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A Message from the Chair

Patricia Salkin

The fall of 2010 brings more uncertainty to local governments in terms of growing demands for creativity with respect to fiscal challenges. Municipal attorneys are being challenged more now than ever to assist with creative thought leadership to provide advice and counsel on ways in which local governments can, among other things: generate revenue without turning to tax hikes; address capital construction and infrastructure demands resulting from deferred maintenance; maintain expected levels of service to community residents with growing costs and less resources available; equitably address myriad workforce issues; and further increase efficiency and economies of scale. Add to these daunting issues attention that must be focused on mounting environmental concerns related to sustainable communities and climate change, the cost of housing across the State, and the ways in which technology has changed the way lawyers and our municipal clients are doing business, and the practice of municipal law is anything but boring.

Municipal Law Section members are literally on the front lines every day dealing with cutting-edge issues. Our Section strives to provide opportunities for networking, education and communication among members to provide resources and information to assist with the challenges that confront each of us.

We invite you to join us October 16-18 for our fall meeting in Washington, D.C. The Executive Committee debated whether to hold a meeting out of state, but decided that the 65th Anniversary of our Section was an occasion that should be marked with something special. Therefore, we are pleased to offer a unique opportunity for members of our Section to participate in a U.S. Supreme Court admissions ceremony for those not yet admitted to practice before the Court and who desire to participate. Approximately 40 Section members have registered for this event. In addition to that program on Monday, October 18th, please see the program agenda on p. 29 in this newsletter for terrific CLE programming on October 16th and 17th. Remember, Amtrak offers a great schedule

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from the Hudson Valley and South through Penn Station to Union Station in Washington, D.C.; many Section members will find cheap flights from Southwest into BWI (and an easy train shuttle into Union Station), and flights into Reagan National Airport are, as of this writing, under $300 because of the Saturday night stay over. Special thanks to our program co-chairs Sharon Berlin and Steven Leventhal, who have put together a terrific, substantive CLE program that includes, in addition to New York lawyers, attorneys from Washington, D.C. who have considerable experience with federal and national municipal law issues that affect each of our practices.

Our Section remains committed to growing our membership and to increasing our diversity. If you know of a municipal lawyer who is not a member of our Section, please forward his or her name and contact information. Members of the Executive Committee are ready to follow up immediately. In addition, if you have time to take a more active role in the Section, we are anxiously awaiting for you to contribute to this publication, to join and participate in a Committee, and to help us launch a New York municipal law blog. Further, if you have ideas for how this Section can be more relevant to your practice, please don't be shy…we want to know. Interested? Please contact me at psalk@albanylaw.edu and/or attend one of our upcoming meetings and become a more active member.

Patricia Salkin

From the Editor

Local governments continue to be burdened by their inability to recover the costs incurred in providing municipal services to tax-exempt entities. The severe economic downturn, substantially reducing tax revenues and state aid, has only aggravated the situation. Particularly hard hit are cities, such as Albany, in which 53% of the assessed valuation of all real property is tax exempt. Commercial and residential property taxpayers are left to bear the burden of financing the services delivered to tax-exempt properties.

Recently, the Albany Common Council established a Commission on Public–Private Budgetary Cooperation.[1] Among its responsibilities, the Commission is to report to the Common Council on the costs associated with providing tax-exempt entities with essential city services (e.g., police and fire protection, snow removal, sanitation, water and sewer service, etc.), the financial and programmatic contributions made by tax-exempt entities to municipalities nationwide, and the financing vehicles utilized for such contributions.

While the City's efforts are admirable, municipalities have a limited tool box to accomplish the Common Council's objectives for generating revenue from tax-exempt entities. Section 858 of the General Municipal Law authorizes Industrial Development Agencies to enter into agreements for payments in lieu of taxes ("PILOT Agreements") to reimburse affected tax jurisdictions for lost revenue. Other entities and public authorities authorized to enter into PILOT Agreements with municipalities include the state and federal government, public utilities and public housing authorities.[2]

There is, however, no "general statute which requires or authorizes the owner of a tax-exempt property to make payments in lieu of taxes."[3] Absent such specific statutory authority, the courts have refused to enforce PILOT Agreements between municipalities and tax-exempt entities on public policy grounds, finding that such agreements contravene the tax-exempt status conferred by the Legislature.[4]

In *County of Sullivan*, the Third Department held that a town had no authority to enter into an agreement with a nonprofit corporation for a "contribution in lieu of taxes."[5] There, the County challenged a PILOT Agreement between a town and tax-exempt nonprofit where the entire payment was allocated to the town. The agreement between the town and the nonprofit contained a reclassification of the nonprofit back to tax-exempt status in return for an annual contribution to the town of $10,000 for five years. Previously, the nonprofit had made annual payments to the town of $6,000 but in May 2008 the town revoked its tax-exempt classification and assessed the value of the nonprofit's land at over one million dollars. In response, the nonprofit filed a grievance, resulting in the challenged compromise, which the court rejected, opining:

> The Town has not set forth any statutory authority for the type of agreement it used to resolve this tax dispute. The June 2008 agreement *clearly does not* fall within the parameters of a statutorily authorized payment in lieu of taxes program.[6]

Further, the court stated:

> [W]hile we ascribe no ill intent to the Town in this case, we note that the type of agreement it used opens the door for potential abuse, such as, among others, a governmental authority wielding the weighty power of taxation to commandeer 'contributions' from entities that are exempt from real property taxes, or a municipality negotiating an agreement to its benefit *at the expense of other taxing jurisdictions*.[7]

Similarly, in *Village of Upper Nyack v. Christian and Missionary Alliance*,[8] the Village of Upper Nyack unsuccessfully sought to enforce a PILOT Agreement that it entered into with a religious institution, when that tax-exempt entity stopped its promised payments altogether. The court determined that the action to recover delinquent payments violated the State's Real Property Tax Law Section 420-a, which grants tax-exempt status to religious corporations.[9] Here, the religious nonprofit promised to make annual PILOT payments in the amount of property taxes in order to secure zoning permits to build its headquarters and stopped payments shortly after the headquarters were built.

Notwithstanding the absence of authority and uncertainty of enforceability of such voluntary agreements, municipalities in New York can take heart from the experience of Boston and other cities throughout the nation. According to a recent article,[10] thirteen Bos-

ton universities participated in a PILOT Agreement in which the schools voluntarily donate a sum of money to the City. In 2009, those schools paid an estimated $8.7 million in PILOT funds to Boston. Providence, Rhode Island collected $3 million annually from its resident universities.[11] Although efforts to impose a "tuition tax" failed in Pittsburgh, Pennsylvania and Evanston, Illinois, the universities targeted by that tax worked with those cities to devise ways to defray the costs associated with the municipal services they received.[12] Undoubtedly, current economic times will leave cities little choice but to continue to aggressively pursue strategies to offset the costs of municipal services provided to tax-exempt entities.

In this issue of the *Municipal Lawyer*, Michael H. Donnelly of Dickover, Donnelly, Donavan & Biagi, LLP traces the origin and extent of constitutional limits on the authority to zone. In "Property Rights and the Constitution," Mr. Donnelly provides a primer on the types of constitutional claims that are made in land use cases and the standards utilized by the courts in adjudicating those claims.

Recent decisions on standing and ripeness highlight the quarterly Land Use Law Case Law Update authored by Henry M. Hocherman and Noelle V. Crisalli of Hocherman, Tortorella, & Wekstein, LLP. Their article updates prior reporting on a major eminent domain litigation involving Columbia University.

The legislative history of Article 18 of the General Municipal Law is the subject of the ethics article written by Ivy Chiu, a student at New York University, and Mark Davies, Executive Director of the New York City Conflicts of Interest Board. Recent amendments to the Open Meetings Law are summarized by Camille Jobin-Davis, Assistant Director of the New York State Committee on Open Government.

Lester D. Steinman

Endnotes

1. Albany City Code Chapter 42, Part 37.
2. *See Dillenburg v. State*, 55 A.D. 3d 1363, 865 N.Y.S.2d 437 (4th Dep't 2008); Unconsolidated Laws Title 27, Charter 5; Public Authorities Law §§ 1012, 1105(3) 1296(2), 2770(1), 2796(1); Public Housing Law §§ 52(3), 158.
3. 8 Op. Counsel SBEA No. 97 (1980).
4. *County of Sullivan v. Tusten*, 72 A.D. 3d 1470, 899 N.Y.S. 2d 455 (3d Dep't 2010); *Village of Nyack v. Christian and Missionary Alliance*, 143 Misc. 2d 414, 540, N.Y.S. 2d 125 (Sup. Ct. Rockland Co. 1988).
5. *County of Sullivan v. Town of Tusten, supra*.
6. *Id.* at 457 (emphasis added).
7. *Id.*
8. 143 Misc. 2d 414 at 421, 540 N.Y.S.2d 125 (Sup. Ct., Rockland Co. 1988).
9. *Id.*
10. Ganesan, M., *In Lieu of Taxes, a Donation System for Boston's Non-Profits* (June 3, 2010). UPIU, http://www.upiu.com/articles/in-lieu-of-taxes-a-donation-system-for-Boston-non-profits.
11. A2Politico, *The Politics of Neighbors: You Don't Get What You Deserve. You Get What You Negotiate* (Feb. 5, 2010), http://www.a2politico.com'?tag=payments-in-lieu-of-of-taxes.
12. *Id.*

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Property Rights and the Constitution

By Michael H. Donnelly

Exercise by government of the authority to zone inherently pits the right of a landowner to enjoy his property against efforts by government to protect the greater good—a classic constitutional-dimension showdown. One would, therefore, expect to find a time-tested, robust and comprehensive body of constitutional law outlining the limits of the authority to zone. Yet, zoning power jurisprudence is spotty, confusing and, surprisingly, of almost exclusively recent origin. The United States Supreme Court has, by its own admission, made a mess of things, confessing to having confused due process concepts with Fifth Amendment takings concepts[1] when defining the limits of zoning. Commentators and practitioners have followed that lead and are fond of categorizing nearly every species of overreaching by government in the land use arena as a "taking." There is diversion among the circuits as to the nature and scope of a land use equal protection claim; the law of exactions is in its cranky infancy (the wildly uncertain status of impact fees[2] being perhaps one of the most striking examples of such uncertainty). To make matters worse, decisions of the New York Court of Appeals are woefully out of step with the law that has developed in the federal courts. It is hard enough to keep pace with the law—to stay ahead of the curve is nearly impossible. This is unfortunate for municipalities and landowners alike.

What then are the constitutional limits on the authority to zone? What is a taking? Under what circumstances may a landowner bring a civil rights claim for the violation of a property right? Even more fundamentally, what is a property right? While there are no easy answers, there are some clear guideposts, a few developing trends and many exciting questions in this new-frontier-like field of law. This brief article will, hopefully, light the way.

The Property Right

As noted, zoning laws quite obviously impact a citizen's desire to use his property as he wishes. The constitution does not fully protect this desire but it does protect a citizen's *property right*. The property right is multidimensional in nature and is often analogized by the courts to a bundle of sticks.[3] The "sticks" in the bundle of property rights fall into four essential categories of rights: possession, use, exclusion of others and disposal.[4] It is the property right—and not the physical property itself—that the constitution protects.[5]

The United States Constitution is not the source of property rights, nor does the constitution define the individual sticks in the bundle that together constitute the right. Property rights are instead "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law."[6] Thus, in most cases, the common law of each state defines the nature of the right that the constitution then protects. Mere expectancy or desire to use property does not create a protectable right (although distinct investment-backed expectations go a long way), nor can one assert a protectable property interest in an activity that would, under existing common law principles, constitute nuisance.[7]

While an oversimplification, it is fair to say that one has the right to do as he wishes with his property consistent with existing rules or understandings of property law. Government may, however, place restrictions on that right, provided that those restrictions[8] are justified by protection of the general health, safety and welfare of its citizens and, provided further, that such restrictions do not so unduly interfere with an individual's property rights as to violate constitutional principles. Unreasonable, or unjustified, interference with an individual's property rights *may* constitute a violation of that individual's civil rights entitling that property owner to an award of damages or even to "just compensation" if the interference rises to the level of a taking.

Origins of Zoning

The law of zoning is relatively new, originating during the 1920's. Zoning law overlaps and extends the law of restrictive covenants and nuisance. It finds its legal support in the *police power.* Its permissible objective is the protection of the public safety, health and welfare. Building codes (first enacted during the Industrial Revolution) preceded true zoning. Such codes—which regulate matters such as construction materials, fire separations, safety escapes, *etc*.—can easily be seen as legislation enacted in furtherance of protecting the public safety, health and welfare. True zoning laws—laws that establish separate zoning districts and that restrict certain uses to certain zones—are a bigger stretch.

The United States Supreme Court first examined and upheld a true zoning law[9] in 1926 in *Village of Euclid, Ohio v. Ambler Realty Co*.[10] From that decision:[11]

> The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations.

This decision was considered remarkable when it was announced. To us today, the position it announces seems obvious and mundane. And, while *Euclid v. Ambler Realty* tells us that zoning is constitutionally permissible, it does not answer the question: How far can zoning go?

Legislative Basis of the Authority to Zone

Local land use boards have only that power to regulate use of land granted to them by state law (enabling legislation) and exercised by them through their zoning ordinances (implementing legislation); there is no inherent local municipal power to zone. Thus, while state law *enables* a municipality to enact zoning laws, in order to exercise that power a municipality must, by adopting local legislation, *implement* that power. Not every municipality in New York State has implemented that power and very few have implemented it as fully as the power has been enabled.

The United States Constitution

In recent years (the past fifty or so) the United States Supreme Court has begun to define the scope and contour of the protections the constitution gives to the property right. Implicated, of course, is the Fifth Amendment, as well as the Fourteenth. Even the First and Fourth[12] Amendments come into play. Despite the press reports following the 2005 United States Supreme Court decision in *Kelo v. New London*[13] [holding a condemnation of non-blighted property with compensation to its owner valid despite the government's decision to transfer that property to a private citizen in order to effectuate the public purpose for which the property was taken], the Fifth Amendment to the United States Constitution is not new! The nearly afterthought final twelve-word phrase of that amendment is our focus here: "…nor shall private property be taken for public use, without just compensation." This phrase is often called the *takings clause*. Note that this clause *allows* government takings; prohibited only are takings without just compensation. And, while the taking must be "for public use," that phrase was read rather broadly long before *Kelo*.

Fifth Amendment Takings

Much meat has been put on the bones of this twelve-word phrase since the constitution was first adopted. The state of the law has moved far beyond merely recognizing the right to compensation for a physical occupation of property by the government.[14] The constitution now mandates compensation for certain types of "regulatory takings" as well. These new takings theories blend (some say confuse) a property owner's Fifth/Fourteenth Amendment rights to procedural and substantive due process with that owner's Fifth Amendment right to compensation for what has been taken by governmental action.

The earliest and clearest pronouncement of the regulatory takings doctrine came in 1987, when the United States Supreme Court announced, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[15] that a property owner who proves that improper government action deprives him of a property interest not resulting from physical occupation of his land is entitled, nevertheless, to judgment not only invalidating that government action, but to just compensation for that deprivation of his protected Fifth Amendment right as well. Two subsequent cases, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*,[16] put more meat on the bones of this new theory of legal recovery, adding a requirement that government action, to pass muster, must have an "essential nexus" to a legitimate state interest and be "roughly proportionate" to the impact it is designed to address.[17] *Nollan* and *Dolan* are often regarded as bellwether takings cases. They should—as more fully explained below—be regarded more narrowly as *exaction* cases governed by the doctrine of unconstitutional conditions and not as true *takings* cases at all.

What then is the established law surrounding *true* takings? Current takings jurisprudence can be summarized, in bullet fashion, as follows:

- Any permanent physical occupation of property by the government (even of an insignificant portion of that property) constitutes a taking. *Loretto v. Teleprompter Manhattan*.[18]
- A regulation or administrative action that denies *all* economically viable use of property constitutes a taking. *Lucas v. South Carolina Coastal Council*.[19]
- A regulation or administrative action *may* constitute a taking if, after balancing its economic impact on the landowner against the extent to which it interferes with the distinct and reasonable investment-backed expectations of that landowner in the context of the character[20] of the

> governmental action, it goes too far. *Palazzolo v. Rhode Island*; *Penn Central v. City of New York*; *Pennsylvania Coal Co. v. Mahon*.[21]

The "goes too far" outer limit test hardly leads to predictability for developers or certainty for municipalities but, for now, this test will have to do.

Due Process

The Fifth and Fourteenth Amendments to the United States Constitution guarantee all citizens due process of law. The right to due process has both a procedural and substantive component.

Procedural Due Process

The right to procedural due process guarantees a citizen that government will treat him fairly as government carries out its activities. Government must, before it takes action affecting the rights of a citizen, afford that person notice and opportunity to be heard as well as procedures in keeping with basic notions of fair play. While having implications in the land use context, little will be said of procedural due process in this article.

Substantive Due Process

When a property owner proves that actions of local governmental officials in the processing of certain land-use permit applications have deprived him of his constitutionally protected right to due process of law, those local governmental officials may be held to answer in damages for that civil rights deprivation committed under color of law pursuant to 42 USC § 1983. Such claims are called substantive due process claims.[22]

Perhaps the best explanation of the scope and contour of a substantive due process claim in the land use context appears in the decision of the Second Circuit Court of Appeals in *Natale v. Town of Ridgefield*.[23] There are two essential elements of a substantive due process claim in the land use context. First, one claiming a denial of substantive due process must establish a *protectable property interest*. This is very difficult for a challenger to do because a property owner has no protectable property interest in a discretionary land use permit.[24] Unless the permit sought is one that is truly as-of-right or its issuance compelled by near ministerial duty,[25] a refusal to issue the permit—no matter how unjustified—does not constitute a denial of substantive due process and the challenger's remedy is limited to state court-authorized proceedings.

Second, even if a protectable property interest exists, the challenger must prove more than that the conduct of the governmental agency was unjustified. And the conduct of government must be shown to be more than arbitrary, capricious and illegal—the usual New York State Civil Practice Law and Rules Article 78 standard. Instead, the challenger must prove *outrageous conduct.* The governmental conduct challenged must evince a complete lack of justification of any kind. It must constitute "a deliberate flouting of the law that trammels significant personal or property rights [of the challenger]."[26] Such proof entitles the challenger to an award of damages and to attorneys' fees under 42 USC §§ 1983 and 1988.[27]

Doctrine of Unconstitutional Conditions

The *Nollan* and *Dolan* decisions are, as noted already, usually viewed as *takings* cases and are dealt with as such above. Because no protectable property interest existed in the discretionary land use permits involved in either of those cases, they cannot be viewed as substantive due process cases. However, because there was no "physical occupation" of land or denial of "all economically viable use" of land involved and because the court did not declare in either case that the government had gone "too far" in the sense meant by *Penn Central,* neither case falls within the rubric of a taking. *Nollan* and *Dolan* should, therefore, more accurately be viewed as *unconstitutional condition* cases, a doctrine now at the center of the land use litigation arena. The doctrine finds its most frequent land use application in the context of an exaction (i.e., the attachment of a condition to an approval, the imposition of which requires the permit holder to relinquish a right or benefit granted by the constitution).

Under the doctrine of unconstitutional conditions,[28] the challenger, while conceding his lack of a legally protectable property interest (because the permit he seeks is discretionary in nature), nevertheless claims a denial of his constitutional rights resulting from the attachment of an unconstitutional condition[29] to the discretionary grant of an approval actually given. In effect the doctrine holds that government may not condition the grant of a discretionary permit upon relinquishment of a constitutional right, even if the government could have withheld the permit altogether.

A closer examination of *Nollan* and *Dolan* suggests that this doctrine was the basis for the court's ultimate holding:

> [T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.[30]

The two-part *Nollan/Dolan* test outlined earlier fits nicely in the context of an exaction, but should have little application outside of this context. For an exaction condition [i.e., a condition requiring an applicant to relinquish a benefit granted by the constitution] to survive scrutiny under the doctrine of unconstitutional condi-

tions, that condition: (1) must have an "essential nexus" to a legitimate state interest; and (2) its command must be "roughly proportionate" to the projected impacts of the project.[31] In *Nollan,* the Supreme Court found that a permit condition imposed by the California Coastal Commission did not satisfy the essential nexus to a legitimate governmental interest test. In *Dolan,* the Court found the essential nexus to be satisfied but determined that the permit condition imposed was out of proportion to the projected land-use impacts of the project. Both cases resulted in holdings that unconstitutional conditions had been imposed entitling those property owners to recover damages pursuant to 42 USC § 1983.

The *Nollan/Dolan* test should have little application beyond the context of exactions. Utilization of its *essential nexus* and *roughly proportionate* prongs does not—as should be obvious—have any relevance to a physical-occupation taking, nor does use of this test make sense in the context of a *Lucas* categorical taking (in this context there is a taking, instead, whenever the regulation categorically denies all economically viable use of land). This two-pronged test is also of no assistance in conducting the *Penn Central* balancing used to determine whether a regulation or administrative action has gone *too far*.

Equal Protection

The Fourteenth Amendment to the United States Constitution guarantees citizens equal protection of the law. The jurisprudence of equal protection developed in a context far removed from the land use approval process. The focus was most often upon discriminatory conduct exercised to the disadvantage of someone in a *suspect class* (e.g., discrimination based upon race or religion). To establish an equal protection claim a plaintiff was historically required to demonstrate unequal treatment by governmental agents and, further, that such unequal treatment was based upon an impermissible consideration such as race, religion, or retaliation for the exercise of a constitutional right. Usually, some form of animus was required. This was frequently termed the *evil eye* and *uneven hand* requirement. Almost all of the early United States Supreme Court cases dealing with the right of equal protection arose out of claims of evil-minded and uneven-handed treatment of minorities.

In 2000, a claim of denial of the right to equal protection in the land use context came before the United States Supreme Court. In that case, *Village of Willowbrook v. Olech*,[32] the court sustained an equal protection claim advanced by an individual not claiming to belong to a suspect class (indeed, the challenger in *Olech* stood alone as a class of one) and upon proof of disparate and irrational treatment not tied to an evil motive. A dramatic shift in the law of equal protection, at least in the land use context, resulted. It is now the law that an equal protection claim may be made out by a *class of one* upon a showing of treatment different from others similarly situated where there was "no rational basis for the difference in treatment."[33] Suspect class and animus are now gone from the equation.[34]

There actually appear to be two distinct variations of *Olech* claims. In the first, the plaintiff must plead and prove intentional disparate treatment that is "wholly arbitrary." He need not prove that any specific constitutional right has been infringed as a result (beyond, of course, the Fourteenth Amendment equal protection violation that is inherently the nature of the claim) and, of course, he may be a class of one.[35] While "wholly arbitrary" sounds a lot like *Natale*-outrageousness,[36] these two tests may not be identical—a *Natale* substantive due process claim may well require more (a shocking of the conscience). Nor does a protectable property interest[37] need be involved in a wholly arbitrary *Olech* claim—disparate, arbitrary or irrational treatment not justified by any legitimate governmental purpose seems to be enough. And, qualified immunity[38] is no defense because the contour of this right and remedy has been clearly established since *Olech* was decided.[39]

In the second variation of *Olech*, the plaintiff must demonstrate intentional disparate treatment that violates a specifically identified constitutional right in addition to the Fourteenth Amendment equal protection violation. Because the equal protection claim in this variation is hitched, inherently, to the additional claim of another specific constitutional right violation, the equal protection claim *coalesces* into that other constitutional right violation claim. In this variation, the equal protection claim and the additional violation claim (e.g., a claim that the challenger's right to petition was violated by a municipality's refusal to accept and process his application while accepting and processing those of all others similarly situated) coalesce and become one: they succeed or fail together.[40]

In this second type of *Olech* claim there is no requirement of arbitrariness or outrageousness—intentional disparate treatment is enough. If, however, the nature of the additional specific right claimed to have been violated is not clearly established, qualified immunity may then be asserted by the individually named defendants (although not, of course, by the municipal defendant—it is, however, liable if the conduct was official[41] policy). The leading Second Circuit case on the subject, *African Trade & Information Center, Inc. v. Abromaitis*,[42] demonstrates this well. In *African Trade & Information Center*, the plaintiffs alleged a specific reason for the government's unequal treatment actions that was entirely rational but, they claimed, impermissible under the First Amendment. This allegation compelled the conclusion that their equal protection claim and their First Amendment claim coalesced, and that the defendant's qualified immunity on the latter entitles him to

qualified immunity on the equal protection claim as well.

Prima Facie Identical

A challenger claiming an equal protection violation has always been required to establish that government has treated him differently than other persons *similarly situated*. Nothing in the *Olech* decision suggests a change in this requirement. The Second Circuit has, however, adopted, in place of "similarly situated," a "prima facie identical" standard, a standard first put forth by the Seventh Circuit.[43] Under this test, the challenger must demonstrate that he was treated differently than someone who is *prima facie* identical in all relevant respects.

Olech Now Limited by *Engquist*?

The *Neilson* prima facie identical test has never been adopted (or even commented upon) by the United States Supreme Court. However, the Supreme Court, in *Engquist v. Oregon Dept. of Agr.*,[44] recently revisited *Olech*—although in the public employment, not the land use context. *Engquist* appears to limit the availability of *Olech* relief to situations where the governmental conduct challenged was nondiscretionary in nature (i.e., to circumstances where "the existence of a clear standard against which departures, even for a single plaintiff, [can] be readily assessed"). Conversely, *Olech* is not available where government is "exercising discretionary authority based on subjective, individualized determinations."[45] From the decision: [46]

> What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter.… Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected *Olech* to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

Perhaps *Engquist* is making the same point that the seventh and second circuits made when they fashioned their prima facie identical test, although in a different way: where discretionary decision making affecting similarly situated parties is based upon a myriad of factors with few of those factors being truly objective, it is nearly impossible to say that there has been irrational, disparate treatment. Thus, in order to prevent the litigation floodgates from opening further, two circuits have said that the relevant circumstances of the comparators must be prima facie identical. The Supreme Court says, instead, that there can be no *Olech* claim where myriad-subjective-factor discretion exists. It remains to be seen whether *Engquist* discretion will supersede *Neilson* prima facie identity, which may, in turn, depend upon whether the *Engquist* discretion test is applicable only in the public employment[47] context.

Recent Supreme Court Decisions

With this context-orientation in mind, here is a summary of a few important decisions of the U.S. Supreme Court on some of these issues in recent years.

Kelo v. City of New London[48]—A condemnation of property with compensation to its owner was valid despite the government's decision to transfer that property to a private citizen in order to effectuate the public purpose for which the property was taken.

Lingle v. Chevron[49]—Annulled the takings test established in *Agins v. Tiburon*[50] where the U.S. Supreme Court had held that a regulation or administrative action (even one that does not deny all use of property) constitutes a taking if it does not *substantially advance* a legitimate governmental purpose.

San Remo Hotel v. City and County of San Francisco[51]—Some years ago, the U.S. Supreme Court held in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*[52] that takings claims must be initially pursued in state court (if state law affords such a procedure). Ever since, lawyers have been waiting for an answer to the question, "May a litigant proceed in federal court following an unsuccessful claim in state court?" The catch-22 answer in *San Remo* is that he generally[53] may not do so.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[54]—Land Use Moratoria: the question of whether the takings clause requires compensation when government enacts a temporary regulation denying property owner all viable economic use of property is to be decided by applying factors of *Penn Central Transp. Co. v. New York City*,[55] not by applying any categorical rule.

Palazzolo v. Rhode Island[56]—Entry into title subsequent to enactment of a governmental regulation is no longer an absolute bar to a claim that application of the regulation to that titleholder constitutes a taking.

City of Monterey v. Del Monte Dunes at Monterey, ltd.[57]—Repeated rejections, without denial, by city of property owner's proposals for development of property states a claim of a regulatory taking.

New York Cases

This article has, thus far, cited nearly exclusively to federal court decisions. This reflects not a bias but instead a realistic assessment that New York courts have not always gotten it right. For instance, the Court of Appeals found that no taking had occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*,[58] but was reversed by the U.S. Supreme Court.[59] In *Fred F. French Investing Co., Inc. v. City of New York*,[60] the Court of Appeals held that:

> Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation… [S]uch a regulation does not constitute a "taking," and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.[61]

As noted earlier, the United States Supreme Court reached a different conclusion in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[62] in effect, overruling *French*.

On February 18, 1997, the Court of Appeals decided four takings cases:

Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry[63]—Denial of a steep slope variance [resulting in prohibition on building a house on challenger's lot in a residential zone] held not to be a taking because the challenger acquired the property two years after the steep slope law was enacted.

Gazza v. New York State Dept. of Environmental Conservation[64]—A claim that a denial of a tidal wetlands variance constituted a "taking" was dismissed because the challenger purchased the property after the regulatory scheme was enacted.

Basile v. Town of Southampton[65]—A challenge to a local tidal wetlands regulation as a taking dismissed because the regulation was enacted before the challenger took title.

Kim v. City of New York[66]—The regulatory provision challenged [a requirement that a property owner abutting a NYC street raise the grade of his property to meet the grade of that street] predated acquisition of title. Takings claim therefore barred.

All four of these decisions are of questionable validity as a result of *Palazzolo v. Rhode Island*,[67] where the U.S. Supreme Court ruled that entry into title subsequent to enactment of a governmental regulation is no longer an absolute bar to a claim that application of the regulation to that titleholder constitutes a taking.

In *Twin Lakes Development Corp. v. Town of Monroe*,[68] the Court of Appeals applied *Nollan/Dolan* scrutiny to imposition of a fee-in-lieu-of-parkland exaction, but imposed the burden of proof on the challenger ["Here, plaintiff failed to demonstrate that the Town's $1,500 per-lot fee constitutes a taking"] rather than on the town as the Supreme Court required in *Dolan* ["the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement"].[69]

In *Bower Associates v. Town of Pleasant Valley,* decided in 2004, the Court of Appeals had occasion to consider a class of one equal protection claim in the land use context. Without mentioning either *Olech* or the leading Second Circuit case of *Jackson v. Burke*,[70] the court dismissed the *Olech* claim on the ground that the old *evil eye* and *uneven hand* test had not been satisfied:

> [A] violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person (*Harlen Assoc. v. Incorporated Vil. of Mineola,* 273 F.3d 494, 499 [2d Cir. 2001]). In that Home Depot does not allege selective treatment based on race, religion or punishment for the exercise of constitutional rights, it must demonstrate that Rye singled out its request for consent to the road-widening permit with malevolent intent.[71]

This decision is clearly wrong even after *Engquist*.

In *Smith v. Town of Mendon*,[72] the Court of Appeals upheld a site plan approval granted on condition that certain conservation restrictions be recorded by the developer (under authority of a local environmental ordinance) in the face of a claim that such a requirement constituted a taking. It did so upon the ground that both

the ordinance and the condition advanced a legitimate governmental purpose, the test established by the United States Supreme Court in *Agins v. Tiburon*.[73] Unfortunately, the Court of Appeals bet on the wrong horse for, less than one year later, the U.S. Supreme Court, in *Lingle v. Chevron*,[74] abrogated the *Agins* substantially advances test, declaring that "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Smith v. Mendon* is thus no longer good law.

A noteworthy exception to the Court of Appeals' less than stellar track record is its 1977 decision in *Penn Central Transp. Co. v. City of New York,*[75] where that court ruled that "a plaintiff seeking to show that an otherwise reasonable land use regulation constitutes a deprivation of due process of law must demonstrate affirmatively that the regulation eliminates all reasonable return." While the United States Supreme Court re-cast the challenge as in the nature of a *taking* rather than as a *due process* violation and massaged the *eliminates all reasonable* return limitation into a *goes-too-far* test, the Court of Appeals' holding and, indeed, its careful analysis were largely endorsed by the Supreme Court.[76]

The Future

Nearly all of the cases mentioned thus far have focused on the character of governmental action affecting a property right and not on the nature of that right itself; and the governmental action involved has been either legislative [e.g., *Lucas v. South Carolina Coastal Council*][77] or administrative [e.g., *Nollan* and *Dolan*].[78] What of judicial conduct—is there such a thing as a *judicial* taking? To better frame this question we must refocus our attention on the nature of the property right itself. Remember that the Supreme Court frequently reminds us that property rights are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law."[79] Does this mean that a state court declaration that a particular property right does not exist forever bars any claim that such right was *taken* as a result because that state court decision conclusively establishes that there was nothing for government to take? Or, can an erroneous ruling that a right does not exist (when one does) itself constitute a taking? What if a state court declares that a once clearly established private property right no longer exists because that state court believes that that right has outlived its utility and should no longer be honored—is that a taking? Such questions have been kicking around for quite some time.[80]

When the Supreme Court granted certiorari last term in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,*[81] many thought that questions like these were about to be finally and fully answered. *Stop the Beach* arose from a Florida beach restoration program—created legislatively and implemented administratively. However, the challenge brought was not to the legislative enactment or to its administrative implementation but rather to a Florida court decision declaring that the State of Florida, and not the littoral landowners, would become the owner of the new portion of the restored beaches. The question briefed and argued was whether the Florida Supreme Court's decision was a misreading of Florida's property law (a sudden and dramatic change from 100 years of state property law, in the view of the challengers) that constituted a "judicial taking" of the littoral owners' property rights in violation of the Fifth and Fourteenth Amendments.

Stop the Beach has now been decided.[82] The decision sheds some light on the judicial takings issue but it hardly answers the many questions surrounding this topic with any fullness or finality. What does *Stop the Beach* tell us? One thing with certainty—eight justices agreed that the Florida court decision challenged did not constitute a judicial taking (Justice Stevens took no part in the case, presumably because he owned beachfront property in Florida). Things then get less certain. Four justices [Scalia, Roberts, Thomas and Alito] ruled that there *is* such a thing as a judicial taking and that such a taking occurs whenever "a court declares that what was once an established right of property no longer exists."[83] Two justices [Kennedy and Sotomayor] hold that private property rights are adequately protected from judicial trampling by existing concepts of due process[84] and that the takings clause, therefore, need not be invoked. The remaining two justices [Breyer and Ginsburg], while certain that no judicial taking occurred in *Stop the Beach*, found it premature to reach the issue of whether there might ever be a set of circumstances resulting in a judicial taking of a property right.

Stop the Beach, however, contributes little to our understanding of the nature of the property right. We have long known that the property right is an important right [the Supreme Court declaring the property right to be "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of justice."[85]]. This appears to make the property right a *fundamental* right, a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[86] Such rights are protected under the constitution by "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[87]

The scope and contour of most of the rights deemed fundamental are well established and have been for years (e.g., First Amendment speech, Fourth Amendment freedom from unreasonable searches and seizures, the Fifth Amendment right to freedom from compulsory self-incrimination, the Sixth Amendment right to counsel in criminal proceedings, and the more recently developed right under the Sixth Amendment to confront

one's accusers). Each of these rights has been fleshed out and refined by the Supreme Court over many years; indeed, the commands of *Miranda* are so well established in our collective memory that many Americans can chant them seriatim without even holding the police detective's handy *Miranda* card! Thus, when an issue arises regarding the extent of protection afforded one of these fundamental rights, a robust body of law guides practitioners and the courts alike. Not so when an issue regarding the property right arises. Here, we are left fumbling with "existing rules or understandings that stem from an independent source such as state law." Until the Supreme Court defines the nature of the property right and provides a framework setting the limits of the protection the constitution affords that right, property owners, municipalities and the practitioners that advise them will continue to struggle with the nature of the property right and the circumstances under which it is *taken* by the government. Maybe next term we will have some answers!

Endnotes

1. In *Lingle v. Chevron,* 544 U.S. 528 (2005), the United States Supreme Court overruled its decision in *Agins v. Tiburon*, 447 U.S. 255 (1980), in which the court had held that "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." [447 U.S. *at* 260]. Justice O'Connor, after noting (with understated irony) that "our regulatory takings jurisprudence cannot be characterized as unified" [544 U.S. *at* 539], went on to apologize for the invention of the *Agins* takings formulation, characterizing it as "prescrib[ing] an inquiry in the nature of a due process, not a takings, test, and [noting further] that it has no proper place in our takings jurisprudence." [544 U.S. *at* 540]. With continuing understatement, Justice O'Connor later noted, in the same decision, that "there ha[s] been some history [in the United States Supreme Court] of referring to deprivations of property without due process of law as "takings." *Lingle v. Chevron*, 544 U.S. 528, *at pp.* 541–542.

2. New York is far behind the curve of the national impact fee debate. It has authorized only one class of impact fee: the fee-in-lieu-of parkland dedication authorized by statute [Town Law 277 (4)]. Is imposition of such a fee an exaction subject to *Nollan/Dolan* scrutiny? While the Court of Appeals found one such fee to have satisfied that test [*Twin Lakes Development Corp. v. Town of Monroe,* 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003)], the court side-stepped the issue of whether such scrutiny was warranted, specifically noting that "[h]ere, the parties agree that plaintiff's challenge to the Town's per lot fee exacted in lieu of parkland dedication is governed by *Dolan's* rough proportionality test." *Twin Lakes*, at p. 105 [footnote]. Other states have issued wildly divergent opinions as to whether the imposition of an impact fee is an exaction subject to *Nollan/Dolan* scrutiny, as have the various federal circuits. The U.S. Supreme Court is aware that this issue is in need of resolution but most of its members are not yet inclined to resolve it. *See Parking Association of Georgia v. City of Atlanta,* 264 Ga. 764, 766, 450 S.E.2d 200, 203 (1994), 515 U.S. 1116, 1118 (1995), Thomas J. dissenting from denial of certiorari: "The lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict. *See Dolan, supra,* 512 U.S., at 383 (observing that certiorari was granted because the Oregon Supreme Court allegedly had misapplied *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)). Where, as here, there is a conflict, the reasons for granting certiorari are all the more compelling."

3. The "right to exclude [others is consistently viewed as] 'one of the most essential sticks in the bundle.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 831–832 (1987), quoting *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433 (1982) and *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979).

4. *Andrus v. Allard,* 444 U.S. 51, 65–66 (1979).

5. In the words of the U.S. Supreme Court: "the term 'property' as used in the Takings Clause…is not used in the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. Instead, it denotes the group of rights inhering in relation to the physical thing…" *United States v. General Motors*, 323 U.S. 373, 377–378 (1945).

6. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 161 (1980).

7. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

8. In this regard it is important to note that local land use boards have only that power to regulate use of land granted to them by State Law (enabling legislation) and exercised by them through their zoning ordinances (implementing legislation).

9. The legality of New York City's original 1916 comprehensive zoning act was passed upon by the Court of Appeals in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920) and found to be "a proper exercise of the police power" by New York City.

10. *Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365 (1926).

11. *Id*. at 393.

12. *See, e.g.*, *Severance v. Patterson,* 566 F.3d 490 (5th Cir. 2009).

13. *Kelo v. New London*, 545 U.S. 469 (2005).

14. *United States v. Carmack*, 329 U.S. 230 (1946).

15. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

16. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

17. *See Dolan v. City of Tigard,* 512 U.S. at 386–391 (1994).

18. *Loretto v. Teleprompter Manhattan,* 458 U.S. 419 (1982).

19. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

20. In *Agins v. Tiburon,* 447 U.S. 255 (1980), the U.S. Supreme Court held that a regulation or administrative action (even one that does not deny all use of property) constitutes a taking if it does not *substantially advance* a legitimate governmental purpose. Recently, in *Lingle v. Chevron*, 544 U.S. 528 (2005), the Court did a back-flip, declaring that standard an invalid test of whether a taking has occurred.

21. *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Penn Central v. City of New York,* 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

22. Such claims are, too often, incorrectly described as takings claims. This formulation of a taking blurs the distinction between a *true* Fifth Amendment taking and a *side-door* deprivation of one's Fifth Amendment right to compensation resulting from a denial of due process, incorrectly viewed as a *taking* as well. The United States Supreme Court realized how blurry it had made things by the time it decided *Lingle v. Chevron,* 544 U.S. 528, 540 (2005) and there attempted to re-focus takings jurisprudence by abrogating the *Agins* "substantially advances" test, declaring that "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." This brought takings jurisprudence back in conformity with general constitutional jurisprudence for it has long been the rule that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort

of governmental behavior, 'that Amendment, not the more generalized notion of *substantive due process,* must be the guide for analyzing these claims.'" *Albright v. Oliver,* 510 U.S. 266, 273 (1994), quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989).

23. *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999).

24. *See Waltz v. Town of Smithtown,* 46 F.3d 162, 168 (2d Cir. 1995); *Zahra v. Town of Southold,* 48 F.3d 674, 680 (2d Cir. 1995); more seminally and generally, *Board of Regents v. Roth,* 408 U.S. 564 (1972); and, most recently, *Clubside, Inc. v. Valentin,* 468 F.3d 144, 152 (2d Cir. 2006).

25. In *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), the United States Supreme Court held that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." The Second Circuit has held that a legitimate claim of entitlement only exists "when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911, 918 (2d Cir.1989). *See also Clubside, Inc. v. Valentin*, 468 F.3d 144, 152 -153 (2d Cir. 2006) [Sotomayor, J.].

26. *Natale v. Town of Ridgefield*, 170 F.3d 258, 263–264 (2d Cir. 1999).

27. It is important to note, however, that maintenance of a substantive due process claim is not always available—even when a protectable property interest exists—for it has long been the rule that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, 'that Amendment, not the more generalized notion of *substantive due process,* must be the guide for analyzing these claims.'" *Albright v. Oliver,* 510 U.S. 266, 273 (1994), quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989).

28. *See Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563 (1968), as to background principles of the doctrine in the free speech context.

29. The doctrine of *unconstitutional conditions* has had its most frequent application in the First Amendment, *Free Speech* context. *See, e.g., Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996); *Perry v. Sindermann,* 408 U.S. 593 (1972). However, the doctrine has also been invoked in a myriad of other contexts as well: tax exemptions [*Speiser v. Randall*, 357 U.S. 513 (1958)], unemployment benefits [*Sherbert v. Verner*, 374 U.S. 398 (1963)], welfare payments [*Shapiro v. Thompson*, 394 U.S. 618, 627, n. 6 (1969)], and public employment [*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)] to name a few. And, most famously for our purposes, the doctrine has been invoked in the Fifth Amendment, Fourteenth Amendment *Takings/Substantive Due Process* context. *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994).

30. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

31. *Id.* at 386–391.

32. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

33. *Olech,* 528 U.S. *at* 564 (2000).

34. *Jackson v. Burke,* 256 F.3d 93, 97 (2d Cir. 2001) ("To be sure, proof of subjective ill will is not an essential element of a 'class of one' equal protection claim."). However, see, *Bizzaro v. Miranda,* 394 F.3d 82 (2d Cir. 2005); *Prestopnik v. Whelan,* 249 Fed.Appx. 210 (2d Cir. 2007), footnote 1.

35. *See African Trade & Information Center, Inc. v. Abromaitis*, 294 F.3d 355 *at* 362–363 (2d Cir. 2002).

36. *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999).

37. *But see* discussion under the heading "*Olech* Now Limited by *Engquist*?" below, as well as footnote 47, below.

38. As with any civil rights claim, a governmental official sued (but not the governmental entity itself) is entitled to qualified immunity. The doctrine of qualified immunity shields government officials from liability for civil damages when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

39. *See Cobb v. Pozzi*, 363 F.3d 89, 111 (2d Cir. 2004).

40. *See, e.g., Ridgeview Partners, LLC v. Entwhistle*, 227 Fed.Appx. 80, 82 (2d Cir. 2007).

41. *See Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978).

42. *African Trade & Information Center, Inc. v. Abromaitis*, 294 F.3d 355, 363 (2d Cir. 2002) ("[the plaintiffs] allege a specific reason for the refusal that was entirely rational but, they claim, impermissible under the First Amendment. In short, plaintiffs' factual allegations throughout the case require the conclusion that their equal protection claim and their First Amendment claim coalesce, and that [the defendant's] qualified immunity on the latter entitles him to qualified immunity on the equal protection claim as well").

43. *See Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005) ("in… a 'class of one' case…the standard for determining whether another person's circumstances are similar to the plaintiff's must be, as *Purze* states, whether they are '*prima facie* identical'"); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (Plaintiffs, under this test, "must demonstrate that they were treated differently than someone who is *prima facie* identical in all relevant respects."). *See also*, *Clubside, Inc. v. Valentin,* 468 F.3d 144, 159 (2d Cir. 2006); *Sullivan v. Stein,* 487 F.Supp.2d 52, 67 (D. Conn, 2007); *East Bay Recycling, Inc. v. Cahill*, 2007 WL 2728421 (S.D.N.Y., 2007); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

44. *Engquist v. Oregon Dept. of Agr*., 553 U.S. 591 (2008).

45. Does this *subjective discretion* test align the availability of *Olech* relief with the availability of substantive due process relief? Put another way: is *Olech* relief now only available to challenge governmental conduct affecting a protectable property interest? Recall, as discussed above, that a protectable property interest in a land use permit can only exist if issuance of such a permit is either required absolutely or compelled by near ministerial duty. No protectable property interest exists where an administrative body is possessed of discretion to decide whether or not to issue it. *Clubside, Inc. v. Valentin*, 468 F.3d 144, 152–153 (2d Cir. 2006).

46. *Engquist v. Oregon Dept. of Agr,* 553 U.S. 591, 128 S.Ct. 2146 2153–54 (2008).

47. The *holding* of *Engquist* is clearly limited to the public employment context: "We hold that… a 'class-of-one' theory of protection has no place in the public employment context." However, in emphatic dicta, the court seems to announce a holding of tomorrow: "There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Engquist v. Oregon Dept. of Agr,* 553 U.S. 591, 128 S.Ct. 2146, 2154 (2008).

48. *Kelo v. City of New London*, 545 U.S. 469 (2005).

49. *Lingle v. Chevron*, 544 U.S. 528 (2005).

50. *Agins v. Tiburon,* 447 U.S. 255 (1980).

51. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005). Prior to *San Remo,* the Second Circuit had read *Williamson County* as saying that, while all *Fifth Amendment* takings claims must initially be pursued in state court (if that state provided

a procedural mechanism for asserting such a claim), one who was required to litigate his claims there involuntarily pursuant to *Williamson County* could not later be precluded from having those same claims (if unsuccessful in state court) resolved in federal court because "[i]t would be both ironic and unfair if the very procedure the Supreme Court required [a plaintiff] to follow… also precluded [him] from ever bringing a Fifth Amendment takings claim" in federal court. *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d Cir. 2003). The court in *San Remo* critically examined the *Santini* decision at length, finding its logic flawed because its holding relied upon "an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum," the court noting that it is common "that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court," [*e.g., Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984)] adding that "[t]his is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 342 (2005). *San Remo* does not say precisely that one may never bring a *federal* takings claim (in federal court) after unsuccessfully pursuing a *state* takings claim (in state court), but the decision—because it prohibits (on issue and claim preclusion grounds) bringing a subsequent federal claim if the issues litigated in the state proceeding were the same as those cognizable under the Fifth Amendment [*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005)]—dooms, practically speaking, all subsequent federal claims, for nearly every imaginable *state* takings claim involves issues and claims identical to those cognizable as a Fifth Amendment violation.

52. *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).

53. Not all takings claims are subject to the *Williamson County* rule. For instance, the Third Circuit, in *Carole Media LLC v. New Jersey Transit Corporation*, 2008 WL 5303456, recently held that a party need not satisfy the *Williamson County* ripeness requirement where the claim advanced is that the taking was for the benefit of a private person without a justifying public purpose.

54. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

55. *Penn Central v. City of New York*, 438 U.S. 104 (1978).

56. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

57. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

58. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981).

59. *Loretto v. Teleprompter Manhattan*, 458 U.S. 419 (1982).

60. *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976).

61. *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 593–594, 385 N.Y.S.2d 5, 8 (1976).

62. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

63. *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry*, 89 N.Y.2d 535, 656 N.Y.S.2d 184 (1997).

64. *Gazza v. New York State Dept. of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997).

65. *Basile v. Town of Southampton*, 89 N.Y.2d 974, 655 N.Y.S.2d 877 (1997).

66. *Kim v. City of New York*, 90 N.Y.2d 1, 659 N.Y.S.2d 145 (1997).

67. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

68. *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), *cert den*. 541 U.S. 974 (2004).

69. *Dolan v. City of Tigard*, 512 U.S. at 395. See an interesting discussion regarding the *Dolan* burden of proof in Sprung, M., *Taking Sides: The Burden of Proof in Dolan v. City of Tigard*, 71 N.Y.U. L.Rev. 1301 (1996).

70. *Jackson v. Burke*, 256 F.3d 93, 97 (2d Cir. 2001).

71. *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631, 781 N.Y.S.2d 240, 248 (2004).

72. *Smith v. Town of Mendon*, 4 N.Y.3d 1, 789 N.Y.S.2d 696 (2004).

73. *Agins v. Tiburon*, 447 U.S. 255 (1980).

74. *Lingle v. Chevron*, 544 U.S. 528, 540 (2005).

75. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977).

76. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

77. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

78. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

79. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980).

80. *See* Justice Stewart's 1967 concurrence in *Hughes v. Washington* where he opined that a state court decision resulting in a sudden change in state law, unpredictable in terms of relevant precedents, may well violate the constitutional prohibition against taking property without due process of law [*Hughes v. Washington*, 389 U.S. 290, 295–97 (1967)] and the early substantive due process holding in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897), that the rights secured by the Fourteenth Amendment shield an individual from acts committed by "all the instrumentalities of the state—legislative, executive and judicial…").

81. Background information and briefs can be found at http://scotuswiki.com/index.php?title=Stop_the_Beach_Renourishment%2C_Inc._v._Florida_Department_of_Environmental_Protection.

82. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, ___ U.S. ___, 2010 WL 2400086 (2010).

83. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, ___ U.S. ___, 2010 WL 2400086, 8 (2010).

84. To the extent that Justices Kennedy and Sotomayor suggest that a substantive due process claim should be the remedy of first resort in such circumstances, their approach is contrary to that substantial body of law holding that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, 'that Amendment, not the more generalized notion of *substantive due process*, must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994), quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989).

85. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 238 (1897). In *Chicago*, the court also pointedly noted that "the rights secured by the Fourteenth Amendment shield an individual from acts committed by "all the instrumentalities of the state—legislative, executive and judicial…" *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897).

86. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

87. *Twining v. State of N.J.*, 211 U.S. 78, 102 (1908).

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Recent Amendments to the Open Meetings Law

By Camille Jobin-Davis

There were what appeared to be "administrative" changes to the Freedom of Information Law in 2005 (defining time limits for responding to requests), in 2006 (requiring agencies to respond to requests via email), and in 2008 (fees for preparing bulk electronic records, providing records on requested mediums, renewing contracts and designing electronic information systems with public access in mind). These changes, however, coupled with a 2006 amendment regarding attorney's fees, have strengthened the provisions of FOIL, and transformed it into a more modern statute.

The Legislature amended the Open Meetings Law ("OML") to allow for videoconferencing in 2000, another reasonable nod to the advances in technology, and, since 2009, has made four changes to the Open Meetings Law, starting with a new provision regarding notice of public meetings.

First, in May of 2009, the Legislature added a subdivision (5) to § 104 of the OML pertaining to notice, set forth as follows:

> When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website.

Section 104 now imposes a three-fold requirement: one, that notice must be posted in one or more conspicuous, designated public locations; two, that notice must be given to the news media; and three, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a town hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a town board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

The second amendment, OML § 103[d], effective as of April 14, 2010, requires that public bodies make reasonable efforts to hold meetings in rooms that can "adequately accommodate" members of the public who wish to attend. The intent of the amendment, as expressed in the accompanying legislative memorandum, is for public bodies to hold meetings in facilities that can reasonably accommodate the number of people that are reasonably expected to attend. For example, if a typical board meeting attracts 20 attendees, and meetings are held in a meeting room which accommodates approximately 30 people, there is adequate room for all to attend, listen and observe. But in the event that there is a contentious issue on the agenda and there are indications of substantial public interest, for example, numerous letters to the editor, phone calls or emails regarding the topic, or perhaps a petition asking officials to take action, the new provision would require the public body to consider the number of people who might attend the meeting and take appropriate action to hold the meeting at a location that would accommodate those interested in attending, such as a school auditorium, a fire hall or other site. Please note that changing the location of a meeting may require providing notice of the new location, which would be required to comply with the Open Meetings Law.

The third amendment (which creates an additional § 103[d]), although effective in April 1, 2011, codifies existing case law concerning the photographing and recording of open meetings of public bodies. In short, the courts have determined that anyone may record open meetings, so long as use of a recording device is not disruptive or obtrusive. All public bodies will be statutorily required to allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means. The new provision also states that public bodies may adopt reasonable rules governing the use of cameras and recording devices during open meetings, in which case such rules must be written, conspicuously posted, and provided to those in attendance upon request.

The Committee on Open Government will adopt model rules regarding this amendment in the near future and prior to April, 2011.

Finally, and perhaps most importantly, the provision regarding a court's authority to enforce the OML was amended, effective June 14, 2010.

Pursuant to OML § 107, courts have long had the authority to invalidate action taken in private in violation of the Open Meetings Law. Before invalidating any action taken by a public body, and upon good cause shown, a court must find that there was a violation of the OML. This provision was amended to permit a court to declare either that the public body violated the Open Meetings Law and/or declare the action taken void. Further, if the court determines that a public body has violated the law, in addition to awarding attorney's fees, the court has the authority to require the members of the public body to receive training given by the Committee on Open Government.

While these recent changes may appear to be "administrative" at first glance, they are evidence of the Legislature's efforts to modernize and strengthen the Open Meetings Law.

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The Legislative History of New York State's Conflicts of Interest Law for Municipal Officials

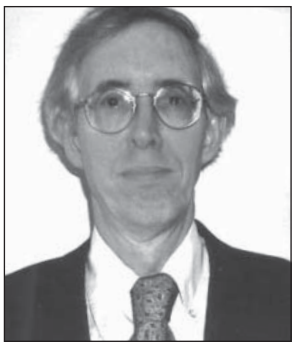
By Ivy Chiu and Mark Davies

Article 18 of the New York State General Municipal Law defines certain conflicts that may exist between the private interests and official duties of municipal officers and employees. It acts as a safeguard against public officials who seek to further their own interests at the expense of their municipal employer. Certain types of municipalities must also have a local code of ethics that may be more stringent, but not less stringent, than Article 18.[1]

While designed to deter self-interested public servants, Article 18 has often been criticized for its confusing language.[2] Through a comprehensive review of the legislative history of Article 18, this article aims to provide a clearer understanding of the statute's legislative intent and to assist practitioners in interpreting this at times obscure law. Following a discussion of the genesis and initial adoption of Article 18 in 1964, this article will review each amendment to Article 18 in the five areas it covers: prohibited interests (sections 800-805), prohibited conduct (sections 805-a and 805-b), administration (sections 806-808), applicant disclosure in land use matters (section 809), and financial disclosure (sections 810-813).[3]

Adoption of Article 18

New York State had a form of a municipal ethics law prior to 1964, but those ethics provisions were scattered throughout the County Law, Education Law, General City Law, General Municipal Law, Local Finance Law, Mental Hygiene Law, Penal Law, Second Class Cities Law, Social Welfare Law, Town Law, and Village Law, as well as in local laws, charters, ordinances, resolutions, rules, and regulations, often resulting in contradictions and confusing exceptions.[4] By consolidating and standardizing ethics regulations across the state, Article 18 sought to provide a uniform law, a single reference point for local officials and municipal attorneys on ethical conduct. It aimed "to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement" Article 18.[5] The Legislature found that



"[e]xisting law is too complex, too inconsistent, too overgrown with exceptions, for…a clarity of understanding to be possible."[6] Article 18 would prevent municipal officers and employees from knowingly or unknowingly violating conflict of interest laws; it would also override any existing conflicts of interest laws contradicting its provisions.

Assembly Bill No. 2807 (1964), enacting Article 18, was introduced at the request of the Department of Audit and Control. This reform was spearheaded by State Comptroller Arthur Levitt.[7] The bill was proposed in response to audits conducted by the State Comptroller, which revealed that between 1961 and 1963, 274 public officers or employees had violated existing conflict of interest laws and in 1961, 63% of the counties, 41% of the cities, and 20% of the towns audited had conflicts of interest cases.[8] To prevent similar occurrences in the future, State Comptroller Arthur Levitt pressed the Legislature to adopt a uniform code of ethics. Indeed, at the time, ethics was very much in the air. Attorney General Louis Lefkowitz based his 1961 campaign for New York City Mayor on ethics issues. The final end of Tammany Hall influence and the removal of Carmine De Sapio as Boss in 1961 undoubtedly provided a further impetus for ethics legislation.[9] Mr. Levitt's interest in the matter may have been influenced by his bruising primary battle in 1961 with Mayor Wagner for the Democratic nomination for Mayor, a campaign in which ethics arose as a major issue,[10] and a later push for a major ethics reform in the State Legislature, an effort in which Levitt played a key role as a member of a special legislative ethics committee.[11] The Assembly bill garnered a broad range of supporters, including the New York State Conference of Mayors and the Association of Towns, although it was opposed by the State Education Department and the School Boards Association.[12]

As stated by the Legislature, Article 18 sought "to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics."[13] The original approach of Article 18 was thus to regulate only municipal officials' interests in municipal contracts and to leave to local codes of ethics all other ethics restrictions.

Prohibited Interests (Sections 800-805)

The 1964 Act

The 1964 act established a foundation upon which later ethics legislation could build, defining specific conflicts of interest and providing a formal procedure for a municipal employee to declare his or her interest in a contract with the municipality if a conflict arose. The 1964 act targeted conflicts that may arise from municipal contracts in which the municipal official has an "interest," as defined in the statute.

Section 801, which was entitled "conflicts of interest prohibited" and which remains substantially the same today, prohibited a municipal official from having an interest in a municipal contract if the official had some control with respect to the contract. An "interest" was defined in section 800(3) more broadly than in current Article 18 to mean not just a pecuniary or material benefit accruing to the municipal officer or employee as the result of a *contract* with the municipality but as a result of "a business or professional transaction" with the municipality. So, too, in the 1964 act, a municipal officer or employee was deemed to have an interest not just in a "contract" of his or her spouse, minor children, dependents, firm, business, or investments but in the "affairs" of those persons and entities. In addition, no exclusion existed for employment contracts of the official's spouse, minor children, or dependents with the municipality.[14] Then, as now, "municipality" was broadly defined and excluded the City of New York.[15] The other definitions in section 800 were substantially the same as now. The power required of the official in regard to the contract in order for the interest to be prohibited was the same then as now.[16]

Section 802, as originally enacted, included a laundry list of exceptions to the prohibited interest provision of section 801. All but one of these exceptions still exists, and a couple of exceptions have been added, as discussed below.

Section 803, requiring the disclosure of interests in a contract with the municipality, has been amended twice. Section 804, voiding contracts entered into in violation of Article 18, and section 805, providing that a violation of section 801 is a misdemeanor, remained unchanged.

Amendments

Definitions and prohibited interests (Sections 800 and 801). The definition of "chief fiscal officer" was amended in 1965 to exclude members and trustees of boards of education, thus permitting the members or trustees to have an interest in the bank or trust company used by the school district.[17] In addition, "contract" was amended to include the designation of any newspaper, not just an official newspaper, for publication of notices, resolutions, ordinances, and other proceedings where such publication is required or authorized by law.[18] In the definition of "interest," the words "direct or indirect" were added before "pecuniary or material benefit" and deleted after "interest" in sections 801 (prohibited interests in contracts) and 803 (disclosure of interest in contracts);[19] this has been the only amendment to section 801 since its enactment almost 50 years ago. At the same time, in the definition of "interest," the phrases "business or professional transaction" and "affairs" were changed to just "contract," thereby narrowing the scope of section 801 and section 803. Most significantly, in the definition of "interest," contracts of employment with the municipality were excluded, thereby permitting, as the Attorney General's Office has opined, a municipal official to hire his or her own spouse as a municipal officer or employee.[20] The definition of "municipality" was expanded to include joint water works systems.[21] This definition was further amended in 1971 to add industrial development agencies.[22] Finally, in 1980, the definition of "municipal officer or employee" was amended to include fire chiefs and assistant fire chiefs, instead of chief engineers and assistant chief engineers; this change, according to the Memorandum of the Department of State, adopted the proper designation for those offices.[23]

Exceptions (Section 802). The exceptions to section 801, set forth in section 802, have been amended numerous times since 1964. In 1965, the exception for the designation of a bank or trust company as a depository or paying agent or for the investment of funds was amended to add "registration agent." The exception for employees of firms was clarified to apply to prohibited interests under section 801 and not to interests generally. The exception for designation of newspapers was amended to reflect the change in the definition of "contract," noted above.[24] In the exception for certain stock holdings, the exclusion from that exception for chief fiscal officers having stock in the municipality's bank was amended in 1965 and then deleted in 1966; and, in 1970, the requirement that the stock be publicly traded in order for the exception to apply was removed,[25] thereby no longer limiting to large corporations the exception for stock ownership.

In 1968, an exception for school doctors was added.[26] In 1973, the exception for contracts with mental health hospitals, clinics, laboratories, and institutions was amended and then repealed in 1977.[27] In 1983, an exception for contracts with private industry councils was added.[28]

Rural municipalities have generated several exceptions to section 801. In 1996, an exception was added for purchases and public work by a municipality, other than a county, located within a county having a population of 200,000 or less, where a member of the municipality's governing body has a prohibited interest, provided that certain requirements are met. At the same time, in the

exception for small contracts in which a municipal officer or employee has an interest, the cap was increased from $100 per fiscal year to $750 per fiscal year.[29] According to the Senate Memorandum in Support, the addition of the exception for rural municipalities arose from a fire district in a rural area with a limited choice of suppliers for updated communications equipment, where the lowest bid came from an individual who was a fire commissioner; the change was thus "aimed at areas who, due to their rural nature, are limited in resources." In 2009, an exception for contracts with rural electric cooperatives was added, to "clarify that it is not a conflict of interest for locally elected officials to vote on contracts which involve rural cooperatives that they may be members of," according to the Senate Introducer's Memorandum in Support.[30]

Disclosure of interests in contracts (Section 803). As noted above, in 1965 the words "direct or indirect" were deleted after "interest" in section 803 because of their addition to the definition of "interest" before "pecuniary or material benefit."[31] While that change was merely technical, in 2005 section 803 was amended in four respects. First, disclosure is now required if the municipal official's spouse has, will have, or later acquires an interest in a contract with the municipality. Second, disclosure is also required if the interest is in a "purchase agreement, lease agreement or other agreement, including oral agreements…." In view of the broad definition of "contract" in section 800(2), this addition seems redundant. Third, disclosure must be made not only to the municipal governing body but also to the official's immediate supervisor. Finally, the 2005 amendment deletes the provision that, once disclosure has been made with respect to an interest in a contract with a particular person or firm, no further disclosure need be made with respect to additional contracts with that party during the rest of the fiscal year.[32] According to the Senate Memorandum in Support, the 2005 amendments arose out of concerns over larceny by school district officials, as a result of a case in May 2004 where an assistant superintendent of a school district misappropriated funds; the disclosure requirements were expanded "in order for the public to be aware of any potential conflicts of interest by school district officials responsible for financial transactions, lease agreements and purchasing contracts."

Special Rules for Nassau County (Section 804-a). In 1970, a new section 804-a was added to Article 18 prohibiting members of the governing board of a municipality from having any interest in the development or operation of any real property located within Nassau County and developed or operated by any membership corporation formed for certain specified purposes.[33] Since section 804-a precedes section 805, a violation of section 804-a is presumably a misdemeanor. Section 805 provides that "[a]ny municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor." Section 804-a has not been amended.

Prohibited Conduct (Sections 805-a and 805-b)

The 1964 Act contained no provisions on prohibited conduct, leaving such regulation to the individual municipality. In 1970, Article 18 was amended to add a new section 805-a prohibiting certain actions by municipal officials: the solicitation of any gifts or acceptance of certain gifts worth $25 or more; disclosure or use of confidential municipal information; compensated services in relation to any matter before the official's own municipal agency or before a municipal agency over which the official has jurisdiction or to which the official has the power to appoint; and compensated services in relation to any matter before any municipal agency where the compensation is contingent on action taken by the agency, except that a fee based on the reasonable value of services rendered may be set at any time. A violation carries no remedy except disciplinary action. Section 805-a was amended in 1987 to increase the gift threshold from $25 to $75. [34]

In 1983, section 805-b was added to permit officials to accept gifts or benefits up to $50 for performing marriages outside of normal business hours and place of business. The amount was increased to $75 in 1990 and to $100 in 2007, when "gift or benefit" was replaced with "fee or compensation."[35] According to the Senate Introducer's Memorandum in Support of the 2007 amendment, municipal officials performing marriages "are often requested to travel on occasion great distances and at great personal inconvenience to themselves to perform these valuable services."

Administration (Sections 806-808)

Codes of Ethics (Section 806)

As originally enacted, section 806 authorized but did not require municipalities to adopt codes of ethics setting forth standards of conduct. A 1969 amendment to section 806 required that each municipality file with the Office of the State Comptroller a copy of the municipality's code of ethics, if any, and any amendments thereto as well as a statement as to whether the municipality had established an ethics board. The following year codes of ethics became mandatory for every county, city, town, village, and school district and discretionary for all other municipalities; and such codes were required to provide standards with respect to certain ethics matters. Interestingly, in making codes mandatory, the Legislature deleted from the list of covered matters representation of private interests before municipal agencies and courts, acceptance of gifts and favors, and disclosure of confidential information, presumably because those matters were addressed, albeit weakly, in section 805-a, enacted by the same session law. The 1970

law also authorized codes of ethics to "provide for the prohibition of conduct or disclosure of information and the classification of employees or officers" and added a requirement that the municipality's CEO cause a copy of the ethics code to be distributed to every officer and employee of the municipality. The Comptroller was also required to submit an annual report to the Legislature of each county, city, town, village, and school district that had failed to file a code of ethics with that office.[36]

The 1987 Ethics in Government Act, which imposed financial disclosure on counties, cities, towns, and villages with a population of 50,000 or more, amended section 806 to authorize the code of ethics to include financial disclosure requirements and to mandate that municipalities maintain on record and file with the Temporary State Commission on Local Government Ethics a copy of the codes of ethics and amendments thereto, the statement whether the municipality has established an ethics board, and a copy of the municipality's financial disclosure form, if any, and when it was adopted. The responsibility of submitting the annual report to the Legislature as to whether the municipality had adopted a code of ethics was shifted from the Comptroller to the Commission and, after the expiration of the Commission, to each individual municipal clerk. The l987 law also required the Comptroller to turn over to the Commission the most recent municipal ethics codes on file with that office and to report to the Commission which municipalities had adopted a financial disclosure law or defaulted into the state financial disclosure law.[37]

Section 806 was amended once again in 2006 to require that fire districts adopt codes of ethics, that the code also apply to volunteer members of the fire district fire department, and that the fire district commissioners require a copy of the code to be posted publicly and conspicuously in each fire district building.[38] The Assembly Memorandum in Support of the law gave the large size of fire district budgets as the justification for mandating ethics codes in fire districts.

Posting of Article 18 (Section 807)

As originally enacted, section 807 did not require the posting of Article 18 but rather mandated that it, along with any local code of ethics, be distributed by the municipality's CEO to every officer and employee of the municipality and to municipal officers and employees before they entered into municipal service, although any failure to distribute or receive a copy of Article 18 or the local ethics code would not affect the duty of compliance with them or their enforcement. With the adoption of the prohibited conduct provisions in section 805-a in 1970, the requirements for distribution of the local ethics code were shifted to section 806, discussed above, and section 807 was changed to require the posting of Article 18. Neither the posting of the local ethics code nor the distribution of Article 18 was required. In 2008, section 807 was amended to require the posting only of sections 800-809 (i.e., not the financial disclosure provisions in sections 810-813).[39] According to the Senate Introducer's Memorandum in Support of that law, the change resulted from the addition of the "voluminous new provisions relating to financial disclosure" in 1987, the limited applicability of those provisions and their absence from Article 18 when the posting requirement was added in 1970, and the fact that most municipalities have adopted their own financial disclosure form and not that set forth in Article 18.

Boards of Ethics (Section 808)

While Article 18 mandates that counties, cities, towns, villages, school districts, and fire districts have ethics codes, local ethics boards have always been, and remain, optional. The 1964 law provided that the board of supervisors of any county may establish a board of ethics and appoint its members, who would consist of an officer or employee of a town, village, school district, and city (if any) within the county, at least one member who was not a municipal officer or employee, and the county attorney sitting *ex officio*. A supervisor was eligible for appointment to the ethics board, which was to serve at the pleasure of the board of supervisors. The ethics board had to render advisory opinions to municipal officers and employees within the county on Article 18 and local ethics codes, but such opinions had to be approved by counsel to the board or, in the absence of such counsel, the county attorney. In addition, the governing body of any city, town, or village (but not other municipalities) could establish a local board of ethics and appoint its members, at least one of whom could not be a municipal officer or employee. The municipal attorney would be an *ex officio* member of the ethics board, which would have the same powers and duties as the county ethics board but only as to officials of the municipality. The county ethics board could not act with respect to the officers and employees of a municipality that had set up its own board of ethics, except upon referral from the local ethics board.[40]

Amendments to section 808 have related to the appointment, structure, and duties of ethics boards. In 1965, section 808 was amended to require the county executive or county manager to appoint the members of the ethics board, subject to confirmation by the board of supervisors, in those counties operating under an optional or alternative form of county government or a county charter. In addition, with respect to city, town, and village ethics boards, the 1965 law required at least three members and clarified that the local ethics board's jurisdiction also existed over agencies of the city, town, or village.[41]

In 1970, section 808 was again amended. The board of supervisors was replaced by the "governing body" as the appointing/confirming authority for county ethics boards. The authorization for the appointment of a supervisor to the county ethics board was deleted, and the county attorney was removed as an *ex officio* member of the ethics board, which, however, was now required to have at least three members, a majority of whom could not be officers or employees of the county or municipalities within the county but at least one of whom had to be an elected or appointed officer or employee of the county or municipality within the county. Advisory opinions of the ethics board would no longer require the approval but only the advice of the board's counsel/county attorney. Most significantly, the 1970 amendments authorized every municipality, not just counties, cities, towns, and villages, to establish an ethics board, the members of which were to be appointed "by such person or body as may be designated by the governing body of the municipality." Members would serve at the pleasure of the appointing authority. The requirement for board membership was changed from at least one member not being a municipal official to a majority not being municipal officials and at least one member being one. The municipal attorney would no longer be an *ex officio* member of the local ethics board.[42]

With the adoption of the financial disclosure provisions in 1987, ethics boards were required to notify the Temporary State Commission whether the Commission or the board was the repository for annual financial disclosure reports. Upon the expiration of the Commission, a statement that the ethics board is the repository for such reports is to be filed with the municipal clerk.[43]

Disclosure in Land Use Applications (Section 809)

As enacted in 1964, Article 18 did not contain applicant disclosure provisions. In 1968, the Town Law was amended to add a requirement for disclosure of interests in zoning applications.[44] That section was repealed in 1969 and replaced with section 809, which has been amended only once, in 1970. Thus, section 809 required most types of land use applications to disclose the name, residence, nature, and extent of the interest of any officer of the state, or any officer or employee of the municipality or any officer or employee of any municipality of which the municipality is a part, in the person, partnership, or association making the application, to the extent the applicant knows. Officers and employees are deemed to have an interest in the applicant when they or their spouse, siblings, parents, children, grandchildren, or any spouse of those relatives are the applicant or are an officer, director, partner, or employee of the applicant or own or control stock of a corporate applicant (unless the stock is publicly traded and they own less than 5%) or are a member of a partnership or association applicant or are a party to an agreement with the applicant pursuant to which they may receive a benefit if the application is approved. An intentional violation is a misdemeanor. The 1970 amendment, reflecting the special prohibited interest provisions adopted for Nassau County earlier that year, discussed above, required that in Nassau County applicant disclosure under section 809 also be made for party officers.[45]

Financial Disclosure (Sections 810-813)

Almost three-quarters of Article 18 consists of the financial disclosure provisions of sections 810-813. Passed in the wake of a host of scandals involving state and local officials and political party leaders,[46] the 1987 Ethics in Government Act, while focusing primarily on state officials, mandated, for the first time, pursuant to section 811, annual financial disclosure by high-level officials in counties, cities, towns, and villages having a population of 50,000 or more (defined as "political subdivisions" in section 810(1)). Pursuant to section 811(2), those political subdivisions that failed to adopt their own financial disclosure law and form were subject to the state law and form, set forth in section 812. Unlike the rest of Article 18, sections 810-813 expressly applied to New York City, pursuant to section 810(1); indeed, pursuant to section 811(1)(a), New York City, alone among all municipalities in the state, was required to adopt the state financial disclosure form set forth in section 812. Municipalities not subject to mandatory financial disclosure could, but need not, adopt a financial disclosure law and form. In any event, a municipality had to elect to have its officials file their financial disclosure reports either with the local ethics board or with the Temporary State Commission on Local Government Ethics. Upon the expiration of the Commission, its powers, duties, and functions devolved upon the local boards of ethics or, where a political subdivision lacked an ethics board, upon the local governing body.[47]

In 1993, the definition of "local officer or employee" set forth in section 810(3) was amended to provide that the members, officers, and employees of an industrial development agency or authority shall be deemed officers or employees of the county, city, town, or village for whose benefit the agency or authority was established.[48] In 2003, the Real Property Tax Law was amended to add a provision requiring certain tax assessors to file annual financial disclosure reports pursuant to Article 18. According to the Assembly Memorandum in Support, the genesis of this legislation lay in the federal indictment of eighteen tax assessors in New York City for bribery and the suicide of an upstate tax assessor under suspicious circumstances. However, in 2004, the 2003 legislation was amended to set forth a specific form for tax assessors subject to that law but not otherwise subject to the financial disclosure requirements of Article 18.[49] The Assembly Memorandum in Support of the 2004 law

notes that the 2004 law was "designed to streamline the assessor disclosure requirements enacted by [the 2003 law]," presumably because "[m]any assessors believed the requirements of [the 2003 law] to be burdensome and unnecessary." A conforming amendment to section 812(1)(a) provided that tax assessors not covered by the filing requirements of Article 18 are governed by the requirements of section 336 of the Real Property Tax Law.[50]

Finally, in 2008, section 811 was amended to replace the mandate that New York City adopt a financial disclosure law (and form) at least as stringent in scope and substance as the state law (and form) with specified minimum requirements for New York City's financial disclosure forms.[51] According to the Senate Introducer's Memorandum in Support, this change was occasioned by the requirement in the Public Authorities Accountability Act of 2005 that members and staff of municipal-affiliated not-for-profit entities file financial disclosure reports pursuant to Article 18, which in New York City, because of the mandate in section 811, would have meant the lengthy state form, quite possibly driving volunteer board members out of City-affiliated not-for-profit organizations.[52]

Conclusion

Since first enacted almost 50 years ago, Article 18 has maintained its basic approach to municipal ethics regulation: prohibiting interests in contracts with the municipality while leaving almost entirely to the individual municipalities the regulation of all other unethical conduct. The 1970 addition of section 805-a made only a passing feint toward conduct regulation, failing even to touch on such basic conflicts of interest as misuse of office, misuse of municipal resources, or revolving door, and providing no penalties for violations of that section. Apart from mandating financial disclosure in large municipalities and adding restrictions on municipal officials' property interests within Nassau County, the amendments to Article 18 over the years have, on the whole, cut back on Article 18's original restrictions. As has been discussed elsewhere, a complete overhaul of the statute is long overdue.[53]

Endnotes

1. Gen. Mun. Law § 806(1)(a).
2. *See e.g.*, Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA/MLRC Municipal Lawyer, Fall 2009, Vol. 23, No. 4, at 16. Ironically, making conflicts of interest restrictions clearer and in some respects less restrictive formed part of the impetus for the enactment of Article 18. *See Levitt Will Seek Revised State Aid*, N.Y. Times, Oct. 3, 1961; *Levitt Asks Eased Ethics Code for Nonsalaried Local Officials*, N.Y. Times, March 30, 1962; *New Ethics Law Urged by Levitt*, N.Y. Times, Dec. 9, 1963.
3. The session laws enacting and amending Article 18, and the memoranda in support, may be found on the Municipal Law Section's website at http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/Article18LegHis6408.pdf. A detailed analysis of the requirements of Article 18 is beyond the scope of this article. For such an analysis, the reader is referred to Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, NYSBA/MLRC Municipal Lawyer, Vol. 19, No. 3, at 10 (Summer 2005); *Ethics Laws for Municipal Officials Outside New York City*, in 1 NYSBA Government, Law and Policy Journal 44 (Fall 1999); Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 Albany Law Review 1321 (1996); Mark Davies, *The 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Change*, 11 Pace Law Review 243 (1991).
4. *See* 1964 N.Y. Laws ch. 946, § 17 (repealing provisions of the County Law, Education Law, General Municipal Law, Local Finance Law, Social Welfare Law, Town Law, and Village Law); NYS Dept. of Audit and Control, Report to the Governor on Legislation (April 2, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946; Division of the Budget Report on A-2807 (April 20, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946 ("This bill would eliminate conflicting statutes and consolidate into a single statute provisions relating to conflict of interest. At the present time, transactions permitted in one jurisdiction are illegal in another."). Conflicts of interest provisions still exist in other titles of the consolidated laws but are far narrower in scope and primarily address the holding of dual offices, political activities, recusal, and removal from office. *See* Mark Davies, *Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages under New York State Law*, NYSBA/MLRC Municipal Lawyer, Winter 2006, Vol. 20, No. 1, at 5.
5. 1964 N.Y. Laws ch. 946, § 1. See also Division of the Budget Report on A-2807 (April 20, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946 ("By specifically defining what constitutes a conflict and what does not, both the municipality and the employee would be protected").
6. 1964 N.Y. Laws ch. 946, § 1.
7. *See* newspaper articles cited in note 2.
8. *See Levitt Asks Eased Ethics Code for Nonsalaried Local Officials*, N.Y. Times, March 30, 1962; *Violations Found by Albany Audits*, N.Y. Times, May 11, 1963.
9. *See 'Village' Vote Big: Tammany Chief Loses His District Post by 6,165 to 4,745*, N.Y. Times, Sept. 8, 1961; *Brake on Tammany's Power*, N.Y. Times, Sept. 14, 1961; *De Sapio Says Good-By Today at Meeting with his Regulars*, N.Y. Times, Sept. 19, 1961; *Levitt Will Seek Revised State Aid*, N.Y. Times, Oct. 3, 1961; *Lefkowitz Faces Heavy Odds in Mayoralty Race: Despite His Successes with the Issue of Ethics He Still Must Develop Other Strong Points*, N.Y. Times, Oct. 8, 1961.
10. *See e.g.*, *Gerosa Questions Wagner's Ethics on Home Expenses*, N.Y. Times, Aug. 23, 1961; *De Sapio Asserts State Questioned Mayor on Ethics*, N.Y. Times, Sept. 6, 1961; *Ethics Unit Clears Mayor, Asks Fund-Raising Curb*, N.Y. Times, Oct. 6, 1961; *Prendergast Calls Wagner an Ingrate over Fund-Raising*, N.Y. Times, Oct. 22, 1961.
11. *New Ethics Code Is Sought in State for All Officials*, N.Y. Times, Oct. 5, 1963; *State A.D.A. Asks New Ethics Code*, N.Y. Times, Oct. 6, 1963; *New Ethics Plan Studied by State*, N.Y. Times, Oct. 12, 1963; *Levitt Named to Join Study of Ethics Code*, N.Y. Times, Dec. 7, 1963; *State Ethics Body to be Limited to 3*, N.Y. Times, Dec. 14, 1963; *State Ethics Unit Starts Hearings*, N.Y. Times, Jan. 23, 1964; *Obey Conscience Legislators Told*, N.Y. Times, Feb. 4, 1964; *Lawyers Debate Legislative Code*, N.Y. Times, Feb. 6, 1964; *Liberals Demand Stiff Ethics Code*, N.Y. Times, Feb. 8, 1964; *Puzzle in Ethics Battle*, N.Y. Times, Feb. 10, 1964; *City Ethics Body Gaining Stature*, N.Y. Times, Feb. 18, 1964; *Judge Opposes Code of Ethics Being Studied for Legislators*, Feb. 25, 1964; *Panel to Proposed State Ethics Board*, N.Y. Times, March 6, 1964; *Set a High Standard (editorial)*, N.Y. Times, March 6, 1964; *Panel on Ethics Offers New Code for Legislature*, N.Y. Times, March 9, 1964.
12. *See* Bill Jacket, 1964 N.Y. Laws ch. 946.

13. 1964 N.Y. Laws ch. 946, § 1.
14. "For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the affairs of (a) his spouse, minor children and dependents, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee." Gen. Mun. Law § 800(3), as enacted by 1964 N.Y. Laws ch. 946, § 2.
15. Gen. Mun. Law § 800(4).
16. The official's interest in the contract was prohibited "when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder, (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest, direct or indirect, in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more public offices or positions of employment, the holding of which is not prohibited by law." Gen. Mun. Law § 801, as enacted by 1964 N.Y. Laws ch. 946, § 2.
17. 1965 N.Y. Laws ch. 1043, § 1, amending Gen. Mun. Law § 800(1).
18. 1965 N.Y. Laws ch. 1043, § 1, amending Gen. Mun. Law § 800(2).
19. 1965 N.Y. Laws ch. 1043, §§ 2, 4, amending Gen. Mun. Law §§ 801, 803.
20. 1965 N.Y. Laws ch. 1043, § 1, amending Gen. Mun. Law § 800(3). *See* 1967 Op. Atty. Gen. (Inf.) 158 (opining that a sheriff may appoint his wife as the matron of the county jail without violating section 801).
21. 1965 N.Y. Laws ch. 1043, § 1, amending Gen. Mun. Law § 800(4).
22. 1971 N.Y. Laws ch. 179, § 1, amending Gen. Mun. Law § 800(4).
23. 1980 N.Y. Laws ch. 88, § 3, amending Gen. Mun. Law § 800(5).
24. 1965 N.Y. Laws ch. 1043, § 3, amending Gen. Mun. Law § 802(1)(a), (b), (c).
25. 1965 N.Y. Laws ch. 1043, § 3, 1966 N.Y. Laws ch. 135, § 1, and 1970 N.Y. Laws ch. 1019, § 1, amending Gen. Mun. Law § 802(2)(a).
26. 1968 N.Y. Laws ch. 105, § 1, adding Gen. Mun. Law § 802(1)(i).
27. 1973 N.Y. Laws ch. 195, § 18, and 1977 N.Y. Laws ch. 28, § 1, amending and then repealing Gen. Mun. Law § 802(2)(b) and relettering existing paragraphs (c)-(f) as (b)-(e).
28. 1983 N.Y. Laws ch. 440, § 1, adding Gen. Mun. Law § 802(2)(f).
29. 1996 N.Y. Laws ch. 364, adding Gen. Mun. Law § 802(1)(j) and amending § 802(2)(e).
30. 2009 N.Y. Laws ch. 249, § 1, amending Gen. Mun. Law § 802(1)(f).
31. 1965 N.Y. Laws ch. 1043, §§ 1, 4, amending Gen. Mun. Law §§ 800(3), 803.
32. 2005 N.Y. Laws ch. 499, § 1, amending Gen. Mun. Law § 803.
33. 1970 N.Y. Laws ch. 720, § 1, adding Gen. Mun. Law § 804-a.
34. 1970 N.Y. Laws ch. 1019, § 2, adding Gen. Mun. Law § 805-a, as amended by 1987 N.Y. Laws ch. 813, § 21.
35. 1983 N.Y. Laws ch. 433, § 1, adding Gen. Mun. Law § 805-b, as amended by 1990 N.Y. Laws ch. 238, § 1, and 2007 N.Y. Laws ch. 536, § 1.
36. 1964 N.Y. Laws ch. 946, § 2, adding Gen. Mun. Law § 806, as amended by 1969 N.Y. Laws ch. 646, § 2, 1970 N.Y. Laws ch. 1019, § 3. The 1970 amendment also expressly provided that an ethics code may regulate or prescribe conduct not expressly prohibited by Article 18 but may not authorize conduct otherwise prohibited.
37. 1987 N.Y. Laws ch. 813, §§ 10, 11, amending Gen. Mun. Law § 806.
38. 2006 N.Y. Laws ch. 238, § 1, amending Gen. Mun. Law § 806.
39. 1964 N.Y. Laws ch. 946, § 2, adding Gen. Mun. Law § 807, as amended by 1970 N.Y. Laws ch. 1019, § 4, and 2008 N.Y. Laws ch. 236, § 1.
40. 1964 N.Y. Laws ch. 946, § 2, adding Gen. Mun. Law § 808.
41. 1965 N.Y. Laws ch. 1043, § 5, amending Gen. Mun. Law § 808.
42. 1970 N.Y. Laws ch. 1019, § 5, amending Gen. Mun. Law § 808.
43. 1987 N.Y. Laws ch. 813, § 12, amending Gen. Mun. Law § 808.
44. 1968 N.Y. Laws ch. 1086, § 1, repealed by 1969 N.Y. Laws ch. 646, § 1.
45. 1969 N.Y. Laws ch. 646, § 3, adding Gen. Mun. Law § 809, as amended by 1970 N.Y. Laws ch. 825, § 1.
46. *See Neither Scandals nor Jail Terms Derail the Democrats*, N.Y. Times, March 15, 1987; *New York Democrats Need a Tougher Ethics Code than That* (Attorney General Robert Abrams letter to editor), N.Y. Times, May 7, 1987; *2 Inquiries may be Tied through Syracuse Firm*, N.Y. Times, June 25, 1987; *2 New York Bills would Hold Government Officials Accountable for Ethics*, N.Y. Times, July 4, 1987; *Ex-Mayor Indicted in Syracuse Bribes*, N.Y. Times, July 17, 1987; *8 Plead Guilty in Syracuse Kickback Case*, N.Y. Times, July 18, 1987.
47. 1987 N.Y. Laws ch. 813, §§ 13-16, 26, adding Gen. Mun. Law §§ 810-813.
48. 1993 N.Y. Laws ch. 356, § 2, amending Gen. Mun. Law § 810(3).
49. 2003 N.Y. Laws ch. 548, §§ 1-2, amending Real Prop. Tax Law § 334(3) and adding Real Prop. Tax Law § 336, as amended by 2004 N.Y. Laws ch. 85, § 2.
50. 2004 N.Y. Laws ch. 85, § 1, amending Gen. Mun. Law § 812(1)(a).
51. 2008 N.Y. Laws ch. 41, § 1, amending Gen. Mun. Law § 811(1)(a) and adding § 811(1)(a-1).
52. *See* Public Authorities Accountability Act of 2005, 2005 N.Y. Laws ch. 766, §§ 2, 19, adding Pub. Auth. Law §§ 2(2), 2825(3).
53. *See* Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA/MLRC Municipal Lawyer, Fall 2009, Vol. 23, No. 4, at 16; Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, County Attorneys' Association of the State of New York Footnotes, Winter 1996, Vol. 4, No. 12, at 5; *Final Report of the Temporary State Commission on Local Government Ethics*, 21 Fordham Urban Law Journal 1 (1993); Mark Davies, *The 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Change*, 11 Pace Law Review 243, 262-267 (1991); Mark Davies, *New Municipal Ethics Law Proposed*, Municipal Lawyer, March/April 1991, Vol. 5, No. 2, at 1.

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Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

Just as you thought that you had run out of beach reading, we bring you three separate decisions rendered by the Second and Third Departments, each of which sheds light on one of the three main aspects of the standing doctrine in land use cases in New York. Taken together, these three cases are a capsule primer of the standing doctrine. In addition to giving us cases telling us *who* can bring a challenge to a land use determination, the quarter also brings us a Third Department case telling us *when* a land use challenge can be mounted, applying the rule of ripeness stated by the Court of Appeals in *Eadie v. Town Board of the Town of North Greenbush*.[1] The case highlights once again the dangerous no-man's land that lies between the date when an administrative decision becomes ripe for challenge, and the date when the very short statute of limitations expires, when "ripe" turns to "stale." As *Guido v. Town of Ulster Town Board*[2] illustrates, the moment of ripeness (which, of course, also defines the inevitable moment of staleness) is not always easy to identify.

Finally, what had the potential to be a defining case in the realm of takings jurisprudence, in essence ended up being a confirmation by the Court of Appeals of its earlier holding in *Goldstein v. New York State Urban Development Corporation,*[3] which severely limited the role of the courts in reviewing agency determinations underlying the taking of property for a purported public purpose by extending to its logical extreme the degree of deference that a court must accord to an agency determination underlying such a taking.

I. Standing to Challenge Land Use Approvals

Three recent Appellate Division cases highlight the three main aspects of the standing doctrine in land use cases under New York law—namely (1) that the petitioner/plaintiff must have sustained a direct, concrete injury; (2) that such injury is within the zone of interest protected by the law; and (3) that such injury is different than the injury to the public at large. In *Brunswick Smart Growth, Inc. v. Town of Brunswick*,[4] the Third Department held that petitioners did not have standing to challenge the general procedures that the respondent town board uses to review land use projects because the procedures themselves, outside of the context of any specific development application, did not cause

any direct injury to petitioners. In *Riverhead PGC LLC v. Town of Riverhead*,[5] the Second Department denied the petitioner standing since it was alleging only the potential for economic injury from increased business competition, which is not a type of injury that is within the "zone of interest" to be protected by the applicable municipal land use laws. In *Harris v. Town Board of The Town of Riverhead*,[6] which involved the same approvals as *Riverhead PGC, LLC*, the Court held that general traffic concerns and concerns about the impact of an approval on the businesses in the vicinity of the proposed project were not specific to the petitioners, but rather common to the public at large and thus could not confer standing on petitioners.

In *Brunswick Smart Growth, Inc.* the petitioners, a citizens group and two individual Brunswick town residents, brought an Article 78 proceeding challenging the procedures applied by the respondent town board in its review of development applications.[7] Specifically, petitioners' grievance with the system was that the town did not provide for periodic review of its comprehensive plan, did not properly update its zoning regulations, and that the projects approved by respondent were out of step with the town's comprehensive plan and were adopted without adequate consideration of the cumulative environmental impacts of such projects.[8] The decision stressed that the petitioners were not challenging any one specific application or approval, but were challenging the approvals process in general.[9] In its decision, the Third Department first set forth the basic requirements of standing in land use cases. The Court stated that:

> The dual showing typically required for standing includes establishing an injury-in-fact and demonstrating that such injury falls within the zone of interests protected by the pertinent statute or regulation…. In land use cases, the test is framed in terms of "'direct harm,'" which "'is in some way different from that of the public at large.'"… While geographical proximity provides one potential avenue to standing in land use cases, it is not an indispensable element….[10]

Applying the first prong of this standard, the Court held that the harm petitioners were alleging was "tenuous and ephemeral" and thus "insufficient to trigger judicial intervention[,]" because, among other things, the town board could choose not to act in the manner predicted by petitioners, or, if it were to so act and one of the petitioners was harmed by such action, judicial intervention would lie upon actual injury.[11] Accordingly, the Court held that petitioners lacked standing because they did not suffer any concrete injury.

In *Riverhead PGC, LLC*, the petitioner/plaintiff ("petitioner") was the owner of a shopping center in which Wal-Mart was a main anchor tenant on Suffolk County Route 58 in the respondent/defendant town.[12] Wal-Mart, seeking to expand its business, made an application to the respondent Riverhead town board for site plan approval, variances, and related zoning code amendments to permit it to construct a Super Wal-Mart store in another shopping center on Route 58 in the town approximately two miles from the site of petitioner's shopping center. The decision reflects that it was Wal-Mart's intention to close the store in petitioner's center when the Super Wal-Mart in the neighboring center was opened. Wal-Mart's applications and the related rezoning were granted.[13]

Petitioner commenced the instant hybrid Article 78 proceeding/declaratory judgment action to invalidate the approvals and annul the zoning code amendments claiming, among other things, that it will be injured by the proposed development of the Super Wal-Mart in the rival shopping center because the Super Wal-Mart will have a significant impact on traffic and that impact will result in a change in the traffic patterns in the area diverting traffic away from petitioner's center and thus reducing its viability.[14]

Respondents moved to dismiss the petition/complaint arguing that petitioner lacked standing to bring the hybrid action/special proceeding. The Supreme Court, Suffolk County converted respondents' motion to dismiss to one for summary judgment and held in favor of petitioner, invalidating the approvals and associated zoning code amendments.[15] The Appellate Division reversed finding that petitioner lacked standing to bring the challenge, relying primarily on the second prong of the standing test set forth above—that the alleged injury was not within the zone of interest protected by the relevant law.[16] The Appellate Division held that the only injury alleged by petitioner was economic in nature, an injury not within the zone of interest of the applicable local laws and town code provisions pursuant to which the approvals were granted.[17] Accordingly, petitioner did not have standing to challenge the administrative approvals or the related zoning amendments.

In *Harris,* the United Food and Commercial Workers Union Local 1500 ("Local 1500") and six individual town residents who were also members of Local 1500 commenced a challenge to the same approvals at issue in *Riverhead PGC, LLC, supra*.[18] As in *Riverhead PGC, LLC,* this case was decided solely on the issue of standing. The individual petitioners alleged that they will be injured by the subject approvals because they regularly drive on Route 58 and would be adversely impacted by the additional traffic on that road.[19] Local 1500 based its injury on what the Court described generally as "negative environmental and socio-economic impacts on the businesses along the Route 58 corridor which employ its members."[20] The Second Department held that both arguments were insufficient to confer standing on petitioners since the injuries alleged were not specific to the petitioners, but general to the public at large.[21]

II. Challenges to SEQRA Review: Ripeness

In *Guido v. Town of Ulster Town Board*,[22] the Court, applying the rule of ripeness set forth by the Court of Appeals most recently in *Eadie v. Town Board of Town of North Greenbush*,[23] held that the petitioners' challenge to the SEQRA review and findings associated with a development application in the Town was not ripe for judicial review since the substantive approvals had not yet been granted.

In *Guido*, the proponent of a development known as Ulster Manor made an application to the Ulster planning board for a special use permit, site plan approval, and subdivision approval to construct a residential development in the town. The project was the subject of a full environmental impact statement review, which resulted in the planning board, as lead agency under SEQRA, adopting a findings statement. After the findings statement was adopted, but before any of the substantive approvals were granted, petitioners, neighboring property owners, commenced the instant Article 78 proceeding challenging the "adequacy, accuracy and completeness" of the environmental impact statement and the findings.[24]

Respondents moved to dismiss the petition on the grounds that petitioners' claims were not ripe for judicial review and the Supreme Court, Albany County granted the motion and dismissed the petition. The Third Department affirmed.[25]

An administrative decision is ripe for judicial review when the decision is final. Courts have held that "[a]n action is considered to be final when it represents a definitive position on an issue which 'impose[s] an obligation, den[ies] a right or fix[es] some legal relationship,' resulting in actual, concrete injury[.]"[26] Here, the Court held that although the planning board's SEQRA determination did fix a legal relationship between the involved agencies in that all involved agencies are

required to base their findings on the FEIS accepted by the planning board, the board's decisions to accept the environmental impact statement as complete and to issue SEQRA findings were not "final" because none of the substantive approvals had been granted. The Court reasoned that until the substantive approvals are granted, the planning board could still deny the application and thus petitioners' perceived injury could be prevented without resort to judicial intervention.[27] Accordingly, the Court held that petitioners' challenge to the planning board's SEQRA review of the Ulster Manor project was not ripe for judicial review.

III. The *Kaur* Appeal

In the Winter 2010 edition of the *Municipal Lawyer*, we reported on two cases, *Goldstein v. New York State Urban Development Corporation* and *Kaur v. New York State Urban Development Corporation*,[28] both of which are progeny of *Kelo v. City of New London*[29] in that they address the question whether, and under what circumstances, a taking of private property (albeit fully compensated) by the state for use primarily or exclusively by a private entity rather than by the state itself, is permitted under the Federal and New York State Constitutions.

In *Goldstein,* the Court of Appeals affirmed the Second Department, which had upheld the taking of property for development by a private developer of the Atlantic Yards Project, a large mixed-use project in the Borough of Brooklyn.[30] In *Kaur*, the First Department annulled a determination by the Urban Development Corporation ("UDC") approving the acquisition of private property in the vicinity of Columbia University, a private educational institution, for the purpose of substantially expanding its campus.[31]

In reporting on both cases, we were taken by the opposite results on quite similar fact patterns. We ascribed the difference in the outcomes to, among other things, the *Kaur* court's dissatisfaction (bordering on contempt) with the record upon which UDC relied to justify the taking. Although both the *Goldstein* and the *Kaur* courts articulated a standard of review that would give substantial deference to the agency's determination ("if an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed"),[32] the *Kaur* court in fact reviewed *de novo* and rejected the UDC's findings, even though there was no allegation of corruption, and the only way those findings can be said to be "without foundation" is if one accords no credibility to the agency's consultants or the agency's reliance on those consultants.

Although it must be recognized that Justice Catterson's decision, in which he speaks only for himself and Justice Nardelli (Justice Richter filed a concurring opinion and Justices Tom and Renwick dissented) is the voice of a very divided court, the inadequacy of the underlying record as found by the First Department in *Kaur,* caused us to repeat the old saw that bad facts make bad law.

In speculating on what the Court of Appeals would do when it ultimately and inevitably received *Kaur* (an appeal had been commenced by the time we wrote the article), we made the following observation:

> Although at first blush a reversal would seem likely as being consistent with the Court of Appeals' holding requiring extreme deference to the agency's findings except in the most egregious of circumstances, this may be an opportunity for the Court, having defined one end of the deference spectrum with reference to the record in *Goldstein,* to define the other end by rejecting the agency's findings in *Kaur*.[33]

The Court of Appeals has now spoken and it comes as no surprise that the Court has reversed the First Department's decision in *Kaur*, relying in large measure on its holding in *Goldstein,* but also going to some pains to rehabilitate the underlying record—a rehabilitation which is perhaps irrelevant given the Court's extreme level of deference to the underlying agency determinations.[34] There is little point in restating the facts of *Kaur* and *Goldstein,* the facts of both cases having been described at length in the Winter 2010 *Municipal Lawyer* Case Law Update. Indeed, we first discussed *Goldstein* in the Summer 2009 *Municipal Lawyer*[35] and a related case, *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation,* in the Spring 2009 Case Law Update.[36]

Interestingly, the Court of Appeals in *Kaur*, having already addressed the relevant constitutional issues in *Goldstein,* seems less concerned with those issues than it does with establishing even more firmly the proposition that, in cases such as these, the agency's judgment upon which the taking relies is to be given extraordinary deference. Quoting its decision in *Goldstein,* the Court reiterated that in determining whether a taking will serve a proper public use, the "'actual specifications of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is *no room for reasonable difference of opinion* as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies.'"[37] The Court states these principles as being based on a consistent body of law going back over half a century.

> Thus, given our precedent, the de novo review of the record undertaken by the plurality of the Appellate Division was improper. On the "record upon which the ESDC determination was based and by which we are bound" (citation omitted), it cannot be said that ESDC's finding of blight was irrational or baseless. Indeed, ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole. Accordingly, since there is record support—"extensively documented photographically and otherwise on a lot-by-lot basis" (citation omitted)—for ESDC's determination that the Project site was blighted, the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency.[38]

Having rejected petitioner's arguments that UDC's actions lacked a proper public purpose, and that they had been taken in bad faith, the Court turned to petitioner's challenge to the constitutionality of the term "substandard or insanitary area," referring to what is commonly known as a blighted area, as that term appears in the Urban Development Corporation Act.[39] Petitioners argue that the language is unconstitutionally vague.[40]

In addressing this issue, the Court appears again to lean in the direction of expanding the state's prerogatives:

> In the context of eminent domain cases, we have held that, to guard against discriminatory application of the law, it is not necessary that "the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision" (citation omitted).
>
> . . .
>
> Not only has this Court, but the Supreme Court has consistently held that *blight is an elastic* concept that does not call for an inflexible, one-size-fits-all definition (*see, Berman v. Parker,* 348 US 26, 33-34 [1945]). Rather, blights or "substandard or insanitary areas," as we held in *Matter of Goldstein* and *Yonkers Community Dev. Agency*, must be viewed on a case-by-case basis (emphasis added).[41]

If, as we had speculated in our Summer 2010 article on *Goldstein* and *Kaur*, the *Kaur* appeal offered the Court of Appeals the opportunity to circumscribe the state's discretion in taking property for public use, the Court resoundingly rejected that opportunity and, if anything, confirmed the extraordinary extent of deference to be accorded to an agency's determination, not only in finding facts to justify a taking, but in interpreting and applying the statute from which the agency derives its authority. In short, it would appear that in the absence of an entirely one-sided record upon which there is no room whatever for reasonable people to differ, the determination of an agency empowered to take property for a use which the legislature has declared, and very broadly defined, as a public purpose, is, in New York, essentially untrammeled.

Endnotes

1. *Eadie v. Town Board of the Town of North Greenbush*, 7 N.Y.3d 306 (2006).
2. *Guido v. Town of Ulster Town Board*, 74 A.D. 3d 1536, 902 N.Y.S.2d 710 (3d Dep't 2010).
3. *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511 (2009).
4. *Brunswick Smart Growth, Inc. v. Town of Brunswick*, 73 A.D.3d 1267, 901 N.Y.S.2d 387 (3d Dep't 2010).
5. *Riverhead PGC, LLC v. Town of Riverhead*, 73 A.D.3d 931 (2d Dep't 2010).
6. *Harris v. Town Board of the Town of Riverhead*, 73 A.D.3d 922 (2d Dep't 2010).
7. *Brunswick Smart Growth, Inc.*, 73 A.D.3d at 1268.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Brunswick Smart Growth*, 73 A.D.3d at 1269.
12. *Riverhead PGC, LLC*, 73 A.D.3d at 932.
13. *Id.* at 933.
14. *Id.*
15. *Id.* at 932.
16. *Id.* at 933-934.
17. The Court also held that petitioner did not have "automatic standing" because its property was not in sufficiently close proximity to the site of the future Super Wal-Mart to relieve it of the obligation of demonstrating injury in fact. *See Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406 (1987), for a discussion of the issue of automatic standing.
18. *Harris*, 73 A.D.3d at 923.
19. *Id.* at 923-924.
20. *Id.* at 924.
21. As in *Riverhead PGC, LLC,* the Court held that the individual petitioners did not live close enough to the project site to be afforded "automatic standing."

22. *Guido, supra.*
23. *Eadie, supra.*
24. *Guido*, 902 N.Y.S.2d at 712.
25. *Id.*
26. *Id.*
27. *Id.* at 713.
28. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 24.1 MUNICIPAL LAWYER 5-12 (Winter 2010).
29. *Kelo v. City of New London*, 545 U.S. 469 (2005).
30. *Goldstein, supra.*
31. *Kaur v. New York State Urban Development Corp.*, 72 A.D.3d 1 (1st Dep't 2009).
32. *Id.* at 9; *see also Goldstein*, 13 N.Y.3d at 526 ("It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies.")
33. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 24.1 MUNICIPAL LAWYER 8 (Winter 2010).
34. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
35. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 23.3 MUNICIPAL LAWYER 22-26 (Summer 2009).
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37. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010) (emphasis original; citation omitted).
38. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
39. Unconsol. Laws §§6253[12] and 6260[c][1].
40. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
41. *Id.*

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NYSBA

Municipal Law Section
Fall Meeting

The Ritz Carlton Hotel
Washington, DC
October 16-18, 2010

THIS PROGRAM PROVIDES 7 MCLE CREDIT HOURS. TOPICS INCLUDE:

- Honest Services Statute, Public Corruption and Prosecution of Municipal Officials
- What's New In Washington - Supreme Court and Legislative Roundup
- Section 1983 Update
- Technology in the Courtroom
- Hot Topics in Land Use, Environmental and Green Technology

Saturday, October 16

10:30 a.m. **Registration** - Plaza Ballroom Foyer
Attorneys pick up box lunches at the registration desk - included in the attorney registration fee.

11:00 - 11:10 a.m. **Welcoming Remarks:** - Salon 3B
Patricia E. Salkin, Esq.
Section Chair
Government Law Center, Albany Law School
Albany

Program Introductions:
Sharon N. Berlin, Esq.
Lamb & Barnosky LLP
Melville

11:10 - 12:50 p.m. **Honest Services Statute, Public Corruption and Prosecution of Municipal Officials**
Honorable Richard A. Dollinger
New York State Court of Claims, Rochester

12:50 - 1:05 p.m. **Refreshment Break**

1:05 - 1:55 p.m. **Section 1983 Update**
A. Kevin Crawford, Esq.
New York Municipal Insurance Reciprocal
Albany

Lisa Weber, Esq.
New York Municipal Insurance Reciprocal
Albany

1:55 - 2:45 p.m. **Recent Developments in the Siting of Wireless Communications Equipment**
James R. Hobson, Esq.
Miller & Van Eaton, P.L.L.C.
Washington, DC

Matthew K. Schettenhelm, Esq.
Miller & Van Eaton, P.L.L.C.
Washington, DC

Jeffrey S. Steinberg, Esq.
Deputy Chief of the Spectrum and Competition Policy Division
Federal Communications Commission Wireless Telecommunications Bureau
Washington, DC

6:30 - 7:30 p.m. **Cocktail Reception** - Roosevelt Room

7:30 - 9:30 p.m. **Dinner** - Plaza Ballroom

Sunday, October 17

8:30 a.m. **Registration** - Plaza Ballroom Foyer

8:55 - 9:00 a.m. **Program Introductions:** - Plaza Ballroom 1
Steven G. Leventhal, Esq.
Leventhal & Sliney, LLP
Roslyn

9:00 - 10:15 a.m. **Supreme Court Roundup and Federal Legislative Updates for Municipal Attorneys**
Charles W. Thompson, Jr., Esq.
General Counsel and Executive Director
International Municipal Lawyers Association
Washington, DC

10:15 - 10:30 a.m. **Refreshment Break**

10:30 - 11:45 a.m. **Technology in the Courtroom**
Michael L. Fox, Esq.
Jacobowitz & Gubits, LLP
Walden

Mr. Gene Klimov
DOAR Litigation Consulting Services
Lynbrook

12:00 - 2:15 p.m. **Lobby Cafe** - Executive Committee Meeting

2:30 p.m. **Tour of the U.S. Capitol**
Sign up on the Meeting Registration Form.

Free evening

Monday, October 18

Supreme Court Admission Program

7:00 a.m. **Meet in the Ritz Carlton Lobby** - Bus transport to the Supreme Court

7:40 a.m. **Group Photo** - Steps of the Supreme Court

7:50 a.m. **Line up for security clearance to begin**

9:00 a.m. **Continental Breakfast** - Group briefing in holding room at the Supreme Court

10:00 - 11:00 a.m. **Admissions Ceremony** - No packages or cameras are allowed inside the United States Supreme Courtroom. Should you bring any packages or cameras, you will be required to leave them unattended in a separate room. **Only one guest per admittee will be allowed to attend the ceremony.** Children under six (6) years of age are not admitted into the courtroom. These policies are strictly enforced. Those who are not staying at the Ritz-Carlton must plan to arrive at the United States Supreme Court no later than **7:40 a.m. on Monday.**

SCHEDULE OF EVENTS

Following the Admissions Ceremony, you will be escorted back into the holding room. Please note that one or more of the Justices may come into your holding room, following the Admissions Ceremony, for a brief visit and photos.

11:45 a.m. **Meet back at the drop off point** - (near steps where the group photo will be taken) for transport back to the Ritz Carlton

12:00 p.m. **Champagne Brunch** -RIS Restaurant located next door to the Ritz Carlton 2275 L Street, NW Washington, DC

IMPORTANT INFORMATION

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider.

Under New York's MCLE rule, this program has been approved for a total of 7 MCLE credit hours, including 7 hours in professional practice.

This course is not a transitional course and is not suitable for newly admitted attorneys because it is not a basic practical skills program.

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