (1996).
57. 260 A.D.2d 829, 688 N.Y.S.2d 747 (3d Dep't 1999), *lv. denied,* 93 N.Y.2d 812, 695 N.Y.S.2d 540 (1999).
58. 100 N.Y.2d 236, 762 N.Y.S.2d 18 (2003).
59. 1 N.Y.3d 218, 771 N.Y.S.2d 40 (2003).
60. *Gordon*, 100 N.Y.2d at 239-41, 762 N.Y.S.2d at 18.
61. *Id.* at 241-42, 762 N.Y.S.2d at 21.
62. *Id.* at 242-43, 762 N.Y.S.2d at 22.
63. *Stop-the-Barge*, 1 N.Y.3d at 223, 771 N.Y.S.2d at 42.
64. 7 N.Y.3d 306, 821 N.Y.S.2d 142 (2006).
65. *Eadie,* 7 N.Y.3d at 312-13, 821 N.Y.S.2d at 144-45.
66. *Id.* at 317, 821 N.Y.S.2d at 147.
67. 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987).
68. *Eadie,* 7 N.Y.3d at 315-18, 821 N.Y.S.2d at 146-48.
69. 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011).
70. *Id.* at 1451, 936 N.Y.S.2d at 711.
71. *Id.* at 1452, 936 N.Y.S.2d at 712.
72. *Id.* at 1453-54, 936 N.Y.S.2d at 713.
73. 12 N.Y.S.3d 874 (Sup. Ct Westchester Co. 2015).
74. *Id.* at 876-77.
75. *Id.* at 877-78.
76. *Id.* at 879-80.
77. *Ranco Sand and Stone Corp. v. Vecchio*, 27 N.Y.3d 92, 100, 29 N.Y.S.2d 873, 878 (2016) ("Moreover, and contrary to Ranco's suggestion, the ruling in *Gordon* was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an initial step in the SEQRA process... .Instead, *Gordon* stands for the proposition that where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency, or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper" (citations omitted)).
78. 57 A.D.2d 1336, 870 N.Y.S.2d 582 (3d Dep't 2008).
79. Town Law §276(5)(d)(i) (emphasis added and in court decision).
80. In its entirety the subsection, which would seem to provide straightforward grounds to support the outcome of the case, reads as follows:

> A preliminary plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the state environmental quality review act. The time periods for review of a preliminary plat shall begin upon filing of such negative declaration or such notice of completion. *See also* corresponding provisions of the Village Law (Section 7-728(5)(c)) and the General City Law (Section 32 (5)(c)).

81. *Kittredge*, 57 A.D.3d at 340, 870 N.Y.S.2d at 586.
82. *See* ECL § 8–0109 (5); 6 NYCRR 617.6 617.7; 6 NYCRR 617.9 (a) (3), (4).
83. *Kittredge*, 57 A.D.3d at 1341, 870 N.Y.S.2d at 586.
84. 108 A.D.3d 851, 968 N.Y.S.2d 731 (3d Dep't 2013).
85. *Center of Deposit, Inc. v. Village at Deposit,* 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011) (discussed above).
86. *Center of Deposit, Inc. II*, 108 A.D.3d 852-53, 968 N.Y.S.2d at 733 (citations omitted; emphasis added).
87. 46 Misc.3d 1217, 9 N.Y.S.3d 593 (Sup. Ct. Tompkins Co. 2015).
88. 6 NYCRR 617.3(c); *see also* ECL § 8-0109; *Sun Beach Real Estate Development Corp. v. Anderson*, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 965, 479 N.Y.S.2d 341 (1984).
89. *SEQRA Handbook*, p.167.
90. *SEQRA Handbook*, pp.167-68.

Introducing Touro Law Center's New Municipal Law Fellows

The Local & State Government Law Section is pleased to introduce the Municipal Lawyer's new student editors. Touro Law Center students Michael Spinelli and Stephen Weinstein have been awarded Municipal Law Fellowships and have begun serving as our new student editors.

Michael W. Spinelli is a 4th-year part-time evening student. During the day, Michael is a registered architect who provides design and construction consulting services on distressed construction projects. It was his involvement in these projects, and the expert testimony that followed, that peaked his interest in the study of law. Michael has lectured and published on construction and construction claim issues. He holds his B.S. in Architectural Technology from the New York Institute of Technology. Michael is a member of the Touro Honors Program, and he recently finished first place in the New York State Bar Association Judith Kaye American Arbitration Association competition. He was also the recipient of CALI Awards for Academic Excellence in Legal Process II (best brief and best oral argument), Remedies, Family Law, Construction Law, Disaster Relief Clinic, Intro to New York Court Practice, and Professional Responsibility. Michael is also the student editor of the *NYSBA Construction Lawyer*.

Stephen Weinstein is a second-year student at Touro Law Center. Stephen received his Bachelor of Arts degree from Fairfield University, majoring in Psychology and minoring in Sociology and Anthropology. Stephen is a Siben Scholar, member of both the *Touro Law Review* and Touro Honors Program, was named to the Touro Law Center Dean's List in Fall 2015 and Spring 2016, and was the recipient of CALI Awards for Academic Excellence in Contracts I, Contracts II, Legal Process I, Legal Process II, Property, and Foundations in Legal Analysis.

Michael Spinelli

Stephen Weinstein

Both Michael and Stephen are looking forward to deepening their understanding of municipal law and getting to know the members of the Local and State Government Law Section.

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 405
Central Islip, NY 11722-4539
(631) 761-7104
rcitron@tourolaw.edu

Prof. Mike Lewyn
Touro Law Center
225 Eastview Dr., Room 415
Central Islip, NY 11722-4539
(631) 761-7124
mlewyn@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

Employee Use of Employer-Owned Email Systems

By Karen M. Richards

I. Introduction

Email is a widespread method of communication for sending and receiving business and personal messages.

> The convenience and versatility of email understandably makes a business's email network attractive to its users far beyond what is directly or indirectly related to business objectives. From the worker's perspective, it is very convenient to use the same terminal, device, or email account directly available on the business email network to engage in wholly personal matters, instead of switching terminals, devices or accounts.[1]

Sending or receiving personal messages over their employers' email systems, however, may have negative consequences for employees. For example, such use may waive a privileged communication.

"Specifically, Part II of this article summarizes a statute that provides limited protection to email communications between persons whose confidences are entitled to a privilege under Article 45 of New York's Civil Practice Law and Rules (CPLR)."

Recognizing that policies regarding employee use of employer email systems present significant concerns for state and local government employers and employees, this article examines legal issues related to employee use of employer email systems, including issues related to waiver of privileges and the right of employees to use their employers' email systems to communicate with other employees about union-related issues. Specifically, Part II of this article summarizes a statute that provides limited protection to email communications between persons whose confidences are entitled to a privilege under Article 45 of New York's Civil Practice Law and Rules (CPLR). The case of *In re Asia Global Crossing Ltd*., where the court developed a four-factor test for determining whether an employee had an objectively reasonable expectation of privacy in email, is discussed in Part III.[2] Finally, this article provides a summary of *Purple Communications, Inc*., where the National Labor Relations Board (the Board) reconsidered whether employees should have a right to use their employers' email systems during union organizing and other activities protected by federal law.[3]

II. CPLR § 4548 Provides Limited Protection to Email Communications Between Persons Whose Confidences Are Entitled to a Privilege

Section 4548 of New York's Civil Practice Law and Rules explicitly provides:

> No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.[4]

In enacting this statute, the Legislature made a "finding that when the parties to a privileged relationship communicate by e-mail, they have a reasonable expectation of privacy."[5] Adopted in 1998, it was "one of the first of its kind in the United States."[6]

"Applying this test in Asia Global, *Chief Judge Bernstein found the evidence regarding the existence or notice of corporate policies banning certain uses or monitoring employees' email was 'equivocal.'"*

CPLR § 4548 "eliminates uncertainty over the question whether privilege can attach to a communication made by electronic means, 'e-mail,' between persons whose confidences are entitled to a privilege under Article 45, such as lawyers and clients, physicians and patients, and husbands and wives."[7]

> Some caveats should be noted. The statute provides only that privilege shall not be lost solely because the parties use e-mail. All other aspects of the privilege must be satisfied, including the conventional requirements of confidentiality.[8]
>
> Furthermore, the statute addresses only the privileged status of e-mail communications as a matter of evidence law.[9]

Thus, CPLR § 4548 is only applicable in limited circumstances.

III. The *Asia-Global* Test: Determining Whether Employees Have a Reasonable Expectation of Privacy in the Context of Email Sent or Received Over Their Employers' Systems

In re Asia Global Crossing Ltd. established that employees' use of their employers' email systems may result in a waiver of confidentiality, and by extension, privileges.[10] Relying on the watershed case of *O'Connor v. Ortega*, and other Fourth Amendment "reasonable expectation of privacy" cases, Chief Judge Bernstein found the same right of privacy considerations had been adapted to measure an employee's expectation of privacy in computer files and email.[11] He formulated a four-factor test for determining whether the employee had an objectively reasonable expectation of privacy in computer files and email:

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?[12]

Applying this test in *Asia Global*, Chief Judge Bernstein found the evidence regarding the existence or notice of corporate policies banning certain uses or monitoring employees' email was "equivocal."[13] 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."[14]

"If the policy warned there was no expectation of privacy in using the company's system, courts have reached a different conclusion."

Although only advisory, this test has been "widely adopted" by many courts and, therefore, "it is a good framework with which to conduct this highly fact-dependent analysis."[15] Although no one factor is dispositive,[16] 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."[17]

> Because an 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.[18]

A. The First Factor: Does the Corporation Maintain a Policy Banning Personal or Other Objectionable Use?

Courts focus on the nature and specificity of the employer's email policy when analyzing the first factor. If the policy did not completely ban personal use of the employer's email system, some courts have found the first factor weighed in favor of the employee.[19]

"Some jurisdictions found the employer's failure to actually monitor email suggested to employees that email was confidential."

If the policy warned there was no expectation of privacy in using the company's system, courts have reached a different conclusion.[20] *In re Reserve Fund Securities and Derivative Litigation* is a case in point.[21] In this case, the first factor weighed in favor of finding the employee did not have a reasonable expectation of privacy because the company's policy provided employees "should" limit their use of email resources to official business, and the court found the use of the word "should" in this context connoted a mandate, as opposed to an aspirational statement.[22] Additionally, although the policy also included the admonition that employees "remove personal and transitory messages from personal inboxes on a regular basis," and this language acknowledged the possibility that employees may receive personal email from outsiders over the company's system, this admonition did not undermine the mandatory nature of the language that they "should" limit their use of email resources to official business.[23] Since the employee had no reasonable expectation of privacy when using his company's email system, messages sent to his wife were not protected by the marital communications privilege.[24]

In *United States v. Hatfield*, the court added a "fifth and ultimately deciding factor"—how the company interpreted its computer usage policy.[25] This additional factor was merely a clarification of the first *Asia Global* factor.[26] The court reasoned, "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."[27] Because the company in *Hatfield* believed its 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.[28]

B. The Second Factor: Does the Company Monitor the Use of the Employee's Computer or Email?

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."[29] Some jurisdictions found the employer's failure to actually monitor email suggested to employees that email was confidential.[30]

"Merely deleting email does not establish an objectively reasonable expectation of privacy where third parties have access to the employee's computer and email."

Most courts, including New York courts, do not require the employer to actually monitor employees' email use. "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."[31] For example, in *United States v. Finazzo*, although there was no evidence the company had a practice of actually monitoring email, the employee had no reasonable expectation of privacy because the company's policies clearly reserved the right to access email.[32] 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.[33]

In *Reserve Fund Securities*, the employer's policy "reserv[ed] the right to access an employee's e-mail for legitimate business reason…or in conjunction with an approved investigation…"[34] Since there was a reservation of the right to access and monitor employees' email, the second factor weighed against finding the employee had a reasonable expectation of privacy.[35]

C. The Third Factor: Do Third Parties Have a Right of Access to the Computer or Emails?

Regarding the third factor, Chief Judge Bernstein 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."[36] However, as he acknowledged, many jurisdictions found these precautions may not create an expectation of privacy if the employer's policy notified employees they should have no expectation of privacy.[37] For example, in *Reserve Fund Securities,* the employee's expectation of privacy was lessened because the employer's policy explicitly warned that email communications were automatically saved and were subject to review by the employer and may be disclosed to regulators and the courts.[38]

Merely deleting email does not establish an objectively reasonable expectation of privacy where third parties have access to the employee's computer and email. "Cases that take into account an employee's deletion efforts usually require more to render any expectation of privacy reasonable."[39] For example, a university professor's act of deleting over 3,000 pornographic images of young boys downloaded through a university's monitored computer network did not establish an objectively reasonable expectation of privacy with respect to the deleted emails.[40] In *United States v. Angevine*, the university's policy clearly warned computer users that data was "fairly easy to access" by third parties, such as network administrators, who actively audited network transmissions for misuse, and system administrators, who kept file logs recording when and by whom files were deleted.[41]

In *Scott v. Beth Israel Medical Center, Inc.*, the court found the third factor was not relevant, stating, "[t]he New York legislature in enacting *CPLR 4548* has decided that access, or potential access, by third parties, such as 'persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication' does not destroy privilege."[42] Prior to Dr. Scott's departure from the hospital, no one else had access to his computer, which was located in his locked office, and the hospital's policy was to delete a departing employee's information from the computer hardware itself but not from the email server.[43] "Accordingly, the only personnel with continuing access to the e-mails at issue after Dr. Scott's departure would be the computer staff which is addressed by *CPLR 4548*."[44]

D. The Fourth Factor: 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.[45] In *Finazzo*, *supra*, the fourth factor weighed heavily against Finazzo because not only did he admit awareness of the policy, but each quarter he was required in writing to acknowledge that he read and was familiar with the policy.[46]

"The majority reasoned their ruling was consistent with the purposes and policies of the Act, as well as its responsibility to adapt the Act to the changing work environment and its obligation to accommodate the competing rights of employers and employees."

Courts often consider the employee's position in the company when analyzing whether the employee had knowledge of the company's policy. High level executives and senior level managers are expected to know of the contents of company policies.[47]

IV. The National Labor Relations Board Recognizes the Right of Employees to Use Their Employers' Email Systems on Nonworking Time for Statutorily Protected Communications

On December 11, 2014, in *Purple Communications, Inc.*, the National Labor Relations Board (Board) overruled its divided 2007 decision in *Register Guard*, where it "held that an employer may completely prohibit employees from using the employer's email system for Section 7 [of the National Labor Relations Act (Act)] purposes, even if they are otherwise permitted access to the system, without demonstrating any business justification, so long as the employer's ban is not applied discriminatorily."[48] *Register Guard's* analysis failed, according to the majority in *Purple Communications*, "to adapt the Act to changing patterns of industrial life."[49]

In *Purple Communications,* the company's electronic communications policy "strictly prohibited" employees "from using the computer, internet, voicemail and email systems, and other Company equipment" to engage "in activities on behalf of organizations or persons with no professional or business affiliation with the Company" or to send "uninvited email of a personal nature."[50] The Communications Workers of America filed an unfair labor practice, asserting this policy unlawfully interfered with employees' rights.[51]

"The majority maintained their decision did not create a new statutory right, as employees' statutory right to communicate in the workplace was recognized by the United States Supreme Court almost 70 years ago."

The majority, with lengthy dissents by Members Miscimarra and Johnson, adopted a presumption that employees who have been given access to their employers' email systems in the course of their work are entitled to use the systems to engage in communications protected by Section 7 of the Act on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions.[52] The majority reasoned their ruling was consistent with the purposes and policies of the Act, as well as its responsibility to adapt the Act to the changing work environment and its obligation to accommodate the competing rights of employers and employees.[53]

The majority maintained their decision did not create a new statutory right, as employees' statutory right to communicate in the workplace was recognized by the United States Supreme Court almost 70 years ago.[54] Instead, they were "simply addressing the exercise of that right in a new context."[55]

Characterizing their decision as "carefully limited," the majority contended, "[f]irst, it applied only to employees who were already granted access to their employer's email system in the course of their work and it did not require employers to provide such access."[56] Second:

> [A]n employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. [The Board] "emphasize[d], however, that an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice.[57] And, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer

> has authorized.[58] Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.[59]

Finally, their decision did not address email access by nonemployees or any other electronic communications systems.[60]

The majority acknowledged that employers will be concerned about the extent to which they can monitor employees' email use to enforce a working-time limitation.[61] But confident that it could assess any surveillance allegations by the same standards that it applied to surveillance "in the bricks-and-mortar world," the majority swept aside concerns that monitoring computers and email systems will make employers "vulnerable to allegations of unlawful surveillance of employees' Section 7 activity."[62]

"The Board's decision creates yet another wrinkle for courts to iron out in cases involving employee use of employer-owned electronic communication systems."

The majority stated that monitoring of electronic communications on their email systems would be lawful, so long as the employers did nothing out of the ordinary, such as increasing monitoring during an organization campaign or focusing monitoring efforts on protected conduct or union activists.[63]

> Nor is an employer ordinarily prevented from notifying its employees, as many employers also do already, that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's e-mail system.[64]

Further, employers are not prevented "from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability."[65]

V. Conclusion

Employees often use their employers' email systems to communicate with third parties, including their spouses and attorneys, about personal matters. Although a privileged communication does not lose its protection merely because it was sent by email, it can be waived if there was no objectively reasonable expectation to believe that email sent over the employer's system was confidential, even though the employee subjectively intended that it be confidential.

As a result of the decision in *Purple Communications*, with certain narrow limitations, employees may use their employers' email systems to communicate with other employees about Section 7-protected communications. The majority stated its ruling does not prevent employers from monitoring or reserving the right to monitor computer and email use for legitimate management reasons or for misuse and reduced productivity, and it does not prevent them from notifying employees they may have no expectation of privacy when using their employers' email systems. However, as dissenting Member Miscimarra wrote:

> [T]he Act's protection is undermined by creating rights, presumptions, and exceptions – like those adopted in today's decision – that will be extremely difficult to apply. Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and when it is prohibited as a matter of law.[66]

The Board's decision creates yet another wrinkle for courts to iron out in cases involving employee use of employer-owned electronic communication systems.

Karen M. Richards is retired. She was formerly an Associate Counsel with the Office of General Counsel, State University of New York.

Endnotes

1. *Purple Communications, Inc.*, 361 NLRB No. 126 at 29 (Dec.11, 2014) (Johnson M. dissenting), *denying repeal after remand*, 2015 WL 936235 (NLRB Mar. 4, 2015), *supplemental decision*, 2015 L.R.R.M. (BNA) ¶ 178780 (NLRB Mar. 16, 2015) (evaluating Respondent's restrictions on employee use of its email system under standards set forth in Dec. 11, 2014 opinion). Note that the author uses "email," but uses "e-mail" if it was spelled that way by the quoted authority.
2. *In re Asia Global, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005).
3. 361 NLRB No. 126.
4. CPLR § 4548 (McKinney's 1999).
5. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B CPLR § C4548.
6. *Id.*
7. *Id*.
8. *Id.*; *see Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc. 3d 934, 938 (Sup. Ct. N.Y. Co. 2007) (recognizing that as with any other confidential communication, the privilege must be protected; otherwise, it will be waived).
9. *Id*.

10. 322 B.R. 247, 256-57 (Bankr. S.D.N.Y. 2005) (where the main question raised was whether the employee's use of the company's email system to communicate with his personal attorney destroyed the attorney-client, work product or joint defense privileges).

11. *Id*. (comparing *United States v. Simons,* 206 F.3d 392, 398 & n. 8 (4th Cir. 2000) (no reasonable expectation of privacy in office computer and downloaded Internet files where employer had a policy of auditing employee's use of the Internet, and the employee did not assert that he was unaware of or had not consented to the policy); *Muick v. Glenayre Elec.,* 280 F.3d 741, 743 (7th Cir. 2002) (no reasonable expectation of privacy in workplace computer files where employer had announced that he could inspect the computer); *Thygeson v. U.S. Bancorp,* No. CV–03–467, 2004 WL 2066746, at *20 (D. Or. 2004) (no reasonable expectation of privacy in computer files and email where employee handbook explicitly warned of employer's right to monitor files and email); *Kelleher v. City of Reading,* No. Civ. A. 01–3386, 2002 WL 1067442, at *8 (E.D. Pa. 2002) (no reasonable expectation of privacy in workplace email where employer's guidelines "explicitly informed employees that there was no such expectation of privacy"); *Garrity v. John Hancock Mutual Life Ins. Co.,* No. Civ. A. 00–12143, 2002 WL 974676, at *1–2 (D. Mass. 2002) (no reasonable expectation of privacy where, despite the fact that the employee created a password to limit access, the company periodically reminded employees that the company email policy prohibited certain uses, the email system belonged to the company, although the company did not intentionally inspect email usage, it might do so where there were business or legal reasons to do so, and the plaintiff assumed her emails might be forwarded to others); *Leventhal v. Knapek,* 266 F.3d 64, 74 (2d Cir. 2001) (employee had reasonable expectation of privacy in contents of workplace computer where the employee had a private office and exclusive use of his desk, filing cabinets and computers, the 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.) (employee had reasonable expectation of privacy in his computer and files where the computer was maintained in a closed, locked office, the employee had installed passwords to limit access, and the employer "did not disseminate any policy that prevented the storage of personal information on city computers and also did not inform its employees that computer usage and internet access would be monitored"), *vacated on other grounds,* 537 U.S. 802 (2002); *Haynes v. Office of the Attorney General,* 298 F. Supp. 2d 1154, 1161–62 (D. Kan. 2003) (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 email was prohibited, employees were given passwords to prevent access by others and no evidence was offered to show that the employer ever monitored private files or employee emails). *But see Smyth v. Pillsbury Co.,* 914 F. Supp. 97, 101 (E.D. Pa.1996) (no reasonable expectation of privacy where employee voluntarily sends an email over the employer's email system); *see O'Connor v. Ortega*, 480 U.S. 709, 711 (1987) (where a four-Justice plurality opined that employees' privacy expectations in their offices, desks and files "may be reduced by virtue of actual office practices and procedures, or by legitimate regulation").

12. *Id*.

13. *Id*. at 259-60.

14. *Id*.

15. *U.S. v. Finazzo*, 2013 WL 619572, at *7 (E.D.N.Y. 2013); *see also In re the Reserve Fund Securities and Derivative Litigation*, 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").

16. *Id*.

17. *U.S. v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999), *cert. denied*, 536 U.S. 961 (2002) (discussing attorney-client privilege); *see also Harvey v. Standard Insurance Co*., 275 F.R.D. 629, 734-35 (N.D. Ala. 2011) (same).

18. *Reserve Fund Securities*, 275 F.R.D. at 160.

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

20. *See, e.g., Finazzo,* 2013 WL 619572, at *8 (finding the first factor weighed against the employee where the company's policy set forth 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"); *Aventa Learning*, *Inc. v. K12, Inc*., 830 F. Supp. 2d 1083, 1109 (W.D. Wash. 2011) (finding no reasonable expectation of privacy where the company "discouraged" personal use and advised 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 the policy allowing "[i]ncidental and occasional personal use" of bank's systems).

21. *Reserve Fund Securities*, 275 F.R.D. 154, 161 (S.D.N.Y. 2011).

22. *Id*. ("While 'should' 'has various shades of meaning' and 'does not automatically denote...a mandatory...direction,' and while 'the meaning depends on the context in which the words are found,' there is nothing in RMCI's email policy suggesting that 'should' was intended to be precatory or aspirational" (citations omitted)).

23. *Id*.

24. *Id*.

25. 2009 WL 3806300, at *10 (E.D.N.Y.).

26. *Id*. at *10 n.14 (where the 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 the policy did not prohibit employees from using company computers to conduct legal matters).

27. *Id*.

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

29. *Information Management Services*, *Inc. Derivative Litigation*, 81 A.3d 278, 289 (Del. Ct. Chancery 2013).

30. *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 the employer reserved the right to review the employee's hard drive, but never actually did so, there could still be a reasonable expectation of privacy).

31. *Hanson,* 2011 WL 5201430, at *6 (finding no expectation of privacy where the employer reserved the right to monitor, even though there was no evidence of actual monitoring); *see also Finazzo*, 2013 WL 619572, at *9; *see, e.g., Long v. Marubeni America Corp.,* 2006 WL 2998671, at *3 (S.D.N.Y. 2006) (finding no expectation of privacy where the employer's policy warned employees they had "no right of personal privacy" and the employer reserved the right to monitor its systems); *Scott v. Beth Israel Med. Center, Inc.,* 17 Misc. 3d 934, 941, 847 N.Y.S.2d

436, 442 (Sup. Ct. N.Y. Co. 2007) (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"); *Reserve Fund Securities*, 275 F.R.D. at 161–62 (rejecting the suggestion to ignore the 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").

32. *Id.*

33. *Id.* (citing *U.S. v. Mejia*, 655 F.3d 126, 134 (2d Cir. 2011)).

34. *Reserve Fund Securities*, 275 F.R.D. at 163.

35. *Id.* at 164.

36. *Asia Global*, 322 B.R. at 257 n.7 (citations omitted).

37. *Id*. at 257-58 (citing *Garrity v. John Hancock Mutual Life Ins. Co.*, 2002 WL 974676, at *1–2 (D. Mass. 2002) (finding no reasonable expectation of privacy where, despite the fact that the employee created a password to limit access, the company periodically reminded employees that company email policy prohibited certain uses, email system belonged to the company, and although the company did not intentionally inspect email usage, it might do so where there were business or legal reasons to do so, and the employee assumed her emails might be forwarded to others); *see Silverberg & Hunter, L.L.P. v. Futterman*, 2002 WL 34461954 (N.Y. Sup. 2002) (Trial Order) (stating "[p]rotecting 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").

38. *Reserve Fund Securities*, 275 F.R.D. at 164 (considering whether an employee was on actual or constructive notice that email could be read or otherwise monitored by third parties).

39. *Finazzo,* 2013 WL 619572, at *10 (finding the third factor did not weigh for or against Finazzo where he 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 email, i.e., that a copy no longer remained on the company's server) (citing *Covertino v. U.S. Dept. of Justice*, 674 F. Supp. 2d 97, 108-110 (D.D.C. 2009) (finding a reasonable expectation of privacy in email 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 [DOJ] would be regularly accessing and saving such e-mails"); *Curto v. Med. World Comm.*, 2006 WL 1318387, at *5-6 (E.D.N.Y. 2002) (finding the employee had reasonable expectation of privacy in company-provided laptops where the employee 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").

40. *U.S. v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), *cert. denied*, 537 U.S. 845 (2002).

41. *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").

42. *Scott*, 17 Misc. 3d at 942, 847 N.Y.S.2d at 443.

43. *Id*. 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 Management Systems*, 81 A.3d at 290-91, and that employees have a lesser expectation of privacy when they communicate via a company email 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, "[i]n 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.

44. *Scott*, 17 Misc. 3d at 942, 847 N.Y.S.2d at 443 (rejecting Dr. Scott's argument that the third factor violated HIPAA, the federal statute that protects patient information, because the email at issue was between Dr. Scott and his attorney and because a "hospital can certainly have access to its patients' information").

45. *Finazzo*, 2013 WL 619572, at *10 (finding it was unreasonable for Finazzo to conclude the company did not monitor email system merely because its CEO was never disciplined for violating the company's rules about personal use of e-mail); *see also Long*, 2006 WL 2998671, at *3 (finding the attorney-client privilege was 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 the employee's belief that information on the hard drive would remain private was objectively reasonable where, even assuming the existence of a computer policy, the employee was not aware of a policy and had never seen or signed a policy).

46. *Id*.

47. *See, e.g., Long v. Marubeni America Corp*, 2006 WL 2998671 (S.D.N.Y. 2006) (finding vice presidents and general managers knew or should have known of the company's email use policy); *In re High-Tech Employee Antitrust Litigation*, 2013 WL 772668, at *7 (N.D. Cal. 2013) (assuming constructive knowledge where the employee was a high level executive and admitted familiarity with the company's policies); *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1107 (W.D. Wash. 2011) (ascribing constructive knowledge of the company's privacy policy to a senior level manager who was "expected to know of the contents of company policies"); *U.S. v. Hatfield*, 2009 WL 3806300, at *9 (E.D.N.Y. 2009) (presuming employee, as Chairman and CEO, had knowledge of company's computer use policy).

48. *Purple Communications, Inc.*, 361 NLRB No. 126 at 4 (Dec.11, 2014) (where the employer in *Purple Communications* provided video interpreting services to deaf and hearing-impaired individuals from 16 call centers located across the country); *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom., Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

49. *Purple Communications,* 361 NLRB No. 126 at 11. Dissenting Member Johnson disagreed, writing, "*Register Guard's* conclusion flows from decades of well-settled precedent on the use of employer equipment to engage in Section 7 activity." *Id*. at 30.

50. *Id*. at 2-3.

51. *Id*. at 3. Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). 29 U.S.C. § 157.

52. *Id*. at 14. The majority stated that an "employer may rebut this presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employee's rights," but that "limitations on employee communication should be no more restrictive than necessary to protect the employer's interests" and

it anticipated "that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." *Id*.

53. *Id*.

54. *Id*. at 5 n.15 (citing *Republic Aviation*, 324 U.S. 793 (1945)). Dissenting Member Miscimarra believed the majority created a right and "newly created standards." *Id.* at 18.

55. *Id*.

56. *Id*. at 1, 14 (only email systems were at issue in this case). Dissenting Member Johnson wrote:

> The majority's rationale today is absolutely not 'carefully limited,' as the majority claims. By implication, albeit an obvious one, this rationale extends beyond email to any kind of employer communications network (be it distant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs. *Id*. at 30.

57. *Id*. at 14 n.68 (noting "The prior existence of an employer prohibition on employees' use of email for nonwork purposes will not itself constitute a special circumstance.").

58. *Id*. at 14.

59. *Id*. at 1.

60. *Id*. at 1, 14 (stating "as neither issue is raised in this case"). Dissenting Member Johnson wrote:

> The majority's rationale today is absolutely not 'carefully limited,' as the majority claims. By implication, albeit an obvious one, this rationale extends beyond email to any kind of employer communications network (be it distant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs. *Id*. at 30.

See also Quicken Loans, Inc., 07-CA-145794, 2016 WL 1445983 (NLRB Apr. 7, 2016) (declining to extend *Purple Communications* to unrestricted downloads of materials from the Internet onto employer's server or to employees' right to use employer communication systems other than email).

61. *Id*. at 15.

62. *Id*.

63. *Id*. at 16.

64. *Id*. (stating, "An employer that changes its monitoring practices in response to union or other protected concerted activity, however, will violate the Act.").

65. *Id.* The majority expressed confidence "that employers, whether or not they already allow nonwork email use by employees, have developed methods appropriate to their particular business for monitoring and measuring employee productivity, and we would not presume to tell them how to do so." *Id*. at 15 n.72.

66. *Id.* at 28.

The Third Department Gives Some Teeth to the Statutory Protections Afforded to Conservation Easements under the Environmental Conservation Law

By Phillip Oswald

The Third Department issued an important decision recently that broadened the protections available to conservation easements. The decision in *Argyle Farm & Properties, LLC v. Watershed Agricultural Council of the N.Y. City Watersheds, Inc.* involved a dispute between the holder of a conservation easement and the owner of the encumbered property.[1] The easement was held by the Watershed Agricultural Council of the New York City Watersheds (the "WAC"), which acquires conservation easements on upstate properties in order to protect the water supply for New York City (the "City").[2] In addition to acquiring conservation easements, the WAC also administers voluntary land-use programs that ensure that only "best [agricultural] management practices" occur on the properties.[3] Since the City is restricted from directly regulating these properties by the Agriculture and Markets Law, it relies on these voluntary agreements with landowners to ensure that contaminants do not enter the streams and reservoirs that supply its water.[4]

The plaintiff owned the subject property, which consisted of 475 acres in the Pepacton Basin.[5] Six years after purchasing the property, the plaintiff sold a conservation easement on the property to the WAC.[6] Prior to closing on the easement, however, the plaintiff began converting a barn on the property into a residence, which required the installation of a septic system.[7] After the easement was conveyed, a dispute arose with respect to the location of the septic system because it was located in an area that was outside of the designated building area on the property.[8]

The WAC nevertheless negotiated with the plaintiff in an attempt to maintain the easement, even with the septic system being located in a prohibited area.[9] The WAC even offered to grant the plaintiff an exception to the building restrictions, or to modify the terms of the easement as necessary to bring the septic system into compliance with those terms at no cost to the plaintiff.[10] The plaintiff refused the offer because it apparently still was concerned about the effect of the easement on its ability to use and market its title in the future.[11] As a result, the plaintiff commenced a lawsuit against the WAC, *inter alia*, seeking to rescind the easement, or, alternatively, seeking a judicial declaration that interpreted the easement in a manner that permitted the location of the septic system.[12]

The WAC filed a motion to dismiss the complaint, which was granted by the trial court.[13] The main grounds for the WAC's motion were lack of standing, expiration of the statute of limitations, and failure to join a necessary party.[14] The statutory protections that are afforded to conservation easements under Article 49 of the Environmental Conservation Law (the "ECL") were not the primary defenses raised by the WAC, but, instead, were ancillary to the defenses discussed above.[15] In fact, the ECL protections constituted only about a page and a half of the trial court's 16-page decision.[16]

When the case came before the Third Department Appellate Division, however, the court seemingly brushed aside the primary grounds for the WAC's motion. The court issued a 6-page decision that upheld the dismissal, largely on the basis of the protections under the ECL.[17] The Third Department's decision is groundbreaking in New York because it executes and gives effect to the important conservation policies of the state. Specifically, the decision substantially expands the protections that are afforded to conservation easements under the ECL, and strictly limits declaratory-judgment actions that seek an interpretation of these easements.

1. Section 49-0305 of the ECL Is Given an Expansive Interpretation to Protect Conservation Easements From Defenses to Enforcement That Are Not Specified in the Text of That Statute

The first important point from the Third Department's decision in *Argyle Farm & Properties, LLC* is that the protections under section 49-0305 of the ECL were expanded beyond the text of that statute. The first five causes of action in the plaintiff's complaint were based on common-law defenses to contract formation and enforcement, including mutual mistake, misrepresentation, and frustration of contract.[18] Basically, the plaintiff claimed that the parties were mistaken as to whether a farming plan was in place for the property as necessary for a WAC-held easement, that the WAC misled the plaintiff with respect to the WAC's procedures, and that the parties' intent in entering the easement was frustrated due to the lack of a farming plan.[19] In light of these allegations, the plaintiff asserted that it was entitled to rescind the conservation easement.[20]

At the outset, the plaintiff's reliance on these defenses was not misplaced because they are not

eliminated as defenses to conservation easements by section 49-0305, which abolishes several traditional defenses to ordinary easements by making those defenses inapplicable to conservation easements.[21] These traditional defenses include, *inter alia*, a lack of appurtenance, a failure to touch and concern, the defense against negative burdens, a lack of privity, and adverse possession.[22] Thus, the plaintiff's attempt to raise these common-law contractual defenses was a plausible theory for rescission because an instrument that conveys an easement essentially is treated as a contract[23] and these contractual defenses were omitted from the text of section 49-0305,[24] thereby arguably signaling a legislative intent not to protect conservation easements from them.[25] This may explain why the protections under section 49-0305 were not the primary, secondary, or even tertiary arguments raised by the WAC on its motion or in response on appeal.[26]

Nevertheless, the Third Department held that section 49-0305 applies broadly to encompass all "defenses that exist at common law," including the defenses to contract formation and enforcement that the plaintiff raised in its complaint.[27] The omission of these common-law contractual defenses from the statutory text of section 49-0305 did not preclude the Third Department from applying that statute to those defenses.[28] The Third Department reasoned that "[c]onservation easements are of a character *wholly distinct* from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement."[29] The Third Department cited the Bill Jacket for section 49-0305 and further reasoned that this statute manifested an intentional legislative acknowledgement of this distinction, thereby compelling courts to provide differential treatment to conservation easements.[30]

Thus, the Third Department reasoned that the omission of these common-law contractual defenses from the list of defenses in section 49-0305 was not an intentional omission by the legislature.[31] Instead, the legislative history "made clear" that protecting conservation easements from these defenses is consistent with the legislative policy of protecting these easements from the generic, common-law grounds that can be used to defeat a traditional easement.[32] In fact, this decision can be read to hold that a conservation easement will be unenforceable only under the limited grounds for amendment or termination[33] that are provided for in section 49-0307 of the ECL.[34] This broad interpretation of the legislative intent behind section 49-0305 is supported by the statutory codification of the important public policies that conservation easements serve.[35] Essentially, this interpretation of section 49-0305 constitutes a significant advance in protecting conservation easements and the policies that they affect by ensuring that enforcement of these easements will survive all but a very limited set of challenges.

2. Landowners Cannot Seek to Reform the Terms of a Conservation Easement by Artfully Pleading a Declaratory Judgment Action That Seeks an "Interpretation" of Those Terms

The second important point from the Third Department's decision in *Argyle Farm & Properties, LLC* is that a landowner cannot obtain a judicial amendment of a conservation easement by artfully pleading a declaratory judgment action. In addition to the contractual claims asserted in plaintiff's complaint, the plaintiff also sought an "interpretation" of the terms of the easement under Article 15 of the Real Property Actions and Proceedings Law (the "RPAPL").[36] In other words, the plaintiff sought a declaratory judgment stating that construction of the septic system was permitted under the terms of the easement.[37] The Third Department, however, was not fooled by the plaintiff's attempt to use a declaratory-judgment action to obtain a judicially compelled amendment of the easement. In addressing these claims, the court reasoned that the "[p]laintiff *effectively* is seeking to *reform* the easement, and it is readily apparent that the *'interpretation'* advanced by plaintiff in this regard would result in either the termination of the easement itself or a material *amendment* thereto."[38]

Accordingly, the Third Department reasoned that in order for the plaintiff to succeed in obtaining a declaratory judgment, which effectively amended or terminated the easement, the plaintiff would need to establish that one of the grounds in section 49-0307 of the ECL applies.[39] The plaintiff had to satisfy section 49-0307 because section 49-0305 provided that a conservation easement can be amended or terminated only in accordance with the grounds that are provided for in section 49-0307.[40] Under section 49-0307, the "exclusive means" for the amendment or termination of a conservation easement are: (1)in accordance with the terms of the easement; (2) in a proceeding under section 1951 of the RPAPL; or (3) by eminent domain.[41] The Third Department determined that the action was "not in the nature of an RPAPL 1951 proceeding or an eminent domain proceeding."[42] Thus, the only ground available to the plaintiff was the first—the terms of the easement.[43]

The terms at issue, however, permitted for amendment or termination of the easement only upon mutual consent, with termination also requiring changed conditions, which prevent the continued accomplishment of the conservation easement's purpose.[44] Since neither consent nor changed conditions were present, the court held that the amendment or termination that the plaintiff sought was unavailable.[45] Therefore, the Third Department upheld the dismissal of the plaintiff's claims seeking a declaratory judgment interpreting the easement, because that proposed interpretation would

have essentially amended the easement, and none of the "statutorily recognized grounds" for amendment were applicable.[46]

Thus, the Third Department's decision effectively held that landowners cannot circumvent the restrictions under a conservation easement by seeking an "interpretation" of that easement in a manner that would effectively abrogate one or several of those restrictions.[47] The Third Department even put the term "interpretation" in quotations in its decision when referring to the relief that the plaintiff was demanding, thereby signaling the court's skepticism of the plaintiff's artful characterization of its claims in this respect.[48] In sum, landowners cannot reform the terms of a conservation easement through a declaratory judgment action. Instead, consistent with the legislative treatment of conservation easements, the amendment or termination of these easements is strictly limited to the exclusive means provided for in section 49-0307 of the ECL.[49]

3. Conclusion

The Third Department's decision in *Argyle Farm & Properties, LLC* constitutes a significant victory for the conservation community by acknowledging the importance of conservation policies and giving practical effect to those policies. This includes affording greater protections to conservation easements, which are an important land-use tool in effectuating conservation policies. Under this decision, a landowner cannot violate a conservation easement—including the act of building first, and asking for permission later—and subsequently seek judicial ratification of this conduct via a judicial "declaration" or "interpretation" of the terms of the easement. While other New York courts have cursorily passed upon the important policies underlying conservation easements,[50] the Third Department went further by giving practical effect to these policies.

Additionally, the decision is a manifestation of judicial willingness to consider conservation policies in the decision-making process. The attention which the court gave to these ECL protections in its decision, especially when the protections were not a central issue in the lower court's decision, cannot be understated.[51] This is an important indication that the judiciary will stand behind the legislative policies on this issue. In sum, this decision is a valuable shield that will protect conservation easements against challenges that likely will increase as many conservation properties transition into second-generation ownership.

Endnotes

1. 2016 N.Y. App. Div. LEXIS 562 at *1-*5, 2016 NY Slip Op. 00559, 1-2 (3d Dep't Jan. 28, 2016).
2. *Id*. at *1-*3.
3. *Id*. at *2.
4. *See id*. at *1-*2; *see also Argyle Farm & Props., LLC v. Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, Index No. 2013-1270 at 4 (N.Y. Sup. Ct. Delaware Cnty. Oct. 17, 2014) (the trial court's decision); N.Y. Agric. & Mkts. Law § 305-a (McKinney 2016) (precluding local governments from "unreasonably" regulating agricultural operations).
5. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *2.
6. *Id*. at *2-*3.
7. *Id*. at *3-*4.
8. *Id*.
9. *Id*. at *4.
10. *Id*.; *Argyle Farm & Props.*, Index No. 2013-1270 at 10.
11. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *4-*5; *Argyle Farm & Props.*, Index No. 2013-1270 at 10.
12. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5.
13. *Id*. The City and the New York City Department of Environmental Protection also were defendants and also moved to dismiss the complaint. *Id*.
14. *Id*.
15. *Id*.
16. *See generally Argyle Farm & Props.*, Index No. 2013-1270 at 13-15.
17. *See Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5-*7 (the Third Department assumed the standing, timeliness, and joinder issues in favor of the plaintiff and proceeded to uphold the dismissal of the complaint on the ECL provisions that are specific to conservation easements).
18. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
19. Compl., *Argyle Farm & Props., LLC v. Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, Index No. 2013-1270 (Dec. 31, 2013) ¶¶ 180-82, 193-94, 208-12, 231-33, 249-50.
20. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
21. N.Y. Envtl. Conserv. Law § 49-0305(5) (McKinney 2016).
22. *Id*.
23. *See Somers v. Shatz*, 22 A.D.3d 565, 567, 802 N.Y.S.2d 245, 246 (2d Dep't 2005) (applying traditional rules of contract interpretation to interpret the grant of an easement); *Route 22 Assocs. v. Cipes*, 204 A.D.2d 705, 706, 613 N.Y.S.2d 33, 33 (2d Dep't 1994) (same).
24. *Id*.
25. *See Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262, 640 N.E.2d 125, 129, 616 N.Y.S.2d 458, 462 (1994) (in the context of statutory interpretation, the maxim *expressio unius est exclusio alterius* imposes the judicial presumption that the legislature intended to omit a proviso from the ambit or effect of a statute when that proviso is omitted from a statute that includes a list of other provisos).
26. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5; *Argyle Farm & Props.*, Index No. 2013-1270 at 13-15.
27. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
28. *Id*.
29. *Id*. at *6-*7 (emphasis added) (quoting *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of Am.*, 73 A.D.3d 1257, 1261, 900 N.Y.S.2d 494, 499 (3d Dep't 2010), *lv. denied*, 15 N.Y.3d 715, 939 N.E.2d 809, 913 N.Y.S.2d 643 (2010); *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 393, 476 N.E.2d 988, 991, 487 N.Y.S.2d 543, 546 (1985)).
30. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7 (citing N.Y. Envtl. Conserv. Law § 49-0305 and Mem. of Support, Bill Jacket, 1983 N.Y. Laws ch. 1020 (1983)).
31. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.

32. *Id*. (citing N.Y. Envtl. Conserv. Law § 49-0305 and Mem. of Support, Bill Jacket, 1983 N.Y. Laws ch. 1020 (1983)).

33. Out of convenience for the reader, the terms "amendment" and "termination" will be used for the purposes of this article, since the Third Department uses these terms interchangeably with the terms "modification" and "extinguishment" in its decision. The text of section 49-0307, however, is limited to the terms "modification" and "extinguishment." N.Y. Envtl. Conserv. Law § 49-0307(1).

34. *See Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7 (implying that only the grounds that are identified in section 49-0307 of the ECL can be relied upon to avoid the enforcement of conservation easements because one of the grounds for upholding the dismissal of the contractual-defense causes of action was that those defenses are not set forth in section 49-0307).

35. N.Y. Envtl. Conserv. Law § 49-0301 (codifying "the state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources").

36. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7; *Argyle Farm & Props.*, Index No. 2013-1270 at 6.

37. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7-*8.

38. *Id*. at *7 (emphasis added).

39. *Id*. at *6-*8.

40. *Id*. at *6; N.Y. Envtl. Conserv. Law § 49-0305(2).

41. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *6; N.Y. Envtl. Conserv. Law § 49-0307(1).

42. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *6.

43. *Id*. at *6-*7, *7-*8.

44. *Id*. at *6-*7.

45. *Id*. at *7-*8.

46. *Id*.

47. *Id*.

48. *Id.*

49. *Id.* at *6, *7-*8.

50. See generally *Smith v. Town of Mendon*, 4 N.Y.3d 1, 14, 822 N.E.2d 1214, 1221, 789 N.Y.S.2d 696, 703 (2004); *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 393, 476 N.E.2d 988, 991, 487 N.Y.S.2d 543, 546 (1985); *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of Am.*, 73 A.D.3d 1257, 1261, 900 N.Y.S.2d 494, 499 (3d Dep't 2010), *lv. denied*, 15 N.Y.3d 715, 939 N.E.2d 809, 913 N.Y.S.2d 643 (2010).

51. See *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5-*6 (again, the three grounds that were the foci of the appellate arguments by the defendants were standing, the statute of limitations, and non-joinder); *Argyle Farm & Props.*, Index No. 2013-1270 at 13-15 (same).

Phillip Oswald is an attorney who practices environmental litigation and business litigation at Rupp Baase Pfalzgraf Cunningham LLC in Buffalo, NY. Phillip has represented land conservancies in easement enforcement and title disputes. Phillip graduated *magna cum laude* from Syracuse University College of Law and is a veteran of the U.S. Marine Corps.

This article originally appeared in the Spring/Summer 2016 issue of the New York Environmental Lawyer, *published by the Environmental Law Section of the New York State Bar Association.*

Land Use Law Update: Creating Flood-Resilient Communities Through Local Waterfront Revitalization Planning

By Sarah J. Adams-Schoen

Sarah Adams-Schoen

The Local Waterfront Revitalization Planning (LWRP) process offers an opportunity for municipalities, either individually or acting together, to receive technical assistance and state funding to develop local land and water use plans to improve resilience to sea-level rise, storm surge and flooding.[1] Because an LWRP is both a planning document and implementation plan, technical assistance and funding is available not only to support traditional planning activities related to waterfront resilience, but also to support local law assessment and amendment. Moreover, because adopted and approved LWRPs become part of the State's Coastal Management Program, the LWRP provides an opportunity for municipalities to set forth enforceable coastal policies that will govern the actions of not only local actors, but state and federal agencies as well.

"LWRPs are intended to allow a local government to refine the state coastal policies to reflect local needs and conditions, including identification of strategies for addressing critical waterfront issues such as sea-level rise, storm surges and flooding."

Following passage of the federal Coastal Zone Management Act of 1972 (CZMA),[2] New York State developed a Coastal Management Program (NYS CMP) and the Waterfront Revitalization of Coastal and Inland Water Resources Act of 1981 (the "NYS Waterfront Revitalization Act").[3] By doing so, New York State participates in the federal Coastal Zone Management Program, which offers financial incentives and management opportunities for participating states and waterfront municipalities. The NYS CMP, which applies to coastal areas and inland waterways, is a land and water use management program for the State's coastal area, which sets forth enforceable coastal policies to guide public and private uses of lands and waters in the coastal zone.

Under the state law, any municipality, or two or more municipalities acting jointly, which has any portion of its jurisdiction contiguous to the state's coastal waters or inland waterways[4] may adopt an optional Local Waterfront Revitalization Program (LWRP),[5] which is a "locally prepared, comprehensive land and water use program for a community's natural, public, working waterfront, and developed coastal area [that] provides a comprehensive structure within which critical issues can be addressed."[6]

"Additionally, for municipalities within the coastal zone, when the U.S. Secretary of Commerce concurs with the incorporation of an LWRP into the CMP, federal agency actions must also be consistent with the approved addition to the CMP."

LWRPs are referred to as both a plan and a program because the term "LWRP" refers both to the planning document prepared by the municipality as well as the organizational structure and local laws that implement its policies.[7] LWRPs are intended to allow a local government to refine the state coastal policies to reflect local needs and conditions, including identification of strategies for addressing critical waterfront issues such as sea-level rise, storm surges and flooding. An LWRP that has been approved by the Secretary entitles the municipality to the benefits provided in Article 42 of the Executive Law, including financial assistance.[8]

The CZMA transfers a great deal of authority to local governments and the states in the administration of the Act. Once a municipality's LWRP is approved by the New York State Secretary of State, the LWRP becomes part of the New York State Coastal Management Program and state agency actions are required to be consistent with the approved LWRP to the maximum extent practicable.[9] Specifically, Title 19 of the New York Compilation of Codes, Rules and Regulations (N.Y.C.R.R.) part 600 provides that in enacting the NYS Waterfront Revitalization Act, it was the Legislature's intention that review by state agencies to determine the consistency of proposed actions with the policies of the Act and any applicable approved LWRP be coordinated with and made a part of each agency's existing procedures, including reviews conducted under the State

Environmental Quality Review Act (SEQRA).[10] Per the implementing regulations, no State agency may carry out, fund or approve any action until it has complied with the provisions of the Act.[11] Additionally, for municipalities within the coastal zone, when the U.S. Secretary of Commerce concurs with the incorporation of an LWRP into the CMP, federal agency actions must also be consistent with the approved addition to the CMP.[12]

"Another important resilience component of the State's program is the provision for a local government to adopt, amend, and enforce local laws or ordinances to regulate the construction, size, and location of waterfront structures such as wharfs and docks."

The NYS CMP contains a number of coastal policies and Long Island Sound regional coastal policies that promote flood resilience. Among other things, the NYS CMP seeks to minimize damage to natural resources and property from flooding and erosion by encouraging "proper location of new land development, protection of beaches, dunes, barrier islands, bluffs and other critical coastal and inland waterway features and use of non-structural measures, whenever possible." The program also seeks to encourage and facilitate urban renewal of waterfronts in municipalities, while encouraging and facilitating public access for recreational purposes; minimizing loss of life, structures, and natural resources from flooding and erosion; protecting and improving water quality and supply in the Long Island Sound coastal area; and protecting and restoring the quality and function of the Long Island Sound ecosystem.[13] Another important resilience component of the State's program is the provision for a local government to adopt, amend, and enforce local laws or ordinances to regulate the construction, size, and location of waterfront structures such as wharfs and docks.[14]

"Funding for preparation, refinement, and implementation of LWRPs is available under Title 11 of the New York State Environmental Protection Fund Local Waterfront Revitalization Program (EPF LWRP) among other sources."

NYS Department of State provides both technical assistance and grant funding to waterfront communities to facilitate coastal (and inland waterway) flood resilience. DOS has prepared guidance on Coastal Resilience Plans to help assess risks from coastal hazards, including sea level rise, and incorporate that information into LWRPs.[15] DOS advises that "[p]lans should be informed by scientific projections of climate impacts, the community vision, best available options and carrying capacity of the landscape."[16] DOS also advises that, "[s]ince the effects of climate change will be shared across regional systems, it may be advantageous for neighboring communities to prepare regional adaptation plans."[17] Funding for preparation, refinement, and implementation of LWRPs is available under Title 11 of the New York State Environmental Protection Fund Local Waterfront Revitalization Program (EPF LWRP) among other sources.[18]

The 2014 Community Risk and Resiliency Act (CRRA)[19] amended provisions of the New York Environmental Conservation law governing LWRPs. Specifically, Section 10 of CRRA: (1) clarified that "planning projects to mitigate future physical climate risks and updates to existing local waterfront revitalization program plans to mitigate future physical climate risks" are included among the LWRP projects DOS may support through state assistance payments or technical assistance,[20] and (2) added to the list of contractual requirements that DOS must impose on a municipality that receives state assistance payments toward the development of its LWRP is a requirement that the municipality demonstrate it considered "future physical climate risk due to sea level rise, and/or storm surges and/or flooding."[21]

The condition on LWRP funding may turn out to be one of the more significant provisions in CRRA, as it has the potential to impose climate resilience considerations on not only the municipality's LWRP planning process, but—as a result of the consistency requirements discussed above—on all local and state actions that affect areas in the municipality that are in the coastal zone or designated inland waterways, and all federal actions that affect areas in the municipality that are in the coastal zone.

Sarah J. Adams-Schoen is an Assistant Professor of Law 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 Law, Land Use Law, Environmental Law and related courses.

Endnotes

1. For a detailed description of the New York State Coastal Management Program and other laws related to planning and zoning in New York's coastal zone, see Patricia Salkin, New

York Zoning Law and Practice, 1 N.Y. Zoning Law & Prac. § 9B (November 2016 Update).

2. 16 U.S.C. § 1454 (2012).

3. The NYS CMP was approved by the U.S. Secretary of Commerce in 1982. State of New York Coastal Management Program and Final Environmental Impact Statement (August 1982, as amended in 1983 and 2001), *available at* http://www.dos.ny.gov/opd/programs/pdfs/CoastalPolicies.pdf. The statutory authority for the state's Coastal and Inland Waterways Program is contained in Article 42 of the Executive Law and the law is implemented by 19 NYCRR Parts 600 through 603. The NYS Waterfront Revitalization Act is administered by the Department of State's Office of Planning and Development.

4. N.Y. Exec. Law § 911 (McKinney's 2013) (defining "coastal area" and "inland water ways"); *see also* N.Y.S. Dep't of State, Guidebook: Making the Most of Your Waterfront 3 (2009), available at http://www.dos.ny.gov/opd/programs/pdfs/LWRP_guidebook.pdf.

5. N.Y. Exec. Law § 915 (McKinney's 2013); *see also* 19 NYCRR Part 601 (implementing optional LWRP provisions).

6. NYS Dep't of State, Office of Planning & Devel., Communities & Waterfronts, Frequently Asked Questions, http://www.dos.ny.gov/opd/faq.html (last visited Mar. 30, 2016).

7. NYS Dep't of State, Guidebook: Making the Most of Your Waterfront 4 (2009), available at http://www.dos.ny.gov/opd/programs/pdfs/LWRP_guidebook.pdf.

8. *Id.* § 916. Title 19 NYCRR Part 601 contains the procedures for review, submission, and approval of an LWRP.

9. 42 N.Y. Exec. Law § 916 (McKinney's 2013); 10 NYCRR § 97.12(d)(13) (providing for state environmental impact review based on effects of proposed action on applicable policies of LWRP as opposed to WRP when municipality has an approved LWRP).

10. 19 NYCRR § 600.1(d) (2008).

11. *Id.* § 600.3(a).

12. 16 U.S.C. §§ 1456(c)(1)-(2) & (d) (2012); 15 C.F.R. Part 930. Another benefit of an approved LWRP is the involvement of the Governor's Office of Regulatory Reform, which, with the assistance of the Secretary of State, will conduct continuing studies of the means of expediting the development called for in the LWRP. The Secretary of State will also consult and work with state agencies, including the Urban Development Corporation, the Office of Parks, Recreation and Historic Preservation, and the departments of Economic Development and Transportation to identify additional means of effectuating the program. N.Y. Exec. Law § 916(2)-(3) (McKinney's 2012).

13. NYS Dep't of State, State Coastal Policies [hereinafter Coastal Policies], excerpted from State of New York Coastal Management Program and Final Environmental Impact Statement, part II, sect. 6 (Aug. 1982, as amended in 1983 and 2001), available at http://www.dos.ny.gov/opd/programs/pdfs/CoastalPolicies.pdf; N.Y. State Dep't of State, Long Island Sound Coastal Management Program, available at http://www.dos.ny.gov/opd/programs/pdfs/LISCMP.pdf.

14. 19 NYCRR § 603.3(m)(2) (2008).

15. NYS Dep't of State, Sea Level Rise and Climate Change Adaptation, http://www.dos.ny.gov/opd/programs/SeaLevelRiseCC/index.html (last visited Mar. 30, 2016). The New York State Energy Research and Development Authority has also prepared a report examining climate impacts and potential adaptation strategies for the following eight sectors in New York State: water resources, coastal zones, ecosystems, agriculture, energy, transportation, telecommunications, and public health. See NYSERDA, Responding to Climate Change in New York State Technical Report (Nov. 2011), available at http://www.nyserda.ny.gov/About/Publications/Research-and-Development-Technical-Reports/Environmental-Research-and-Development-Technical-Reports/Response-to-Climate-Change-in-New-York.

16. NYS Dep't of State, Sea Level Rise and Climate Change Adaptation, http://www.dos.ny.gov/opd/programs/SeaLevelRiseCC/index.html (last visited Mar. 30, 2016).

17. *Id.*

18. Funding is available on a cost-shared basis for planning and implementation projects through the New York State Environmental Protection Fund grant program under the Local Waterfront Revitalization Program (LWRP) category administered by DOS.

19. To summarize, the climate change adaptation scheme created by CRRA does three things: (1) mandates that by January 1, 2016, the NYS DEC "adopt regulations establishing science-based state sea level rise projections" and "update such regulations no less than every five years," 2014 N.Y. Laws ch. 355 § 17, codified at ECL § 3-0319; (2) requires DEC and DOS to work together to prepare model local laws to help communities incorporate measures related to the specified physical climate risks into their local laws, and to provide guidance on the implementation of the law, including the use of resilience measures that utilize natural resources and natural processes to reduce risk, 2014 N.Y. Laws ch. 355 § 16; and (3) mandates consideration of "future physical climate risks due to sea level rise, and/or storm surges and/or flooding" in numerous permitting, funding and regulatory decisions, including siting of wastewater treatment plants and hazardous waste transportation, storage and disposal facilities, design and construction regulations for petroleum and chemical bulk storage facilities, and oil and gas drilling permits, and the designation of properties listed in the state's Open Space Plan, 2014 N.Y. Laws ch. 355 §§ 2–15.

20. 2014 N.Y. Laws ch. 355 § 10, amending ECL § 54-1101(1). LWRP projects eligible for CRRA funding include preparation of new local laws, plans, and studies, and construction projects.

21. 2014 N.Y. Laws ch. 355 § 10, amending ECL § 54-1101(5).

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV)

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

AUGUST 3, 2016

Approved by the House of Delegates on November 5, 2016

Membership of the New York State Bar Association's Committee on the New York State Constitution

CHAIR:
Henry M. Greenberg, Esq.

MEMBERS:
Mark H. Alcott, Esq.
Martin Bienstock, Esq.
Hon. Cheryl E. Chambers
Hon. Carmen Beauchamp Ciparick
Linda Jane Clark, Esq.
David L. Cohen, Esq.
Hon. John R. Dunne
Margaret J. Finerty, Esq.
Helen E. Freedman, Esq.
Mark F. Glaser, Esq.
Hon. Victoria A. Graffeo
Peter J. Kiernan, Esq.
Bennett M. Liebman, Esq.
A. Thomas Levin, Esq.
Justine M. Luongo, Esq.
John M. Nonna, Esq.
Hon. Karen K. Peters
Joseph B. Porter, Esq.
Andrea Carapella Rendo, Esq.
Sandra Rivera, Esq.
Nicholas Adams Robinson, Esq.
Hon. Alan D. Scheinkman
Hon. John W. Sweeny, Jr.
Claiborne E. Walthall, Esq.
G. Robert Witmer, Jr., Esq.
Hon. James A. Yates
Stephen P. Younger, Esq.
Jeremy Benjamin, Esq., Liaison to Civil Rights Committee
Betty Lugo, Esq., Liaison to Trial Lawyers Section
Alan Rothstein, Esq., Liaison to New York City Bar Association
Richard Rifkin, Esq., NYSBA Staff Liaison
Ronald F. Kennedy, Esq., NYSBA Staff Liaison

TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20-years voters be asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the conservation article in the State Constitution, Article XIV.

In 1894, a New York State Constitutional Convention made world history by adopting the first constitutional provisions mandating nature conservation.[2] In the debates over the establishment of an Adirondack and Catskill Forest Preserve ("the Forest Preserve"), Convention delegates concurred with their President — the eminent lawyer Joseph H. Choate — when he observed: "You have brought here the most important question before this Assembly. In fact, it is the only question that warrants the existence of this convention."[3]

Approved by the voters in 1894, this groundbreaking provision, known as "the forever wild clause," is "generally regarded as the most

---

[1] N.Y. CONST. art. XIX, § 2 ("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; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

[2] PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 245 (1991) [hereinafter, "REFERENCE GUIDE"].

[3] *Quoted in* 2 ALFRED L. DONALDSON, A HISTORY OF THE ADIRONDACKS 190 (1921) [hereinafter, "HISTORY OF THE ADIRONDACKS"].

important and strongest state land conservation measure in the nation."[4] It is now part of Article XIV of the State Constitution,[5] which currently consists of five sections.

Section 1 contains the forever wild clause, establishing and protecting the Forest Preserve, and then carving out exceptions for certain lands and uses in it. The historic language is set forth in Section 1's first two sentences:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.[6]

Section 2 provides for the creation of public reservoirs within the Forest Preserve.[7] Section 3 recognizes that forest and wildlife conservation are public policy and permits acquisition of additional lands outside the Forest Preserve for these purposes.[8] Section 4 — the so-called "Conservation Bill of Rights" — recognizes that the conservation and preservation of the natural resources and scenic beauty of the State are public policy and provides for State acquisition of lands for a "state nature

---

[4] WILLIAM R. GINSBERG, The Environment, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 318 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) (paper prepared for the New York State Temporary State Commission on Constitutional Revision established prior to the 1997 mandatory referendum vote on whether to hold a Constitutional Convention).

[5] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 173, 295-97, 347-49 (1996) [hereinafter, "ORDERED LIBERTY"].

[6] N.Y. CONST. art. XIV, § 1.

[7] *Id.* § 2 (on "Reservoirs"; section titles summarize content and are not part of the Constitution).

[8] *Id.* § 3 (on "Forest and wild life conservation; use or disposition of certain lands authorized").

and historical preserve" located outside the Forest Preserve.[9] Finally, Section 5 addresses how violations of Article XIV may be enjoined.[10]

The Forest Preserve has stood the test of time, enjoying widespread public support since its enactment.[11] Constitutional Conventions held in 1915, 1938 and 1967 all concluded that the forever wild clause should be retained, and voters have defeated all efforts to dilute it. Moreover, since 1894, the State has vastly expanded the acreage of the Forest Preserve, purchasing lands with funds approved by bond acts, legislative appropriations and gifts.[12] Voters have only removed a relatively small volume of acres from the Forest Preserve, through surgically-precise amendments.[13]

In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters.[14] After more than 120 years, however, the forever wild

---

[9] *Id.* § 4 (on "Protection of natural resources; development of agricultural lands").

[10] *Id.* § 5 (on "Violations of article; how restrained").

[11] GINSBERG, The Environment, *supra* note 4, at 318.

[12] DAVID STRADLING, THE NATURE OF NEW YORK: AN ENVIRONMENTAL HISTORY OF THE EMPIRE STATE 102-04 (2010).

[13] These amendments appear as the clauses that begin with the word "Notwithstanding" in Section 1 of Article XIV. *See infra* Appendix A (setting forth each "notwithstanding" amendment). An example of such a limited amendment occurred on November 5, 2013, when the voters approved the Raquette Lake amendments to allow 200 landowners and public facilities to clear title of legal impediments since 1848 affecting their properties, while enlarging the size of the Forest Preserve by adding 295 acres on the Marion River. *See* MIKE PRESCOTT, *Commentary: Vote Yes on the Township 40 Amendment*, ADIRONDACK ALMANAC (Oct. 8, 2013), http://www.adirondackalmanack.com/2013/10/commentary-vote-yes-township-40-amendment.html.

[14] For example, in 1997, a task force of the New York City Bar Association concluded that "the risk of elimination or dilution of the 'forever wild' provisions far outweighs the nominal or speculative gains that could be achieved at a constitutional convention." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE

clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause's future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.

Indeed, few New Yorkers know what Article XIV covers, beyond the "forever wild" clause. Analysis of this one article, illustrates how comparable studies of other articles can make a significant contribution to the public's understanding of the State Constitution. The Committee's review of Article XIV suggests at least four potential changes that warrant study and debate:

First, since the forever wild clause's adoption in 1894, the text immediately following it has been the subject of 19 amendments, making Section 1, by far, the most amended section of the Constitution.[15] The net result is a series of detailed exceptions, consisting of 1,401 words, which have also rendered Section 1 one of the longest sections in the Constitution.[16] One way to eliminate this excessive verbiage — and thereby

---

TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION *in* 52 THE RECORD 627-28 (1997) (hereinafter, "CITY BAR REPORT").

[15] PETER J. GALIE & CHRISTOPHER BOPST, *Constitutional "Stuff": House Cleaning the New York Constitution — Part II*, 78 ALB. L. REV. 1531, 1545-46 (2015) [hereinafter, *"House Cleaning"*]; *see also* GALIE, ORDERED LIBERTY, *supra* note 5, at 173 ("The very stringency of [the forever wild clause's] . . . language . . . has frequently interfered with legitimate and important uses of the land, such as scientific forestry. Not surprisingly, this provision has been amended fifteen times [as of 1996] to accommodate other uses.").

[16] GALIE & BOPST, *House Cleaning*, *supra* note 15, at 1540. *See* N.Y. CONST. art. XIV, § 1, *infra* Appendix A (setting forth each "notwithstanding" amendment).

enhance the forever wild mandate — would be to place it in a separately authorized constitutional document.[17]

Second, Section 2, adopted in 1913, reserving up to 3% of the Forest Preserve for constructing possible water reservoirs, has rarely been invoked, and the reasons behind its adoption may no longer exist.[18] An argument can thus be made that Section 2 should be eliminated.

Third, the mandate in the Conservation Bill of Rights (Section 4) to establish a natural and scenic preserve has been unfulfilled. The State has made little effort to implement this mandate, which lacks the clarity of the forever wild clause in Section 1. Other states have natural and scenic preserves, and their approaches could be emulated in New York.

Fourth, the "rights" set forth in Section 4 are not "self-executing,"[19] meaning that they cannot be invoked absent legislative authorization. Several other states,[20] such as Pennsylvania,[21] and 174 nations,[22] have adopted and implemented constitutional "environmental rights." The object of constitutional environmental rights is to ensure that citizens have a right

---

[17] For example, New Jersey includes a list of amendments in a constitutional "Schedule." *See* N.J. CONST. art. XI.

[18] *See infra* notes 49 to 51, and 93 to 102, and accompanying text.

[19] *See* GINSBERG, The Environment, *supra* note 4, at 221-29.

[20] BARTON H. THOMPSON, JR., *The Environment and Natural Resources, in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM ch. 10 (G. Alan Tarr & Robert F. Williams eds., 2006).

[21] *See* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."); *see generally*, James R. May & William Romanowicz, *Environmental Rights in State Constitutions, in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James. R. May ed., 2011).

[22] DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION (2012).

— and government has a duty — to provide resilient and effective responses for environmental problems.[23] Whether New York should amend Article XIV to include an enforceable "Environmental Bill of Rights" to address contemporary environmental challenges is a question worthy of consideration.

This report takes no position on whether a Constitutional Convention should be called in 2017, or if called, how in 2019 it should address potential changes to Article XIV. Even so, if the voters wish to simplify and enhance the present Constitution, Article XIV provides opportunities to do so.

To provide background for public discussion and debate, this report summarizes the Committee's background and study of Article XIV, provides a historical overview of its provisions, and evaluates potential amendments.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee serves as a resource for the State Bar on issues relating to or affecting the State Constitution; makes recommendations regarding potential constitutional amendments; provides advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional

[23] For discussion of other states' constitutional environmental rights provisions, *see infra* notes 119 to 126, and accompanying text. New York State and local governments have begun to address sea level rise and storm surges, such as experienced in Superstorm Sandy in 2012. In 2014, for example, the State Legislature enacted, and Governor Cuomo signed, The Community Risk and Resilience Act, 2014 N.Y. Sess. Laws ch. 355 (S-6617B) (McKinney) (codified as amended in scattered sections of N.Y. ENVTL. CONSERV. LAW, N.Y. PUB. HEALTH LAW, and N.Y. AGRIC. & MKTS. LAW), which provides for planning to cope with ongoing sea level rise, larger numbers of extreme weather events, and other impacts of climate change. Some other states provide constitutional provisions to cope with climate change impacts. *See, e.g.*, N.J. CONST. art. VIII, § 6(a) (directing, in Tax and Finance Article, that funds shall be available for flood and storm damage). It may be asked whether or not climate change today is an environmental issue comparable to the need in 1894 to save forest lands, or in 1967 to abate extreme pollution through framing a "Conservation Bill of Rights" (adopted just before "Earth Year," 1969), which led to the enactment of laws for pollution control, wetlands preservation, and other environmental legislation of the 1970s and 1980s.

Convention; and promotes initiatives designed to educate the legal community and public about the State Constitution.

On March 10, 2016, the Committee began its study of Article XIV, by listening to a presentation delivered by Committee member Nicholas A. Robinson, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus at the Elisabeth Haub School of Law at Pace University.

At the Committee's next meeting on April 29, 2016, it heard from two additional distinguished experts on environmental law: Michael B. Gerrard and Philip Weinberg. Professor Gerrard is the Andrew Sabin Professor of Professional Practice at Columbia Law School, teaches courses on environmental law, climate change law, and energy regulation, and is director of the Sabin Center for Climate Change Law. Professor Weinberg taught constitutional and environmental law at St John's Law School, after establishing and heading the Environmental Protection Bureau in the New York State Department of Law under Attorney General Louis J. Lefkowitz, and is currently an adjunct member of the faculty of the Elisabeth Haub School of Law at Pace University. Professors Gerrard and Weinberg discussed Article XIV, including its relevance to emerging environmental issues, such as the impacts of climate change in New York.

After further discussion and review, the Committee concluded that the public and legal profession would be well served by a report that provided a review of significant issues concerning Article XIV. On June 2, 2016, the Committee met and reviewed a first draft of this report. The final report and recommendations were considered and generally agreed at a meeting held on July 14, 2016, with final unanimous approval, after reviewing editorial refinements, on August 3, 2016.

II. THE HISTORICAL DEVELOPMENT OF ARTICLE XIV[24]

Since 1894, the New York State Constitution has included an article addressing nature conservation. In that year the Constitutional Convention adopted and voters approved the forever wild clause that conferred constitutional protection of the Forest Preserve.[25] Over time, and through numerous amendments, the current provisions of Article XIV took shape. To understand the opportunities that exist for simplifying and enhancing Article XIV, it is essential to recall the history of how it came to be.

A. The Dawn of Constitutional Conservation

New York inaugurated constitutional conservation in the last quarter of the 19th century because citizens were increasingly troubled by mismanagement of forests in both the Catskill and Adirondack regions of the State.[26] Verplank Colvin, appointed State Surveyor in 1870, had been

[24] The Committee acknowledges the research on the legal history of Article XIV by its member Professor Nicholas A. Robinson.

[25] *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF NEW YORK 350 (2d ed. 1915) (In 1894, "[t]he convention initiated the sound policy of protecting the lands of the State known as the forest preserve, forbad their being leased, sold or exchanged or taken . . . This was the first constitutional recognition of forestation . . ."). Previously, the Forest Preserve had been established by statute. 1885 N.Y. Laws ch. 283, §§ 7 & 8. The Forest Preserve is today defined in Article 9 of the Environmental Conservation Law. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[26] Extreme forest fires, erosion, flooding and loss of flora and fauna accompanied extensive logging operations, in the Catskills and Adirondacks. In THE ADIRONDACK PARK, Frank Graham, Jr. described the public debates and legislative lobbying of the time. The issues included: intense debates about economic trade-offs between advocates of scientific forestry as opposed to unbridled timber exploitation; distress about unlawful corruption by lumber interests; concerns to preserve watersheds to ensure water supplies for many uses, especially the flow for the Erie Canal; and vocal calls to preserve resources for fish and game, other recreation, health and for spiritual values. *See* FRANK GRAHAM, JR., THE ADIRONDACK PARK *passim* (1978) [hereinafter, "THE ADIRONDACK PARK"].

mapping the Adirondacks for the first time. He and others alerted the State to growing environmental degradation in the wake of undisciplined timbering. As early as 1868, Colvin had urged "the creation of an Adirondack Park or timber preserve under the charge of a forest warden and deputies."[27] Vast areas of trees were being clear-cut and the lands abandoned to fires and erosion. Based on Colvin's topographical survey reports, in 1883, the Legislature banned sales of State lands in the 10 Adirondack counties, appropriated funds for the first time to buy lands, and directed Colvin to locate and survey all State lands.[28] In 1884, the State Comptroller issued a report of investigations into unpaid taxes on abandoned lands. That report featured maps of the State's lands in the Forest Preserve, along with a more extensive map depicting the wider Adirondack region as a "park," with its borders delineated in blue. This is the origin of the term "Blue Line," which continues to refer to the Adirondack Park's borders, an area encompassing both the Forest Preserve and other public and private lands.[29]

On May 15, 1885, the Legislature adopted legislation to establish the Forest Preserve in both the Catskills and Adirondacks, with a State Forest Commission to oversee it.[30] Just prior to the Forest Preserve's

---

[27] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 164-65.

[28] *Id.* at 171-75.

[29] The Forest Preserve was defined by the N.Y. Laws of 1885 (ch. 283) to be situated in "the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan." The Adirondack Park was established by the N.Y. Laws of 1892 (ch. 707). The Adirondack and Catskill Forest Preserve and the Adirondack Park were re-enacted in the N.Y. Laws of 1893 (ch. 332, §§ 100 & 120).

[30] N.Y. Laws of 1885 (ch. 283, § 7) provided:

> All the lands now owned or that any hereafter be acquired by the State of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Laurence, Warren, Washington, Greene, Ulster, and Sullivan, shall constitute and be known as the Forest Preserve.

establishment, on April 20, 1885, the Legislature had transferred the mountain lands and forests, then held by Ulster County, to the State in settlement of the State's outstanding claims for tax revenues.[31] Many parcels of land in the North Woods had escheated to the State,[32] because loggers, after clear-cutting the timber had ceased to pay annual taxes due and abandoned their properties.[33] These damaged lands became the first Forest Preserve acreage.

In the decade after 1885, despite the Forest Commission's oversight, 100,000 acres of forest were logged unlawfully in the Adirondacks. These years saw both increased land degradation and public demands for enhanced protection. In 1886, William F. Fox, a representative of the State Forest Commission, visited the Forest Preserve in the Catskills and noted its value for watershed and recreation, encouraging its protection.[34] By 1890, the Forest Commission had issued a special report, "Shall a Park be established in the Adirondack Wilderness?"[35] However, in 1893 the Forest Commission

---

The statute further provided that the lands of the Forest Preserve "shall be kept forever wild" and "shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.* § 8.

[31] ALF EVERS, THE CATSKILLS: FROM WILDERNESS TO WOODSTOCK ch. 77 (1972) [hereinafter, "CATSKILLS"].

[32] *See, e.g.*, *People v. Turner*, 72 Sickels 227, 117 N.Y. 227, 22 N.E. 1022 (1889) (involving a plea that defendant had not cut state trees unlawfully based on defects in an 1877 tax sale of lands in default of taxes for the years 1864 through 1871).

[33] In 1885, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. Today, the State owns 2.6 million acres in the Adirondack Preserve and 286,000 acres in the Catskill Preserve. N.Y. DEPT. Envtl. Conserv., http://www.dec.ny.gov/lands/4960.html.

[34] EVERS, CATSKILLS, *supra* note 31, at 579-80.

[35] NEW YORK STATE FOREST COMMISSION, THE SPECIAL REPORT OF THE NEW YORK FOREST COMMISSION ON THE ESTABLISHMENT OF AN ADIRONDACK STATE PARK (1891).

also approved extensive wood cutting contracts, which the State Surveyor and the State Engineer disapproved.[36]

B. 1894: The Forever Wild Clause

Concerns over the destruction of the State's forests, and the resulting impact on the public's health and well-being, became a central issue during the 1894 Constitutional Convention.[37] A delegate from New York City, David McClure,[38] introduced an amendment to the Constitution that was supported by delegates committed to nature conservation, led by Louis Marshall, a prominent constitutional lawyer.[39] The heart of the proposed amendment read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."[40] This language was refined a bit and during the Convention's debates, Judge William P. Goodelle, a delegate from Syracuse, proposed the addition of a few extra words. The Convention adopted the revised text of New York's first "forever wild" clause by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that Convention or any prior Convention.[41]

---

[36] *Id.* at 186.

[37] GALIE, ORDERED LIBERTY, *supra* note 5, at 173.

[38] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

[39] OSCAR HANDLIN, *Introduction, in* LOUIS MARSHALL: CHAMPION OF LIBERTY xi, (Charles Reznikoff ed., 1957). *See also* HENRY M. GREENBERG, *Louis Marshall: Attorney General of the Jewish People, in* NOBLE PURPOSES: NINE CHAMPIONS OF THE RULE OF LAW at 111 (Norman Gross ed., 2006).

[40] GEORGE A. GLYNN, ed., DOCUMENTS AND REPORTS OF THE [1894] CONSTITUTUTIONAL CONVENTION 172 (1895).

[41] *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 786-87; DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

The 1894 Convention also addressed how violations of the forever wild clause were to be enjoined. The delegates settled on an enforcement mechanism (the current Section 5) that authorized proceedings brought for this purpose by the State, or by a private citizen with the consent of the Appellate Division of the Supreme Court, on notice to the State Attorney General.[42]

The forever wild clause and its companion enforcement mechanism were placed in Article VII, Section 7, which was approved by the voters on November 6, 1894.[43] Opponents of the forever wild mandate immediately challenged the scope of the provision. In 1896, the Legislature placed before the electorate an amendment that would allow timbering on State lands. However, the proposed amendment was resoundingly defeated, by a vote of 710,505 to 321,486.[44]

New York courts soon took notice of the forever wild clause. In an 1899 case, the Court of Appeals observed: "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving the timber for use in the future."[45]

---

[42] Former N.Y. CONST. art. VII, § 7 (now N.Y. CONST. art. XIV, § 5). Examples of such lawsuits include: *Helms v. Reid*, 90 Misc.2d 583, 394 N.Y.S.2d 987 (Sup. Ct. Hamilton Cnty. 1977); *Slutzky v. Cuomo*, 128 Misc. 2d 365, 490 N.Y.S.2d 427 (Sup. Ct. Albany Cnty. 1985).

[43] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 193.

[44] *See* HISTORICAL SOCIETY OF THE NEW YORK COURTS, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS, https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf [hereinafter, "VOTES CAST FOR AND AGAINST"].

[45] *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 248, 54 N.E.2d 689, 696 (1899), *aff'd*, 176 U.S. 335 (1900).

Nearly every year since the forever wild clause's enactment, the State has acquired lands in the Catskills and Adirondacks to add to the Forest Preserve, with funds provided by Bond Acts approved by the voters, or from appropriations enacted by the Legislature.[46] For example, in 1916, by a majority of 150,496, voters approved a Bond Act to acquire lands for the Palisades Interstate Park and to increase lands in the Forest Preserve.[47] Many subsequent Bond Acts have financed acquisitions expanding the Forest Preserve.[48]

C. 1913: The Burd Amendment

In 1911, a constitutional amendment (known as the "Burd Amendment") was proposed allowing up to 3% of the Forest Preserve to be flooded for reservoirs. This would allow water to be diverted for municipal drinking water, wells, canals, and flood control.[49] Voters approved the Burd Amendment in 1913, and it appears today in Section 2 of Article XIV.[50]

---

[46] JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 194-95 (1980). After the great "blowdown" of 1950, a storm of hurricane proportions, on the advice of the New York Attorney General, the Legislature authorized the removal of vast amounts of destroyed trees to avert forest fires and disease, and funds from the wood collected and sold were used to buy more lands to add to the Forest Preserve. *Id.* at 228-30.

[47] 1916 N.Y. Laws ch. 569.

[48] For example, Bond Acts approved by the voters in 1960, 1965, 1986, 1993, and 1996 authorized acquisitions of parks lands. *See* N.Y. State Fin. Law § 97-d (entitled, Environmental Quality Bond Act Fund"). Legislative appropriations and gifts have also enabled additions to the Forest Preserve. As of July 2016, the Forest Preserve contains three million acres in the Adirondacks and 287,500 acres in the Catskills. *See* N.Y. Dep't of Envtl. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[49] STACEY LAUREN STUMP, "Forever Wild," *A Legislative Update on New York's Adirondack Park*, 4 ALB. Gov't L. REV. 682, 694 (2011) [hereinafter, "Forever Wild"].

[50] Former N.Y. CONST. art. VII, § 16 (now N.Y. CONST. art. XIV, § 2).

However, this allotment of potential reservoir sites has been rarely invoked.[51]

D. 1915, 1938 and 1967: Constitutional Conventions Affirm the Forever Wild Mandate

Delegates to the 1915 Constitutional Convention reaffirmed the 1894 forever wild mandate.[52] Similarly, the 1938 Constitutional Convention restated the "forever wild" clause and its enforcement mechanism in a revised Article XIV, with Sections 1 and 5 protecting the Forest Preserve.[53] Additionally, the 1938 Convention added forest and wildlife conservation measures in Section 3.1, in order to facilitate increasing the land area of the Forest Preserve;[54] and Section 3.2, to provide that State lands, situated

---

[51] *See infra* notes 93 to 102, and accompanying text.

[52] GINSBERG, The Environment, *supra* note 4, at 318 ("The commitment to forest preservation and a strict interpretation of the 'Forever Wild' clause was reaffirmed by delegates to the 1915 Constitutional Convention.") (citing N.Y. CONSTITUTIONAL CONVENTION, UNREVISED RECORD 1336 (1915)). *See also Ass'n for the Protection of the Adirondacks v. MacDonald,* 228 A.D. 73, 79-80, 239 N.Y.S. 31, 38 (3d Dept. 1930) ("The constitutional convention of 1915 incorporated the 1894 provision verbatim, except that it added the words 'trees and' before the word 'timber' and then expressly added provisions for reforestation, for the construction of fire trails, for the removal of dead trees and dead timber for reforestation and fire protection solely, and for the construction of a state highway from Long Lake to Old Forge."), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[53] *See* GALIE, ORDERED LIBERTY, *supra* note 5, at 295 ("The 1938 convention created a separate article for the conservation provisions of the constitution. At that time these provisions were primarily, but not exclusively, concerned with the forest preserves of the state. The central provision placed an absolute prohibition on the use of the preserve in the desire to keep it 'forever . . . wild.'").

[54] N.Y. CONST. art. XIV, § 3.1 ("Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.").

outside contiguous Forest Preserve acres, might be sold in order to permit further acquisitions within the Forest Preserve.[55]

The last Constitutional Convention of the 20th century occurred in 1967. Then, as before, there was little partisan disagreement. The delegates left the historic language of the forever wild clause intact.[56]

E. 1969: The Conservation Bill of Rights

At the 1967 Constitutional Convention, significant amendments to strengthen the State's environmental stewardship were adopted, without a single dissenting vote, and became known as the "Conservation Bill of Rights."[57] These amendments failed when the voters rejected the Convention's proffered Constitution in 1967.[58] These same provisions were again presented to the electorate in 1969 as a separate constitutional amendment, and adopted by a vote of 2,750,675 to 656,763.[59] It now appears as Section 4 of Article XIV and reads as follows:

---

[55] *Id.* § 3.2 ("As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.").

[56] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 245 (1996) [hereinafter, "1967 CONSTITUTIONAL CONVENTION"].

[57] *Id.* at 250 ("The Conservation Bill of Rights was adopted, 175-0, with support from all sides.").

[58] *Id.* at 349-50.

[59] VOTES CAST FOR AND AGAINST, *supra* note 44.

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.[60]

Following the adoption of this provision, Governor Nelson A. Rockefeller reconstituted the New York State Conservation Department into the Department of Environmental Conservation. Additionally, in the 1970s the Legislature enacted laws dealing with air and water pollution and other environmental issues.[61] These developments fulfilled the spirit of Section 4 while rendering some provisions of little practical effect.[62]

---

[59] DULLEA, 1967 CONSTITUTIONAL CONVENTION, *supra* note 56, at 349-50.

[60] N.Y. CONST. art. XIV, § 4.

[61] GINSBERG, The Environment, *supra* note 4, at 319 n.12.

[62] *See* N.Y. STATE BAR ASS'N, NEW YORK ENVIRONMENTAL LAW HANDBOOK §1.1, at 1-4 (Nicholas A. Robinson ed., 1988) ("The Rapid Development of Environmental Law"); *cf.* GINSBERG, THE Environment, *supra* note 4, at 319 n.12 ("It cannot be ascertained whether these statutes were to some degree a consequence of the

F. Adjustments to the Forest Preserve (1894-present)

Voters have periodically approved small changes to remove or exchange discrete parcels of land from the Forest Preserve to permit clearly defined developments.[63] Such decisions to remove lands have always been narrowly framed and today appear immediately after the forever wild clause in Section 1 of Article XIV.

Examples of such voter approved exceptions include the following:

- 1918: construction of a State Highway from Saranac Lake to Long Lake, and on to Old Forge by way of Blue Mountain Lake and Raquette Lake; [64]
- 1927: construction of a road to the top of Whiteface Mountain as a Memorial to veterans of World War I;[65]
- 1941, 1947 & 1987: ski trails on Whiteface, Belleayre, Gore, South and Peter Gay Mountains;[66]
- 1957 & 1959: 400 acres to eliminate dangerous curves and grades on state highways, as well as lands for the "Northway" Interstate highway, in response to Congress's enactment of the Interstate Highway Act.[67]

Conversely, voters have periodically rejected attempts to carve exceptions to the forever wild mandate. In 1930, for example, Robert Moses campaigned for adoption of the "Closed Cabin Amendment," which would

---

constitutional mandate or a reflection of nationwide federal and state legislative activity concerning the environment in the 1970s and 1980s.").

[63] GALIE, ORDERED LIBERTY, *supra* note 5, at 347-349.

[64] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 248-49.

[65] VOTES CAST FOR AND AGAINST, *supra* note 44.

[66] GINSBERG, The Environment, *supra* note 4, at 319.

[67] *Id.*

have allowed construction of lodges, hotels and recreational facilities on Forest Preserve lands. The Legislature approved the placement of this amendment on the ballot in 1932, but voters overwhelmingly defeated it.[68]

The voters have also approved exchanges of parcels of Forest Preserve for other parcels of equal or greater acreage and value. For example:

- 1963: 10 acres conveyed to the Village of Saranac Lake in exchange for 30 other acres;[69]
- 1965: 28 acres exchanged for 340 acres in the Town of Arietta;[70]
- 1979: 8,000 acres exchanged with the International Paper Company for an equivalent acreage;[71]
- 1983: conveyance of Camp Sagamore and its historic buildings, to the Sagamore Institute, in exchange for 200 acres;[72]
- 2013: swap of land for a mining operation to expand into Forest Preserve Lands by removing those lands in exchange for a larger expansion of the Forest Preserve elsewhere.[73]

---

[68] GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 187; STUMP, "*Forever Wild," supra* note 49, at 696.

[69] GINSBERG, The Environment, *supra* note 4, at 319 n.10.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] The proposal placed before the voters for this amendment was as follows:

> The proposed amendment to section 1 of article 14 of the Constitution would authorize the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land. In exchange, NYCO Minerals would give the State at least the same

This pattern of carefully framing and debating amendments to Article XIV on a case-by-case basis, in order to adjust the strictures of the "forever wild" Forest Preserve, has persisted until today. The forever wild clause itself is preserved as first adopted.

In sum, over the 122 years that the forever wild clause has been a part of the Constitution, it has been debated and amended, but the mandate to safeguard the Forest Preserve remains as critical a component of the Constitution as when adopted in 1894.[74] The provision is unique among state constitutions in the United States. It rightly occupies a treasured place in our State Constitution and has been consistently protected but never weakened.[75]

III. THE FOREST PRESERVE, SECTIONS 1, 2 & 5

Today, the Constitutional provisions for the Forest Preserve are found in Sections 1, 2 and 5 of Article XIV. While the Forest Preserve is renowned worldwide,[76] it has a unique legal status under New York law.[77]

> amount of land of at least the same value, with a minimum assessed value of $1 million, to be added to the forest preserve. When NYCO Minerals finishes mining, it would restore the condition of the land and return it to the forest preserve.

New York Land Swap With NYCO Minerals Amendment, Proposal 5 (2013), Ballotpedia.org, https://ballotpedia.org/New_York_Land_Swap_With_NYCO_Minerals_Amendment,_Proposal_5_(2013)#cite_note-quotedisclaimer-5. Implementation of this amendment is the subject of judicial review as of July 2016.

[74] ALFRED S. FORSYTHE & NORMAN J. VAN VALKENBURGH, THE FOREST PRESERVE AND THE LAW (1996).

[75] *See* CITY BAR REPORT, *supra* note 14, at 627 ("The 'forever wild' provision is important and uniquely protective of the environment, and should be retained in the constitution.").

[76] In 1969, it was included by UNESCO in the Champlain-Adirondack Biosphere Reserve. *See* UNESCO, *Champlain-Adirondak* [sic], in MAB BIOSPHERE RESERVES DIRECTORY, http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=USA+45&mode=all.

A. Sections 1 & 5

The clarity and mandatory nature of the "forever wild" clause is a classic illustration of an enforceable constitutional norm. Through periodic amendments to Section 1 proposed by the Legislature and approved by the voters, the State has determined the appropriateness of any derogation from the Constitution's "forever wild" mandate. These discrete adjustments to allow non-wilderness uses within the Blue Line boundaries of the Forest Preserve are of relatively little moment, in light of the substantial enlargements to the Forest Preserve over the years. Once placed in the Forest Preserve, new acreage enjoys "forever wild" status and constitutional protection.

Although there has been little litigation under Article XIV,[78] the enforceability of the forever wild clause is not open to question. A violation of Article XIV may be enjoined under Section 5, which authorizes the State to seek such relief through a judicial proceeding, or a private citizen with the

---

[77] The Forest Preserve exists in the Catskills and Adirondacks, where it is distinct from the Adirondack Park. It is under the stewardship of the New York State Department of Environmental Conservation. *See, e.g., Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.*, 153 Misc. 2d 606, 583 N.Y.S. 2d 119 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994). The Legislature recognized the Adirondack Park in the N.Y. Laws of 1892 (ch. 707). The Forest Preserve is not legally in the purview of local authorities or the Adirondack Park Agency, both of which govern privately-held lands in the Adirondack Park, or the local authorities in the Catskills, or the New York City Department of Environmental Protection, which manages the reservoirs in the Catskills. When State agencies, such as the Department of Transportation, violate the Forest Preserve's "forever wild" status, enforcement proceedings result. *See* 26 THE N.Y. ENVTL. LAWYER (N.Y. State Bar Ass'n Sec. on Envtl. Law), spring 2006, at 31-34; *id.*, summer 2006, at 9-20.

[78] GALIE, REFERENCE GUIDE, *supra* note 2, at 251. *See also Helms v. Reid,* 90 Misc. 2d at 586, 394 N.Y.S.2d at 992 ("There is almost a total absence of court decisions construing this important provision in our State Constitution and the time has now come for a judicial interpretation of this provision so as to guide the future preservation of the unique Adirondack region of our State.").

consent of the Appellate Division.[79] The intent of Section 5 was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary.[80]

Soon after the 1894 Convention, several New Yorkers formed a civic group to monitor compliance with the "forever wild" mandate. In the 1920s, the Association for the Preservation of the Adirondacks availed itself of its constitutional rights and sought judicial enforcement of the "forever wild" clause.[81] Specifically, the Association opposed siting Winter Olympic facilities in the Forest Preserve. The Appellate Division, Third Department, determined that the Constitution required that the Forest Preserve be preserved "in its wild nature, its trees, its rocks, its streams. It must be a great resort for the free use of all the people, but it must be a wild resort in which nature is given free rein."[82] The Court of Appeals affirmed, declaring that

> [t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for everyone within the state and for the use of the people of the State.[83]

---

[79] Formerly N.Y. CONST. art VII, § 9, renumbered and approved on November 8, 1938.

[80] *See* CHARLES Z. LINCOLN, 3 CONSTITUTIONAL HISTORY OF NEW YORK 395 (1906) ("By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.").

[81] *Association for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73, 239 N.Y.S. 31 (3d Dept.), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[82] *Id.* at 82.

[83] *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 238, 170 N.E. 902, 904 (1930).

Thus, the State's highest court has recognized that the people's rights in the Forest Preserve, established under Section 1, are effective and enforceable through Section 5. The means by which the public may access or enjoy the Forest Preserve can be regulated by the Legislature, but only if it does not infringe on the "wild" characteristics.[84] Courts have had no difficulty construing and applying these straightforward principles.[85]

Although the "forever wild" clause itself is a model of clarity, the balance of Section 1 is unwieldy and unreadable. After the first two elegant sentences comes a dreary and prolix recitation of each specific exception amending the Constitution's rule of "forever wild."[86]

The text of Section 1 could easily be shortened and improved by authorizing a public roster of Forest Preserve Amendments. The roster can be maintained as an official record of amendments' terms, along with a record of land and waters that have been added to enlarge the Forest Preserve. Once an amendment has been adopted, derogation from "forever wild" is realized (such as when a road is built or lands transferred to allow a rural cemetery expanded in exchange for adding wild river lands to the Forest Preserve), and there would seem to be no reason for the Constitution

---

[84] *See id.* at 238-39, 170 N.E. at 904 ("Unless prohibited by the constitutional prohibition, the use and preservation are subject to the reasonable regulations of the Legislature.").

[85] *See* CITY BAR REPORT, *supra* note 14, at 627 ("This provision, first enacted in 1894, has been consistently enforced by the courts as a powerful tool to protect New York's irreplaceable natural resources."). For example, construing Court of Appeals precedent, the court in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.*, Supreme Court, Ulster County, found it clear "that insubstantial and immaterial cutting of timber-sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use is consistent with the wild forest lands." 153 Misc. 2d 606, 609, 583 N.Y.S. 2d 119, 122 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994).

[86] One commentator has referred to the amendments in Article XIV, Section 1, as reading like a road "gazetteer." PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS (2d ed. 2008).

to be used as an historical record of enactments. Indeed, when acres are added to the Forest Preserve, this fact does not appear in the Constitution, even though the "forever wild" safeguard applies to them at once.[87]

Also, the implicit reference in the first sentence of Section 1 to the 1885 Forest Act,[88] through the use of the phrase "as now fixed by law," appears redundant, since "now" has evolved and the Forest Preserve is defined today in the State Environmental Conservation Law.[89] The excision of this phrase would shorten Section 1 without any substantive impact.

While subject to debate, the Forest Preserve's judicial enforcement provisions in Section 5 have proven to be effective.[90] Section 5 anticipated by 78 years the enactment in 1972 of procedures for citizen suits, which appear in many environmental statutes, such as Section 505 of the federal Clean Water Act[91] and its New York State analogue.[92] Section 5 was

---

[87] In a similar vein, two noted commentators have suggested condensing the exceptions into a general exception. "For example, the section could be amended to delete everything after the second sentence and simply add to the end of the first sentence the words 'as heretofore guaranteed by constitutional provision." GALIE & BOPST, *House Cleaning*, *supra* note 15, at 1546.

[88] 1885 N.Y. Laws ch. 283.

[89] *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[90] *Compare* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is unusually restrictive in its limitation on citizens' suits. It may also prohibit other remedies such as damages. Thus, if trees are wrongfully destroyed in the Forest Preserve, the wrongdoer can be enjoined from further cutting, but a court may not be able to award damages to the state for the value of the trees destroyed." (citing *Matter of Oneida County Forest Preserve Council v. Wehle*, 309 N.Y 152, 128 N.E.2d 282 (1955)).

[91] 33 U.S.C. § 1365.

[92] *See* N.Y. DEP'T OF ENVTL. CONSERV., DEE-19: CITIZEN SUIT ENFORCEMENT POLICY (July 23, 1994), http://www.dec.ny.gov/regulations/25226.html.

adopted to permit enforcement of the "forever wild" mandate, and has not been used to enforce other potential rights within Article XIV.

B. Section 2

Adopted by the voters in 1913, Section 2 (known as the Burd Amendment) reserves up to 3% of the Forest Preserve for reservoirs and dams. However, in stark contrast to the forever wild mandate in Section 1, Section 2 is rarely used,[93] and has been contested whenever its provisions have been invoked.[94]

Most notably, in 1953, by a vote of 1,002,462 to 697,279, the electorate approved an amendment that revoked the Legislature's power to provide for use of portions of the Forest Preserve for the construction of reservoirs to regulate the flow of streams.[95] As a consequence, Section 2 "was cancelled and withdrawn" to the extent that "the People of the State . . . rendered the lands of the State Forest Preserve inviolate for use in regulating the flow of streams."[96]

Another example of public opposition to the placement of reservoirs and dams in the Forest Preserve occurred in 1955. Voters then defeated (1,622,196 to 613,727) a proposed amendment to use Forest Preserve lands

---

[93] In 1915, the Legislature enacted the Machold Storage Law, which allowed a Water Power Commission in the Conservation Department to authorize dams. 1915 N.Y. Laws ch. 662. In general, use of Section 2 to site reservoirs for waterpower in the Forest Preserve has been highly contested; and section 2 has gone largely unused for municipal water supplies. While the Stillwater Reservoir was expanded in 1924, little other use was sought to be made of Forest Preserve lands, until the City of New York in the 1960s sought additional water sources.

[94] For example, when proposals were made to flood the Moose River Valley with a dam, they were challenged in *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N.Y. 219, 93 N.E.2d 647 (1950).

[95] VOTES CAST FOR AND AGAINST, *supra* note 44.

[96] *Black River Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475, 484, 121 N.E.2d 428, 430-31 (1954), *rearg. denied*, 307 N.Y. 906, 123 N.E.2d 562 (1954), *app. dismissed*, 351 U.S. 922 (1956).

for the construction and operation of the Panther Mountain reservoir to regulate the flow of the Moose and Black rivers.[97] Likewise, in 1947 Governor Thomas E. Dewey opposed proposals for constructing the proposed Higley Mountain Dam, which the Legislature authorized in the 1920s.[98]

In recent years, few reservoirs and dams have been constructed nationally, and even less in New York.[99] Worries that cities would deplete their water supplies have dissipated. Moreover, statutes enacted long after the adoption of Section 2 would constrain future attempts to place reservoirs, dams and the like in the Forest Preserve. For example, among the provisions of the Environmental Conservation Law is protection of the extensive fresh water wetlands found in the Adirondacks,[100] along with rules for environmental impact assessment,[101] both of which would restrict any contemplated use of Section 2.[102]

---

[97] VOTES CAST FOR AND AGAINST, *supra* note 44; GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 206-07.

[98] PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST WILDERNESS 291-94 (1998).

[99] In 2014, the Lake Placid Village Dam was removed from the Chubb River. In 2015, the Saw Mill Dam in Willsboro was removed from the Bouquet River. There is an increasing nationwide trend of dam removals to restore ecological systems. *See* AMERICAN RIVERS, MAP OF U.S. DAMS REMOVED SINCE 1916, https://www.americanrivers.org/threats-solutions/restoring-damaged-rivers/dam-removal-map/.

[100] *See* N.Y. ENVTL. CONSERV. LAW art. 24; N.Y. COMP. CODES R. & REGS. tit. 6.

[101] N.Y. ENVTL. CONSERV. LAW art. 8 (the "State Environmental Quality Review Act" or "SEQRA").

[102] Beyond locating possible dam sites, enabling legislation would be required to select the sites, in addition to further constitutional amendments to remove the sites chosen along with access roads for construction equipment, eminent domain procedures to condemn private or other public rights unavoidably impacted by the dam and reservoirs, and appropriations to pay for the dam construction.

Thus, a question exists as to whether Section 2 continues to serve a constitutional purpose and should remain part of New York's fundamental law. As noted, Section 2 has rarely been invoked, and any future use of it would be constrained by statute. Arguably, too, the repeal of Section 2 from the Constitution would enhance Section 1's "forever wild" norms.

IV. THE CONSERVATION BILL OF RIGHTS, SECTION 4

Although Section 4 was intended to be a "Conservation Bill of Rights,"[103] it is debatable whether it has attained fundamental constitutional stature. After Section 4's adoption, and at the request of Governor Rockefeller in 1970, the legislature authorized a codification of the 1911 Conservation Law, which it then re-enacted in 1972 as the Environmental Conservation Law. The Legislature thereafter enacted new legislation, including the State's Endangered Species Act,[104] Tidal and Freshwater Wetlands Acts,[105] Wild and Scenic Rivers Act,[106] and New York's implementing statutes for the federal Clean Air Act,[107] Clean Water Act,[108] and laws on solid[109] and hazardous wastes.[110]

---

[103] Proposals for strengthening the environmental rights in the Constitution predate the 1967 Convention. *See, e.g.*, ANNUAL REPORT OF THE JOINT LEGISLATIVE COMM. ON CONSERV., NAT'L RES. AND SCENIC BEAUTY, Legislative Document No. 13 (1967). On the continuing debate over a broader environmental rights, *see* CAROLE L. GALLAGHER, *Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 107 (1997).

[104] 1970 N.Y. Laws ch. 1047 & 1048; N.Y. ENVTL. CONSERV. LAW § 11-0535.

[105] N.Y. ENVTL. CONSERV. LAW art. 24 (Freshwater wetlands) and art. 25 (Tidal wetlands).

[106] 1972 N.Y. Laws ch. 869 ; N.Y. ENVTL. CONSERV. LAW art. 24, tit. 22.

[107] The Clean Air Act of 1970, Pub. L. No. 88-206, 77 Stat. 392 (1970), *codified at* 42 U.S.C. §§ 7401, *et seq.*, implemented in New York as N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq.*; *see Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert denied* 434 U.S. 902 (1977).

[108] *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1251, *et seq.* (the "CLEAN WATER

In one sense, the broad policy goals of the Conservation Bill of Rights have been realized through federal and State environmental statutes.[111] In fact, Section 4 was enacted on the eve of the first "Earth Day" in 1970, which was a time when the State suffered severe water and air pollution, acute loss of wetlands and species, and widespread contamination of hazardous and toxic waste. It was apparent that the voters in 1969 wanted a constitutional mandate to oblige government to restore and secure their environmental public health and quality of life, and the Legislature responded accordingly.

In another sense, the more profound environmental rights contemplated by Section 4 have not been effectuated. Section 4 expressly provides for State acquisition of lands for a "state nature and historical preserve" located outside the Forest Preserve.[112] Although this provision has been on the books for nearly fifty years "with questionable effect,"[113] the State has not established a "Preserve" for natural resources and scenic beauty, either on par with the Forest Preserve or with such preserves in other states.[114]

ACT"); N.Y. ENVTL. CONSERV. LAW art. 17; N.Y. Comp. Codes R. & Regs. tit. 6, §§ 750, *et seq.*

[109] The Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), *codified at* 42 U.S.C. 6901, *et seq.*; N.Y. ENVTL. CONSERV. LAW art. 27.

[110] N.Y. ENVTL. CONSERV. LAW art. 27, tit. 9 *and* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq.*

[111] *See* GALIE, REFERENCE GUIDE, *supra* note 2, at 251 ("Protection of the kind envisaged by this section had already been provided by statute, at least in part. . . . The broad policy goals of this section were implemented by statues in the 1970s.").

[112] N.Y. CONST. art. XIV, § 4.

[113] GINSBERG, The Environment, *supra* note 4, at 326.

[114] Comparable provisions are found in the states of Arkansas, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Virginia and Washington. *See* Frank P. Grad, 10 TREATISE ON

Furthermore, Section 4 does not appear to be self-executing. At least one court has held that Section 4's provisions afford no constitutionally-protected property right enforceable by courts.[115] Hence, the provision amounts to little more than an exhortation for the government to act.[116] Citizens apparently cannot seek judicial enforcement of the Conservation Bill of Rights, as they can the "forever wild" clause.[117]

Over 20 years ago, Professor William R. Ginsberg argued that New York should move "toward 'self-executing' status for the existing constitutional statement of environmental goals."[118] He recommended converting the general language of Section 4 into a specific "environmental right," such as exists in other states. For example, the constitution for the Commonwealth of Pennsylvania provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are

---

ENVIRONMENTAL LAW § 10.03(v) (1986). Although laws in New York exist to protect wild plants and biodiversity, sufficient funding has not been provided to implement them nor integrated them with Article XIV's provisions. *See* PHILIP WEINBERG, *Practice Commentaries*, N.Y. ENVTL. CONSERV. LAW § 3-0302, at 54 (McKinney's 2005).

[115] *See Leland v. Moran*, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002) ("Article 14, section 4 of the New York State Constitution requires the legislature to include adequate provision for the abatement of various types of pollution. It has done so by enacting the ECL [Environmental Conservation Law]. Nothing in the language of this constitutional provision sufficiently restricts the DEC's discretion in enforcing the ECL such that it provides plaintiffs with a source of a constitutionally protected property right."), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

[116] *See* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is similar to other provision of other state constitutions that mandate state legislatures to enact environmentally protective legislation. The efficacy of such provisions is limited. Courts usually refuse to compel legislatures to act on the basis of constitutional mandates. Since the judiciary is a coordinate branch of government, it does not have the power to compel the legislature to act in a purely legislative function.") (citations omitted).

[117] *See id.*

[118] *Id.* at 326 (Conclusion #2).

> the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[119]

Florida,[120] Hawaii,[121] Illinois,[122] and Montana[123] provide comparable constitutional environmental rights (as do 174 nations),[124] and 19 states provide constitutional rights for hunting and fishing.[125] Establishing such rights in state constitutions serve varied objectives,[126] and afford a unique dimension of environmental protection.[127]

---

[119] PA. CONST. art. I, § 27. The Pennsylvania Supreme Court gave direct effect to this provision in *Robinson Township, Washington Cnty., Pa. et al. v. Commonwealth*, 623 Pa. 564, 683-87, 83 A.3d 901, 974-977 (Pa. 2013).

[120] FLA. CONST. art. II, § 7 ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.").

[121] HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

[122] ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

[123] MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities . . . .").

[124] DAVID R. BOYD, THE RIGHTS REVOLUTION *passim* (2012).

[125] *See* NAT'L CONFERECE OF STATE LEGISLATURES, *State Constitutional Right to Hunt and Fish* (Nov. 9, 2015), http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx.

[126] *See* ART ENGLISH & JOHN J. CARROL, *State Constitutions and Environmental Bills of Rights*, *in* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 18 (2015), http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-

But it is by no means clear that New York would benefit from the inclusion in the State Constitution of a self-executing environmental right. Current State and federal law provide ample environmental protections, and regulators already police environmentally harmful conduct. Judicial review of most environmental issues is readily available under Article 78 of the Civil Practice Law & Rules, and citizen suits can be brought to authorize enforcement of most environmental statutes.[128] Thus, it is debatable whether the addition of a self-executing constitutional environmental right could do more; indeed, it might even lead to needless, duplicative litigation, which would discourage economic development, especially in economically-depressed regions of the State.

To be sure, though, there is another side of the argument. Arguably, the narrow scope of Section 4 in Article XIV is insufficient to address New York's new environmental challenges. In 1894, the destruction of forests was deemed a crisis worthy of constitutional reform. The "forever wild" mandate was thus born. In 1969, pollution presented a comparable crisis. The "Conservation Bill of Rights" was thus created.[129] Today's analogue may be impacts associated with climate change, as evaluated in reports by

---

bills-rights; *see also* JAMES R. MAY, PRINCIPLES OF CONSTITUIONAL ENVIRONMENTAL LAW *passim* (2011).

[127] *See generally*, JOHN C. DERNBACH, JAMES R. MAY & KENNETH T. KRISTL, *Robinson Township v. Commonwealth of Pennsylvania*: *Examination and Implications*, 67 RUTGERS L.J. 1169 (2015).

[128] *See, e.g.*, CLEAN WATER ACT § 505; *supra* note 92.

[129] Environmental constitutionalism began in New York, and was expanded in 1969, influenced in part by Dr. Rachel Carson's seminal book, *Silent Spring*. Dr. Carson wrote that "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." RACHEL CARSON, SILENT SPRING 12-13 (1962).

the New York Academy of Sciences,[130] the U.S. National Academy of Sciences,[131] and the Intergovernmental Panel on Climate Change.[132]

CONCLUSION

In 2017, voters will have a unique opportunity to debate whether the provisions of the State Constitution's conservation article, Article XIV, are sufficient to meet current needs or can otherwise be improved. As this report illustrates, Article XIV presents opportunities to simplify its text, address obsolete aspects, and to consider how to enhance its effectiveness. At a minimum, if and when the State establishes a preparatory constitutional commission, it has ample reason to carefully study Article XIV.

[130] *See* NEW YORK CITY PANEL OF CLIMATE CHANGE, *Building the Knowledge Base for Climate Resiliency: New York City Panel on Climate Change 2015 Report*, 1336 ANNALS N.Y. ACAD. SCI. 1-150 (2015), http://onlinelibrary.wiley.com/doi/10.1111/nyas.2015.1336.issue-1/issuetoc.

[131] *See* U.S. NAT'L ACAD. OF SCI. & U.K. ROYAL SOCIETY, *Climate Change: Evidence and Causes* (2014), nas-sites.org/americasclimatechoices.

[132] *See* INTERGOVT'L PANEL ON CLIMATE CHANGE, *Fifth Assessment Report* (2013-14), https://www.ipcc.ch/report/ar5/. *Fifth Assessment Report.*

APPENDIX A

ARTICLE XIV

CONSERVATION

{Text, annotated with subject headings in brackets}

[Forest preserve to be forever kept wild; authorized uses and exceptions]

Section 1.[1] *The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.* (Italics added.)

Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway heretofore specifically authorized by constitutional amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred two from a point in the vicinity of the city of Glens Falls, thence northerly to the vicinity of the villages of Lake George and Warrensburg, the hamlets of South Horicon and Pottersville and thence northerly in a generally straight line on the west side of Schroon Lake to the vicinity of the hamlet of Schroon, then continuing northerly to the vicinity of Schroon Falls, Schroon River and North Hudson, and to the east of Makomis Mountain, east of the hamlet of New Russia, east of the village of Elizabethtown and continuing northerly in the vicinity of the hamlet of Towers Forge, and east of Poke-O-Moonshine Mountain and continuing northerly to the vicinity of the village

[1] Article 14 was formerly Section 7 of N.Y. CONST. art. VII in the Constitution of 1894. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1941; November 4, 1947; November 5, 1957; November 3, 1959; November 5, 1963; November 2, 1965; November 6, 1979; November 8, 1983; November 3, 1987; November 5, 1991; November 7, 1995; November 6, 2007; November 3, 2009; November 5, 2013.

of Keeseville and the city of Plattsburgh, all of the aforesaid taking not to exceed a total of three hundred acres of state forest preserve land, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county, nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length.

Notwithstanding the foregoing provisions, the state may convey to the village of Saranac Lake ten acres of forest preserve land adjacent to the boundaries of such village for public use in providing for refuse disposal and in exchange therefore the village of Saranac Lake shall convey to the state thirty acres of certain true forest land owned by such village on Roaring Brook in the northern half of Lot 113, Township 11, Richards Survey.

Notwithstanding the foregoing provisions, the state may convey to the town of Arietta twenty-eight acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and in exchange therefor the town of Arietta shall convey to the state thirty acres of certain land owned by such town in the town of Arietta.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state, in order to consolidate its land holdings for better management, may convey to International Paper Company approximately eight thousand five hundred acres of forest preserve land located in townships two and three of Totten and Crossfield's Purchase and township nine of the Moose River Tract, Hamilton county, and in exchange therefore International Paper Company shall convey to the state for incorporation into the forest preserve approximately the same number of acres of land located within such townships and such County on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title and the conditions herein set forth, the state, in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under unitary ownership and stewardship, may convey to Sagamore Institute, Inc., a not-for-profit educational organization, approximately ten acres of land and buildings thereon adjoining the real property of the Sagamore Institute, Inc. and located on Sagamore Road, near Racquette Lake Village, in the Town of Long Lake, county of Hamilton, and in exchange therefor; Sagamore Institute, Inc. shall convey to the state for incorporation into the forest preserve approximately two hundred acres of wild forest land located within the Adirondack Park on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.

Notwithstanding the foregoing provisions the state may convey to the town of Arietta fifty acres of forest preserve land within such town for

public use in providing for the extension of the runway and landing strip of the Piseco airport and providing for the maintenance of a clear zone around such runway, and in exchange therefor, the town of Arietta shall convey to the state fifty-three acres of true forest land located in lot 2 township 2 Totten and Crossfield's Purchase in the town of Lake Pleasant.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to the town of Keene, Essex county, for public use as a cemetery owned by such town, approximately twelve acres of forest preserve land within such town and, in exchange therefor, the town of Keene shall convey to the state for incorporation into the forest preserve approximately one hundred forty-four acres of land, together with an easement over land owned by such town including the riverbed adjacent to the land to be conveyed to the state that will restrict further development of such land, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, because there is no viable alternative to using forest preserve lands for the siting of drinking water wells and necessary appurtenances and because such wells are necessary to meet drinking water quality standards, the state may convey to the town of Long Lake, Hamilton county, one acre of forest preserve land within such town for public use as the site of such drinking water wells and necessary appurtenances for the municipal water supply for the hamlet of Raquette Lake. In exchange therefor, the town of Long Lake shall convey to the state at least twelve acres of land located in Hamilton county for incorporation into the forest preserve that the legislature shall determine is at least equal in value to the land to be conveyed by the state. The Raquette Lake surface reservoir shall be abandoned as a drinking water supply source.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to National Grid up to six acres adjoining State Route 56 in St. Lawrence County where it passes through Forest Preserve in Township 5, Lots 1, 2, 5 and 6 that is

necessary and appropriate for National Grid to construct a new 46kV power line and in exchange therefore National Grid shall convey to the state for incorporation into the forest preserve at least 10 acres of forest land owned by National Grid in St. Lawrence county, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land conveyed by the state.

Notwithstanding the foregoing provisions, the legislature may authorize the settlement, according to terms determined by the legislature, of title disputes in township forty, Totten and Crossfield purchase in the town of Long Lake, Hamilton county, to resolve longstanding and competing claims of title between the state and private parties in said township, provided that prior to, and as a condition of such settlement, land purchased without the use of state-appropriated funds, and suitable for incorporation in the forest preserve within the Adirondack park, shall be conveyed to the state on the condition that the legislature shall determine that the property to be conveyed to the state shall provide a net benefit to the forest preserve as compared to the township forty lands subject to such settlement.

Notwithstanding the foregoing provisions, the state may authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. Subject to legislative approval of the tracts to be exchanged prior to the actual transfer of the title, the state may subsequently convey said lot 8 to NYCO Minerals, Inc., and, in exchange therefor, NYCO Minerals, Inc. shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land, on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars. When NYCO Minerals, Inc. terminates all mining operations on such lot 8 it shall remediate the site and

convey title to such lot back to the state of New York for inclusion in the forest preserve. In the event that lot 8 is not conveyed to NYCO Minerals, Inc. pursuant to this paragraph, NYCO Minerals, Inc. nevertheless shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land that is disturbed by any mineral sampling operations conducted on said lot 8 pursuant to this paragraph on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the lands disturbed by the mineral sampling operations.

[**Reservoirs]**

§2.[2] The legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works.

[2] An addition made in 1913 to former N.Y. CONST. art. VII, §7, which was renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November of 1953, and November of 1955.

[Forest and wild life conservation; use or disposition of certain lands authorized]

§3.[3] 1. Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.

2. As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.

[Protection of natural resources; development of agricultural lands]

§4.[4] The policy of the state shall be to conserve and protect its natural

[3] Formerly N.Y. CONST. art. VII, §16, this provision as renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 5, 1957; November 6, 1973.

[4] First proposed and accepted by the Constitutional Convention in 1967, whose proposed constitution was not accepted, and thereafter added by amendment adopted by

resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

[Violations of article; how restrained.]

§5.[5] A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in the appellate division, on notice to the attorney-general at the suit of any citizen.

---

the legislature and approved by vote of the people November 4, 1969.

[5] Initially adopted in 1894 in former N.Y. CONST. art. VII, §7; retained by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938, and renumbered §5 by vote of the people November 4, 1969.

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

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

Ethics and Professionalism
Mark Davies
11 East Franklin Street
Tarrytown, NY 10591-4116
MLDavies@aol.com

Steven G. Leventhal
Leventhal, Cursio, Mullaney & Blinkoff, LLP
15 Remsen Avenue
Roslyn, NY 11576-2102
sleventhal@lcmblaw.com

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

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

Legislation
Marisa Franchini
Assistant Corporation Counsel
Albany Corp. Counsel's Office
City Hall
24 Eagle Street
Albany, NY 12207
mfranchini@albanyny.gov

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

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

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

Jeannette Arlin Koster
Law Office of Jeannette Koster
1767 Front Street
Yorktown Heights, NY 10598
jkoster@jkosterlaw.com

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

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

Taxation, Finance & Economic Development
Kathleen N. Hodgdon
778 Carlton Avenue
Clifton Park, NY 12065
katie.hodgdon@gmail.com

The Local and State Government Law Section Welcomes New Members

Hon. David M. Allen
Gregory R. Alvarez
David Benjamin Amerikaner
Dwayne M. Andrews
Megan Kate Andrews
Babatunde S. Aremu
Alyssa Bain
Allen Deepak Bass
Michele M. Bateman
Steven B. Bengart
Nicole Roisin Benincasa
Seidia Roach Bernard
James D. Bilik
Scott C. Billman
William G. Binckes
James Michael Black, II
Susan W. W. Brecher
Tyler Broker
Kevin R. Bryant
Donna Lynn Burden
Frank V. Carone, Jr.
Kaitlin Ainsworth Caruso
J. Stephen Casscles
Ivy Chiu
Nam Cho
Christopher E. Cooper
Nicholas S. Cortese
Heather D. Crosley
Steven Dalton
Eileen Daly
Edward J. Damico
Louis L. D'Arminio
Charlotte E. Davidson
Adam C. Dembrow
Nelson A. Diaz
Michael D. Diederich, Jr.
Emily Ann Dinsmore
Maria Catherine Donovan
Patricie Drake
Irina Dularidze
Patrick A. Dunlavey
Matthew T. Dyson
Gideon Elliot
Vincent P. Esposito, Jr.
Jeffrey Neil Evans
Melissa Gilbon Ferraro
Eric Firkel
Thomas John Foy
Edward L. Freer
Timothy D. Gallagher
Mingjie Gan
William Francis Garbarino
Kristin LeeAnn Garland
David J. Gilmartin
Michael P. Ginley
Alita J. Giuda
Kevin P. Glasheen
Richard A. Glickel
Scott Glotzer
David B. Goldin
Stacey L. Goldstein
Andrew Simeon Gounardes
Irene K. Graven
Henry M. Greenberg
Edward H. Grimmett
Brian R. Gutman
Jacquelyn Ann Hadam
Phillip G. Harmonick
Katherine Harrigan
Kathryn Festine Hartnett
Jared Benjamin Hickey
James E. Hughes
Heidi A. Husser
Barbara A. Jaccoma
Ashley Wales Johnson
Brian G. Johnson
Kevin Charles Jones
Sydney Joy
Carole Julian
Stuart E. Kahan
Norman W. Kee
David James Kenny
Yei Won Kim
Jessica Klami
Roseanne M. Klein
Ting Kwok
John Ignatius LaMancuso
Geoffrey Lawson
Kenneth M. Leibowitz
Edward Thomas Lentz
James R. Levine
Jacqualine C. Lombardo
Jeffrey Philip Lowell
Timothy M. Mahoney
Andrew M. Mahony
Meghan E. Maslyn
Matthew Robert Mazgaj
Cheryl A. McCausland
Ariadne S. Montare
Patricia C. Moore
Ms. Daniella Munzig
Vanessa Ann Murphy
Lea Nacca
Samir S. NeJame
Amanda Sue Nichols
J. Mark Noordsy
James A. Notaris
Lorna Orak
Andrew J. Orenstein
Christopher Michael Palermo
Crystal Rose Peck
Cecelia F. Pelkey
Charles P. Pensabene
Michael Joseph Petre
Sameer Ponkshe
Vicki J. Prager
Robert Pronteau
Jennifer K. Prossick
Irma Anne Rivera
Gerard Romski
Barry Maxwell Ronner
Jeremy Rosenberg
Joanna Michelle Rotenberg
Travis J. Rothschild
Matthew Rozea
Brandon D. Russell
Maston J. Sansom
Brian David Sarama
Wayne J. Schaefer
Thomas Russell Schepp, II
Adam J. Schultz
Samantha Lee Segal
Jacqueline M. Seitz
Jeffrey G. Shapiro
John Anthony Sickinger
Stanley J. Sliwa
Merima Smajic
Sharon Anne Sorkin
Julia Ann Steciuk
Brian Stecker
James T. Stokes
Jeffrey E. Storch
John D. Svare
Ardian Tagani
Steven Anthony Torres
Vita V. Trujillo
Karen J. Underwood
James A. Vartholomeos
Jessica R. Vigars
Erica A. Vladimer
Kristen P. Walp
Hon. Margaret T. Walsh
Glenn Ephraim Weinstein
Kristin Klein Wheaton
Tasha L Williams
Kristen Kelley Wilson
Benjamin E. Wisniewski
Cheryl M. Wood
Nancy E. Wood
Mary Ellen Wright
Scott H. Wyner
Nicola Young
Kenneth Joseph Zweig

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

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2017

JANUARY 23–27, 2017

NEW YORK CITY

New York Hilton Midtown

LOCAL AND STATE GOVERNMENT LAW SECTION PROGRAM
January 26, 2017

REGISTRATION NOW OPEN. BOOK YOUR HOTEL TODAY!
www.nysba.org/am2017