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U.S. Supreme Court Upholds Use of Eminent Domain for Economic Development and Spurs a Firestorm of Legislative Activity to Limit Such Authority

By Patricia E. Salkin

Introduction

On June 23, 2005, the U.S. Supreme Court handed down a long-awaited decision in the controversial Connecticut eminent domain case that challenged the constitutional authority of state and local governments to exercise the power of eminent domain for economic development purposes absent a finding of blight. In affirming a March 2004 decision of the Connecticut Supreme Court,[1] the U.S. Supreme Court in a 5-4 decision in *Kelo v. City of New London*,[2] confirmed that the goal of economic development can be a valid "public purpose" to justify the use of eminent domain under the Fifth Amendment. In reaching this conclusion, the Court relied on its precedent in *Berman v. Parker*[3] and *Hawaii Housing Authority v. Midkiff*,[4] noted that the phrase "public use" cannot be defined rigidly, and expressed deference to the decision of legislative bodies in making these determinations.

Background—The New London Economic Development Plan

The New London Development Corporation (hereinafter referred to as "Development Corporation"), a private, non-profit economic development corporation was established in 1978 to assist the City of New London in planning for economic development.[5] The State Bond Commission authorized bonds in 1998 to support, among other things, planning activities in the Fort Trumbull area of the city and property acquisition to be undertaken by the Development Corporation.[6] In February 1998, Pfizer, Inc. announced that it was developing a global research facility on a site adjacent to the Fort Trumbull area.[7] In April 1998, the City gave initial approval for the preparation of a development plan for the Fort Trumbull area, and one month later the City authorized the Development Corporation to proceed.[8] In June 1998, the City conveyed to Pfizer the New London Mills site.[9]

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Inside

A Message from the Chair

As a public finance lawyer, I initially wondered what membership in the Municipal Law Section had to offer me and my area of practice. Nearly 18 years later, joining this Section was one of the best things I could have done to broaden my knowledge of matters affecting the clients I represent while offering the opportunity to network with those who specialize in a number of unique practice areas as well as those who still maintain a general practice while at the same time serving the needs of their municipal clients.

Much has changed since I joined the Section. The enhanced scope and quality of our programs, publications and services are attributable to the efforts of Chairs before me and the great work of the Executive Committee and our subcommittees. I will certainly do my best to continue those efforts and make the information and meetings we put together timely and relevant to our members. If you have not done so already, please visit our Web site as it exemplifies some of the great things this Section offers and provides an excellent resource tool to our members.

My father was a Town attorney in a small town in Upstate New York. He is one of the main reasons I became a lawyer and decided to gravitate toward the municipal field (call it a genetic defect). I still remember him threatening to take my brother and I to a Town Board meeting if we did not behave. It wasn't until many years later that I fully understood and appreciated the gravity of that threat. We all know that the legal profession comes under fire all too often for the misbehavior of the few. It has been my observation working with municipal attorneys throughout the state that, even in the face of intense political and media pressure, it is a group that generally exemplifies what it truly means to be a lawyer and helps improve the image of the profession. One of the nicest, and most telling, comments made to me recently during a social setting was, "Gee, I had no idea you were a lawyer, you are so nice!" Being pleasant and cordial does not signify weakness and we should all strive to maintain our professionalism and ethics notwithstanding external actions or pressures.

I follow in the footsteps of many great Chairs before me and look forward to the challenges that await. I travel quite a bit throughout the state and understand and appreciate the diversity of issues confronting municipal entities. Sometimes these issues are quite unique but often they are inextricably intertwined. The recent *Kelo*[1] decision by the Supreme Court has attracted significant attention and will be the focus of programs and written materials sponsored by our Section. The *City of Sherrill*[2] decision and the recent *Cayuga*[3] case have reopened many land disputes and other issues affecting municipalities and their interaction with tribes in New York. Economic development remains a major focus area as well as the role municipalities can play to facilitate same. Legislation recently passed affecting public authorities will change the way such entities operate and you should look forward to a future article in the *Municipal Lawyer* describing these changes and their impacts.

All told, these are exciting times for lawyers working in the municipal field and I along with the rest of the Executive Committee will do our best to make sure the Section continues to reach out and provide timely information and programs to help practitioners deal with the issues that confront them. I look forward to seeing many of you at our Fall meeting, which is part of our ongoing efforts to partner with other Sections to cover as wide an array of topics as possible. Finally, as my former mentor and law partner Tom Galloway used to say, always try to have fun with the practice of law!

Thomas E. Myers

Endnotes

1. *Kelo v. City of New London, CT*, __ U.S. __ (2005).
2. *City of Sherrill, New York v. Oneida Indian Nation of New York*, __ U.S. __ (2005).
3. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

From the Editor

The debate over the exercise of eminent domain powers by state and local governments has taken center stage in the nation's media and legislatures as a result of the United States Supreme Court decision in *Kelo v. City of New London*, upholding the City's authority to condemn private property for economic development. As discussed below, the *Kelo* debate is prominently featured both in this publication and in the program for the upcoming Fall meeting of the Municipal Law Section.

In this issue of the *Municipal Lawyer*, Professor Patricia Salkin, Associate Dean and Director of the Government Law Center of Albany Law School, analyzes the Supreme Court's *Kelo* ruling, chronicles the media attention and legislative initiatives that it has spawned and previews issues likely to arise in the future in connection with municipal exercise of eminent domain authority for community redevelopment.

Less controversial, but equally important, is "Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees," prepared by Mark Davies, Executive Director of the New York City Conflict of Interests Board. Reviewing Article 18 of the General Municipal Law, Mr. Davies' article outlines the various ethical constraints imposed upon local government officers and employees, including prohibited interests in contracts with municipalities, solicitation and acceptance of gifts, using or disclosing confidential information, the receipt of contingent fees and financial and other disclosure requirements.

The case for proper training of the municipal workforce is powerfully stated by Deb Volberg Pagnotta, employment counsel to Silverberg Zalantis, LLP in White Plains. Among the critical subjects for training highlighted by Ms. Pagnotta in her article are employment discrimination and harassment prevention, workplace ethics, cultural diversity and communication, supervisory skills and drug-free and violence-free work places. Ms. Pagnotta also addresses who should be trained, and the when, where, why and how such training should be conducted.

In June 2005, Thomas E. Myers, a municipal finance partner at Orrick Herrington & Sutcliffe, LLP in New York City became the Chair of the Municipal Law Section. In his first Message from the Chair column, Mr. Myers describes how Section membership has enriched his practice and pledges to continue and enhance the quality of programs, services and publications provided by the Section to its members.

Completing this issue of the *Municipal Lawyer*, Ian G. MacDonald, former Dutchess County Attorney, reviews the procedures contained in the Municipal Home Rule Law for the introduction, adoption and publication of local laws.

The *Kelo* decision will also be a focal point of the joint Fall Meeting to be held by the Municipal and Environmental Law Sections of the New York State Bar Association on September 23–25, 2005 at The Sagamore, Bolton Landing, New York.

On Saturday morning, a plenary session will be held for members of both sections. The program will begin with a presentation entitled "Redevelopment and Economic Development after *Kelo*," moderated by Professor Patricia E. Salkin of Albany Law School, Albany. The speakers for this panel discussion will be Richard L. O'Rourke, Esq., Keane & Beane, P.C., White Plains; Professor John R. Nolon, Pace Law School, White Plains; Professor Philip Weinberg, St. John's University School of Law, Jamaica and Susan E. Amron, Esq., New York City Law Department, New York City. Following this presentation, concurrent sessions will be held entitled (1) "Update on Brownfields: Issues Affecting Municipalities," and (2) "Municipal Stormwater Regulation." The Brownfields discussion will be moderated by Professor Joan Leary Matthews, Albany Law School, Albany. The speakers for this panel will be David J. Freeman, Esq., Paul Hastings Janofsky & Walker LLP, New York City and E. Gail Suchman, Esq., New York City. The moderator for the Stormwater panel will be Miriam E. Villani, Farrell Fritz, P.C., Uniondale. Speakers on that panel will be Robert H. Feller, Esq., Bond Schoeneck & King, PLLC, Albany; Barbara Kendall, New York State Department of Environmental Conservation Region 3, New Paltz, and Walter R. Artus, CPESC, The Chazen Companies, Poughkeepsie.

Concluding the Saturday morning session will be a presentation entitled "Current Ethics Issues in Land Use and Environmental Law: Simulation of a Local

Planning Board Session." The speakers will be Marla B. Rubin, Esq., Law Office of Marla B. Rubin, Mohegan Lake and Mark Schachner, Esq., Miller, Mannix, Schachner & Hafner, LLC, Glens Falls.

On Saturday evening, a group dinner will be held at the hotel. Professor Nicholas A. Robinson of Pace Law School will speak on the topic of "Simulation: Acquisition and Multiple Use of Open Space: Redevelopment of the General Motors Plant in Tarrytown."

On Sunday morning, the Municipal Law Section will conduct its own program commencing with a "SEQRA/Land Use Caselaw Update," by Sean Hopkins, Esq., Renaldo Myers & Palumbo PC, Buffalo. That presentation will be followed by an "Election Law Update," by Stanley Zalen, Esq. and Peter Kosinski, Esq., of the New York State Board of Elections, Albany. Concluding the program will be an "Update on IDEA," by Karen Norlander, Esq., Girvin & Ferlazzo, P.C., Albany.

Under New York's Mandatory Continuing Legal Education Rules, the program has been approved for 6.5 credits in the areas of Professional Practice/Practice Management for experienced attorneys and 1 MCLE credit hour in Ethics. Several sporting events and field trips are being arranged for the weekend. The combination of cutting-edge seminars and the natural beauty and recreational opportunities at the Sagamore make this a can't-miss event.

Lester D. Steinman

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In July 1998, a consulting team began working on the development plan for New London.[10] The development plan area consists of approximately 90 acres on the Thames River, adjacent to the proposed Fort Trumbull State Park and the Pfizer facility, which opened in June of 2001.[11] The area consists of about 115 lots, including both residential and commercial uses.[12] In its preface to the development plan, the Development Corporation stated that its goals were to create a development that would complement the Pfizer facility, create jobs, increase tax and other revenues, encourage public access to the waterfront and work towards revitalization of the city.[13] The development plan organized the land area into seven parcels of land, and planned to retain ownership of the land and lease parcels to private developers, requiring that developers comply with the terms of the development plan.[14]

The development plan was expected to generate a significant number of jobs,[15] and tax revenue for the City.[16] With the exception of the new Pfizer facility that had recently been built, the City had experienced major economic declines with the loss of almost 2,000 government jobs in 1996, and the state had designated the City as "distressed."[17] The City approved the development plan in January 2000, and authorized the Development Corporation to acquire properties within the development area.[18] In October 2000, the development corporation voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell, and in November 2000 they filed condemnation proceedings that led to the litigation.[19]

The Connecticut Supreme Court Ruling

Finding that in each case, the Development Corporation had proper authority to institute condemnation proceedings, the State Supreme Court held that the public use clauses of the Connecticut and federal constitutions (which are identical) authorize the exercise of eminent domain power in furtherance of a significant economic development plan that will result in benefits to the distressed city.[20]

In addressing first the constitutionality of Chapter 132 of the Connecticut General Statutes that authorizes the use of eminent domain for private economic development,[21] the Court noted a history of taking a "flexible approach to the construction of the Connecticut public use clause."[22] Citing to earlier precedent[23] to define what is meant by a "public use," the Court reiterated, "'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use."[24] The Court went on to uphold the deferential approach that is afforded to legislative declarations of public use, noting that it is difficult to draw a precise line between what is a public use and what is a private use, preferring to follow precedent stating that "The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society."[25] The Court also noted that prior Connecticut case law stands for the proposition that when the government exercises its eminent domain power and allows the land to be sold or leased to private developers, so long as the initial public purpose for the action was for a public use, that same public use continues after the property is transferred to private persons.[26] Furthermore, the Court noted that any benefit to the private developer is secondary to the public benefit that results from economic growth and community revitalization.[27] The Court concluded that where the legislative body has rationally determined that an economic development plan will promote significant economic development, this constitutes a valid public use for the exercise of the eminent domain power under both the state and federal constitutions.[28] In addressing concerns over the potential for abuse as to what constitutes a valid public purpose, the majority concluded "that responsible judicial oversight over the ultimate public use question does much to quell the opportunity for abuse of the eminent domain power."[29]

The Court also concluded that a valid public purpose is not defeated when the condemnation plan includes a transfer of land to private entities.[30] Noting that integral to the plan was Pfizer's decision to locate in the town, the Court relied on testimony from the record below that Pfizer was key to the plan as it was unusual for a major employer to move into a "brown site" in a major urban area, and that this offered a unique opportunity to the City to take advantage of a number of things that would happen at the site as a result of this move.[31] In upholding the trial court's determination that "in the context of severe economic distress faced by the city, with its rising unemployment and stagnant tax revenues, the benefits to the city will outweigh those to Pfizer,"[32] the Court determined that the takings were not primarily intended to benefit a private party.[33] In fact, the Court noted in response to criticism that the City responded to Pfizer's specific development requirements, that "had the development corporation failed

to consider demands by the Pfizer facility, its planning would have been unreasonable."[34] The Court makes clear that their holding does not give a license for eminent domain simply for the purpose of greater tax revenues, but that rather, "rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster."[35]

The Court next rejected plaintiffs' claim that the condemnation must fail as there was no assurance of future public use.[36] In upholding the trial court's finding that the city's lack of future involvement does not mean that the development corporation and the developers are not bound to use the property in accordance with the approved plan, the Court relied on the existence of sufficient written agreements to this effect.[37] The Court also upheld the City's delegation of the eminent domain power to the development corporation finding that the development corporation is the statutorily authorized agent for the implementation of the development plan, a valid public purpose, and that the development corporation is not acting to further its own operations.[38] In applying a three-prong test: 1) whether the entity is a private entity; 2) whether a public purpose is being advanced; and 3) where the benefit of the property taken is considered to be available to the general public,[39] the court noted that there was no disagreement over the private entity status of the development corporation; that the public purpose was advanced by giving the development corporation authority to acquire property to implement the development plan; and that the public as a whole benefits from the actions of the private development corporation who turns the property over to private developers and tenants.[40]

The U.S. Supreme Court

The U.S. Supreme Court granted review in September 2004 to determine "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[41] Answering this question affirmatively, the Court placed great emphasis on the fact that a public planning process was employed, noting that the eminent domain takings here were "executed pursuant to a 'carefully considered' development plan . . ."[42]

The Supreme Court also rejected the notion that the phrase "public use" must be equated with "use by the public," and relying on *Hawaii Housing Authority v. Midkiff*,[43] stated that the "court long ago rejected any literal requirement that condemned property be put into use for the general public."[44] Writing for the majority, Justice Stevens explains that by the close of the 19th Century, the Court "embraced the broader and more natural interpretation of public use as 'public purpose.'"[45] Turning to the question of whether the City's redevelopment plan is a valid public purpose, the Court acknowledged that over the years it has recognized that the needs of society have varied and have evolved over time to reflect changing circumstances, and that "public use jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[46]

Justice Stevens mentions numerous times the fact that the city had a plan, that the plan was comprehensive, and that it was developed using a thorough deliberative process. He concludes that "Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirements of the Fifth Amendment."[47]

In addressing the use of a local development corporation to implement and execute the economic development plan, Stevens quotes from *Berman v. Parker* that, "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[48] Further, the Court rejected the petitioners' argument that the government should have to prove with "reasonable certainty" that the redevelopment plan will produce the expected public benefits. This, said the Court, was best left to the legislatures and not to the judiciary.

Kelo Attracts Unusual Media Attention

Immediately following the decision, the Institute for Justice, a self-described Libertarian Law Firm, along with other organizations sympathetic to the plight of Suzette Kelo and others similarly situated, launched a national media campaign berating the Supreme Court's decision. The following admonitions came from Institute staff: "The Court simply got the law wrong today, and our Constitution and country will suffer as a result. . . . With today's ruling, the poor and middle class will be most vulnerable to eminent domain abuse by government and its corporate allies. The 5-4 split and the nearly equal division among state supreme courts shows just how divided the courts really are. This will not be the last word."[49] "It's a dark day for American homeowners. While most constitutional decisions affect a small number of people, this decision undermines the rights of every American, except the most politically connected. Every home, small business, or church would produce more taxes as a shopping center or office building. And according to the Court, that's a good enough reason for eminent domain."[50] Ralph Nader added that, "The U.S. Supreme Court's deci-

sion in *Kelo v. City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness."[51]

The negative spin, however, was countered by thoughtful comments from leading land use planners and attorneys who noted that, "The best protection from unfair use of eminent domain is a thorough, open and transparent planning process. The Court reaffirmed this at the same time it correctly ruled that the proper place to decide whether eminent domain should be used or not is in the hands of local communities, not federal courts."[52] These comments were echoed by Washington, D.C. Mayor Anthony A. Williams: "[Eminent domain] has been indispensable for revitalizing local economies, creating much-needed jobs, and generating revenue that enables cities to provide essential services. With cities and towns facing ever-shrinking resources, we need all the help we can to redevelop our neighborhoods and provide jobs for our citizens."[53] The Boston Redevelopment Authority (BRA) noted that economic development is "an essential public purpose of cities and towns," and that "'While the BRA does not utilize eminent domain in the same manner as New London, we do believe that this ruling affirms the importance of maintaining a strong planning and economic development agency to help create and implement the public vision for growth."[54] University of Chicago Law Professor Lior Strahilevitz explained that the decision ". . . means the federal courts are going to stay out of these disputes except in the most egregious circumstances. Had the court gone the other way, I think it would have meant the federal courts would have had their dockets full of challenges to the exercise of eminent domain."[55]

Perhaps Paul Farmer explained it best in a recent Op Ed:

> The Court's decision did not expand government power to use eminent domain. It maintained over 200 years of practice and relied on over 100 years of precedents. No new tests were enunciated, no new powers given to local governments. The Court affirmed that a thorough and engaged planning process protects the values of citizens and their community. The Court affirmed that these are local matters, decided within the context of each state's laws.

Congress Gets Into the Action

Immediately following the Court's decision, members of Congress joined the media frenzy declaring war against the use of eminent domain. House Majority Leader Tom DeLay said that the Supreme Court's ruling would go down in history as a travesty as the House of Representatives voted 365-33 to condemn the decision. The resolution (H.R. 340) was just the first step. Representative Phil Gingrey introduced the "Protection of Homes, Small Businesses, and Private Property Act" (H.R. 3087) which provides that eminent domain powers shall be used only for "public use," and the bill specifically provides that this "shall not be construed to include economic development." A companion bill (S. 1313) was introduced by Senator John Cornyn.

Representative Bonilla, along with 18 House cosponsors, introduced H.R. 3405 that would bar federal economic development assistance to any state or local government that uses the power of eminent domain to obtain property for private commercial development. The bill, known as the "Strengthening the Ownership of Private Property (STOPP) Act," would cut off all federal financial assistance under any federal economic development program to any unit of government that uses its eminent domain power to promote economic development.

The Private Property Rights Protection Act (H.R. 3135) sponsored by Representatives James Sensenbrenner and John Conyers, would bar the use of federal economic development funding for any economic development project where a governmental unit has used its eminent domain power. The bill has 119 co-sponsors in the House. A bill introduced in the State of Rhode Island (H.R .6636) asks Congress to amend the Constitution to address *Kelo*.

The Impact of *Kelo* in New York: Will State Legislation Alter the State of the Law?

Congress is not the only legislative body to respond, as dozens of proposals have been introduced in statehouses across the country. According to one count, just weeks after Court handed down the decision, lawmakers in 28 states have introduced more than 70 bills with various responses to the use of eminent domain.[56] For example, legislators in Alabama, California, Florida, Louisiana, Michigan, New Jersey, Ohio and Texas have currently proposed or are drafting state constitutional amendments prohibiting the use of eminent domain for private development. In Georgia, one bill would prohibit using eminent domain for the purpose of "improving tax revenue." Delaware has legislation to create a task force in the aftermath of *Kelo* and it is charged with making recommendations to restrict eminent domain for a bona fide public use. A second bill would require that a public use be described at least six months before the proposed taking in a planning

document. The Governor in Mississippi created a task force on eminent domain by Executive order. In Alabama, one bill would prohibit using eminent domain for "retail, office, commercial or residential development." In addition, two house resolutions have been introduced to disapprove of the *Kelo* decision. A constitutional amendment in Texas would prohibit "taking private property for the primary purpose of economic development." Legislation in Minnesota would similarly prohibit the use of eminent domain for economic development purposes. A bill in Massachusetts would also prohibit eminent domain for economic development unless there is finding of blight. In New Jersey, lawmakers have introduced proposals to provide that just compensation for single-family residences be based on the cost of comparable relocation properties, and another approach suggests preventing the use of condemnation to acquire residential properties altogether.

Although the decision in *Kelo* did not change the law in New York, the state is not immune from legislative attempts to restrict the ability of local governments to exercise this power. Assemblyman Richard Brodsky announced a proposal that would give property owners 90 days instead of the current 30 days to appeal condemnations. Brodsky's proposal also provides that property owners who are displaced must be paid at least 150 percent of the market value of their homes, and the proposal limits the use of eminent domain to comprehensive economic development plans that have been discussed in public meetings and approved by local legislators.

Another proposal, S.5936, would allow the use of eminent domain for economic development only in blighted areas. Since the decision came down at the end of the legislative session in New York, it is likely that this proposal is the first of many to come.

The Future of Eminent Domain

The sky is not falling. Municipal attorneys can continue to advise their clients that eminent domain remains available as one of the tools, used appropriately, to enable localities to engage in community redevelopment. Consistent with the position of the American Planning Association, eminent domain should be considered a tool of last resort. Municipalities should look for ways to enable redevelopment and facilitate land reassembly without the severity of eminent domain.

Prior to using eminent domain, municipal attorneys should ensure that the local government has engaged in a comprehensive public planning process, and that the proposed redevelopment plan has been fully vetted with the impacted communities. Public notice, education and outreach are critical components of this process. Careful consideration must be afforded to issues involving social equity. Particularly where low-income and minority populations may be subjected to displacement, government has a moral responsibility to address relocation options and to assist in facilitating any necessary moves. Often, displaced residents are not the landowners and therefore they may be left with no financial compensation yet forced to find shelter elsewhere.

The next frontier in the eminent domain battle is likely to bring the subject of fair compensation to the forefront. Whether fair market value of the property before the redevelopment takes place is fair and adequate compensation when eminent domain is used is subject to debate. Assemblyman Brodsky places the number at 150 percent of fair market value regardless of the particular situation. Factors—including longevity of title to the property, whether the property is used as a primary residence, the purchase price (including all expenses), and the estimated value of the property after the implementation of the redevelopment plan—could all become part of a new method for calculating fair market value. It may be easy (and perhaps practical) to assign an arbitrary number as indicative of fair market value, but this may not always be accurate. Formulas and compensation theories will likely be debated in scholarly circles and in the courts over the next several years.

In the aftermath of *Kelo,* the storm may be over but the dust is still settling. Local governments need not fear eminent domain, but it should be exercised with continued discretion, after careful deliberation and with sensitivity to the community and to individual homeowners. While there is no denying that opponents can point to individual situations where the eminent domain power was clearly abused by local governments, the fact remains that these are exceptions rather than representative of government actions as a whole. The practice of law in the public sector is based upon the public trust, and municipal attorneys must continue to provide advice and counsel to localities consistent with this trust.

Endnotes

1. 268 Conn. 1, 843 A.2d 500 (Sup. Ct. 2004).
2. ___U.S.___ (2005).
3. 348 U.S. 26 (1954).
4. 467 U.S. 229 (1984).
5. 843 A.2d at 508.
6. *Id.*
7. *Id.*
8. *Id.*

9. *Id.*
10. *Id.* at 509.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 510.
15. *Id.*, stating that there would be between 518 and 867 construction jobs; 718 and 1,362 direct jobs; and 500 and 940 indirect jobs. The Court later noted that the plan would generate hundreds of construction jobs, approximately 1,000 direct jobs and hundreds of indirect jobs, commenting how significant this was for a city that, not counting those employed by Pfizer, only employs about 2,000 people. The city's unemployment rate is close to double the rate of the rest of the state.
16. *Id.*, stating that property tax revenues were expected to fall between $680,544 and $1,249,843. This represents a significant increase for an area that currently produces about $325,000 in property taxes.
17. *Id.* These jobs were lost when the U.S. Naval Undersea Warfare Center closed, and 1,000 jobs were transferred to Newport, Rhode Island.
18. *Id*. at 510.
19. *Id.* at 511.
20. *Id.*
21. Specifically, sec. 8-186 provides, "that the economic welfare of the state depends upon continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."
22. 268 Conn. 1 at 28, 843 A.2d 500 at 521.
23. The Supreme Court discussed its holding in the 1866 case of *Olmstead v. Camp*, 33 Conn. 532 (1866).
24. 268 Conn. 1 at 30, 843 A.2d 500 at 522, quoting from *Olmstead*.
25. *Id.*
26. *Id.*, citing to *Gohld Realty Co. v Hartford*, 141 Conn. 139, 104 A.2d 365 (1954).
27. 268 Conn. 1 at 47, 843 A.2d at 531.
28. 268 Conn. 1 at 39, 843 A.2d at 527. The Court cites to a laundry list of holdings in other states' courts that essentially support the outcome, including the New York case of *Vitucci v. New York City School Construction Authority*, 289 A.D.2d 479 (2d Dep't 2001) (where a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, these are all legitimate public purposes that justify the use of eminent domain).
29. 268 Conn. at 52, 843 A.2d at 535. The Court notes that the academic literature is rich with articles on both sides of the debate, and further acknowledges that there have been some particularly egregious cases, but concludes that these cases are the exception not the norm, and are therefore readily distinguishable from projects such as the "carefully considered development plan at issue in the present case."
30. 268 Conn. at 54, 843 A.2d at 536.
31. *Id.* at 56 and 538.
32. *Id.* at 58 and 539.
33. I*d.* at 63 and 541.
34. *Id.* at 64 and 542.
35. *Id.* at 66 and 543.
36. *Id.*
37. *Id.* at 67–69 and 544–545.
38. *Id.*
39. *Id.* at 79–80 and 551.
40. *Id.* at 80 and 552.
41. *Kelo v. City of New London*, __ U.S. __ (2005).
42. *Id.*
43. 467 U.S. 229 (1984).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id*., citing to 348 U.S. at 34.
49. Statement of Scott Bullock, Esq., *available at* http://www.ij.org/private_property/connecticut/6_23_05pr.html (site visited July 2005).
50. Statement of Dana Berliner, Esq., *available at* http://www.ij.org/private_property/connecticut/6_23_05pr.html (site visited July 2005).
51. *Available at* http://releases.usnewswire.com/GetRelease.asp?id=49368 (site visited July 2005).
52. Statement of Paul Farmer, Executive Director, American Planning Association, *available at* http://www.planning.org (site visited July 2005).
53. New Jersey League of Municipalities, "Supreme Court Decision in Eminent Domain Case a Victory for Cities," (June 23, 2005) *available at* http://www.njslom.org/NLCpress release 06-23-05.html (site visited August 2005).
54. *Available at* http://www.boston.com/news/nation/washington/articles/2005/06/24/high_court_backs_seizure_of land_for_development/" Boston Globe. High Court backs seizure of land for development. By Peter S. Canellos, June 24, 2005.
55. *Available at* http://www.suntimes.com/output/news/cst-fin-property24.html- Chicago Sun-Times; June 24, 2005; by Abdon M. Pallsch, David Roeder and Eric Herman. Court Shows Homeowners Door.
56. *See* Teresa Baldas, "States Ride Post-"Kelo' Wave of Legislation," *available at* http://www.law.com (site visited August 2, 2005).

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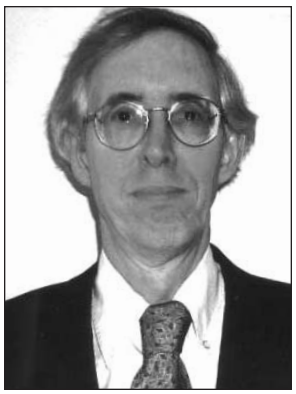
Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees

By Mark Davies



Article 18 of the New York State General Municipal Law sets forth certain baseline conflicts of interest standards that apply in every municipality in the State, except New York City, where only Article 18's financial disclosure requirements apply.[1] Article 18 has been harshly criticized over the years for its complexity, for its overinclusiveness in the prohibited interest provisions of section 801, for its lack of penalties, and for its enormous gaps. Proposals to address these significant problems, however, have repeatedly fallen on deaf ears in the State Legislature.[2] Municipalities, their officers, employees, and counsel, and those who appear before or do business with municipal agencies thus have no choice but to understand and comply with current Article 18, although municipalities may (and should) adopt an effective local conflicts of interest law or resolution, as the case may be.[3] This article accordingly presents a plain language checklist of the requirements of Article 18 that municipal attorneys may employ for their municipal clients.[4] Attorneys must also consult any local municipal ethics code and may wish to modify this checklist to reflect any additional requirements contained in any such local code.

At the outset, one should emphasize that Article 18 defines both "municipality" and "municipal officer or employee" broadly. "Municipality" includes not just political subdivisions (counties, cities, towns, and villages) but school districts, public libraries, BOCES, consolidated health districts, urban renewal agencies, town and county improvement districts, industrial development agencies, fire districts, and even the OTB, as well as many other agencies.[5] "Municipal officer or employee" includes all officers and employees of the municipality, *whether paid or unpaid*, with certain exceptions.[6]

(1) Prohibited Interest in a Contract with the Municipality

A municipal officer or employee may not have an interest in a contract with the municipality if he or she has any control over the contract, unless an exception applies.

Applicable sections: New York State General Municipal Law §§ 800–804, 805

Penalty for violation: misdemeanor; contract void and cannot be ratified

Elements of a violation:

(a) Does the matter involve a ***contract*** with the municipality?

A claim against the municipality is considered a contract with the municipality.

*Note: The officer or employee does **not** have to be a party to the contract.*

(b) Will the officer or employee ***receive a financial benefit*** as a result of that contract, or will his or her spouse or minor children or dependents or outside business or employer or a corporation in which the officer or employee owns stock receive such a benefit?

(c) Does the officer or employee have any ***control*** over the contract? That is, does the officer or employee, either as an individual official or as a member of a board, have the power or duty to negotiate, prepare, or approve the contract or approve payment under it or audit bills under it or appoint anyone who does?

Note: It does not matter if the officer or employee disqualifies ("recuses") himself or herself; the question is whether he or she has the power or duty to do any of those things.

(d) Do any of the ***exceptions*** in Gen. Mun. Law § 802 apply or is the contract an employment contract between the municipality and the officer or employee's spouse, minor child, or dependent?

The most common exceptions include: (1) having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the officer or employee is only an officer or employee of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation at the firm affected by

the contract; (2) having an interest in a contract between the municipality and a not-for-profit organization; (3) having an interest in an existing contract at the time the officer or employee joins the municipality (but this exception does not apply to the renewal of the contract); (4) having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls less than 5 percent of the stock; (5) having an interest in municipal contracts where the total amount paid under the contracts is no more than $750 during the fiscal year.

- If the answer to questions (a), (b), and (c) is yes and if the answer to question (d) is no, then the interest is prohibited. Neither recusal nor public bidding will cure the violation.
- If the answer to questions (a) and (b) is yes, but the answer to question (c) is no, then the interest is not prohibited but the officer or employee must disclose it to the municipal legislative body.
- If the answer to questions (a), (b), and (c) is yes, but an exception applies, then the interest is not prohibited, but the officer or employee must disclose it to the municipal legislative body (unless the interest falls under General Municipal Law § 802(2)).

(2) Dual Employment

"Generally, one person may hold two offices simultaneously unless a constitutional or statutory prohibition bars concurrent holding of the positions, or unless the offices are incompatible."[7] Two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency between the two offices.[8]

Examples of statutory prohibitions on holding simultaneous offices: town board member and town ZBA member (Town Law § 267(3)); two city offices (Second Class Cities Law § 19); elective and appointive village offices (Village Law § 3-300(3)).

Examples of incompatible offices: town board member and secretary to town ZBA (1990 Op. Atty. Gen. (inf.) 1099); town ZBA clerk and assistant town building inspector (1964 Op. Atty. Gen. (inf.) Jan. 23); county planning commission chair and ZBA member of village within same county (Op. Atty. Gen. (inf.) 86-36); village trustee and member of village housing authority (1976 Op. Atty. Gen. (inf.) 198).

(3) Miscellaneous Ethics Requirements

Applicable sections: New York State General Municipal Law §§ 805-a, 805-b

Penalty for violation: disciplinary action

Prohibitions:

(a) *Requesting gifts*. An officer or employee may not request a gift where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.

(b) *Accepting gifts*. An officer or employee may not accept a gift (or gifts) worth $75 or more where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.

(c) *Disclosing confidential information*. An officer or employee may not disclose confidential information that he or she acquired in the course of his or her official duties.

(d) *Using confidential information.* An officer or employee may not use confidential information to further his or her personal interests.

(e) *Matters before your agency*. An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before his or her agency or an agency over which he or she has jurisdiction, or an agency to which he or she has the power to appoint someone.

(f) *Contingent fees.* An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before any agency of the municipality where the payment depends on action by the agency with respect to the matter (but a fee based on the reasonable value of the services performed can be fixed at any time).

(4) Disclosure

(a) *Disclosure of interests in contracts (New York State General Municipal Law § 803)*. See Item (1) above.

(b) *Disclosure in land use applications (New York State General Municipal Law § 809)*. Applicants in land use matters must disclose (i) the name and residence of State

officers, officers and employees of the municipality, and officers and employees of any municipality of which the municipality is a part, who have an interest in the applicant and (ii) the nature and extent of the interest. Officials are deemed to have an interest in the applicant if they or a family member is the applicant, works for the applicant, has stock in the applicant, is a member of a partnership or association applicant, or has an agreement with the applicant to receive anything if the application is approved. A "knowing and intentional" violation is a misdemeanor. By common law, the interested municipal official must recuse.

(c) *Annual financial disclosure (New York State General Municipal Law §§ 810–813)*. Certain officials must file annual financial disclosure reports.[9]

Endnotes

1. N.Y. Gen. Mun. Law §§ 800(4) (excluding New York City from the definition of "municipality" for Article 18 purposes), 810(1) (defining "political subdivision" for financial disclosure purposes to include New York City).
2. *See* Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, Footnotes, Winter 1996, at 5 (County Lawyers' Association of the State of New York); *Final Report of the Temporary State Commission on Local Government Ethics*, 21 Fordham Urban Law Journal 1 (1993); Mark Davies, *New Municipal Ethics Law Proposed*, 5 Municipal Lawyer, March/April 1991, at 1.
3. In regard to adopting a local conflicts of interest law or resolution, see Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 in Ethics in Government—The Public Trust: A Two-Way Street (NYSBA 2002); Mark Davies, *Empowering County Ethics Boards*, Footnotes, Spring 1999, at 11 (County Lawyers' Association of the State of New York); Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 Fordham Urban Law Journal 61 (1993); Mark Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in Ethical Standards in the Public Sector (American Bar Association 1999); Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in Government Ethics and Law Enforcement: Toward Global Guidelines (Praeger 2000).
4. *See also* 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) (a comprehensive review of Article 18 that remains up to date); Mark Davies, *Ethics Laws for Municipal Officials Outside New York City*, in 1 NYSBA Government, Law and Policy Journal, Fall 1999, at 44; Steven G. Leventhal, *Running a Local Municipal Ethics Board: Tips for Drafting Advisory Opinions*, Talk of the Towns & Topics, May/June 2004; Mark Davies, *Working Rules on Ethics for Zoning Boards of Appeals*, Talk of the Towns & Topics, March/April 1996, at 28 and *An Ethics Checklist for Zoning Board Members*, Talk of the Towns & Topics, May/June 1996, at 23. Since 2003 the *Municipal Lawyer* has published a regular column on municipal conflicts of interest, including columns on, for example, compatibility of office, inspectors general, enforcement, New York City's conflicts of interest law, establishment of a conflicts of interest training program, and ethical considerations for town attorneys.
5. N.Y. Gen. Mun. Law § 800(4).
6. N.Y. Gen. Mun. Law § 800(5); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 603(9).
7. Op. Atty. Gen. (Inf.) No. 2002-11 (citation omitted.)
8. *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); *see* James D. Cole, *Compatibility of Office*, 18 Municipal Lawyer, Summer 2004, at 19.
9. Mark Davies, *The 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Change*, 11 Pace Law Review 243 (1991) (the Financial Disclosure Law, as interpreted by the former State agency responsible for administering it); Mark Davies, *New Financial Disclosure Law Becomes Effective January First*, CityLaw, January/February 2004, at 1 (review of changes to New York City's financial disclosure law, including discussion of Article 18's financial disclosure requirements).

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Basic Training: Guidelines for Municipal Employers

By Deb Volberg Pagnotta

> "Training is everything. The peach was once a bitter almond; cauliflower is nothing but cabbage with a college education."[1]

Municipalities serve in dual roles: governmental entities and employers. This writer will not bore you with the statistics on the exponentially increasing litigation against municipalities in their roles as employers. That said, every municipal worker should be trained not only in the substance of their jobs, but also on their responsibilities for complying with harassment, discrimination, and other employment laws. Why? First, government employees need accurate and practical information to comply with the complex web of federal, state and local employment laws. Second, municipalities will save money, time and other tangible and intangible resources by reducing the number of employment law claims with the attendant costs of investigating, litigating, and resolving those claims. Third, recent court decisions, federal guidelines, and state laws make it essential that you provide employees training on certain employment laws. Providing such training not only ensures that you are in statutory compliance, but may help you to avoid punitive damages in employee lawsuits and assert a defense to harassment and even some criminal charges. Following is a discussion of frequently asked questions about training.

Who Should Be Trained?

Your entire workforce should be trained. This includes top-level managers and supervisors, mid-management, rank-and-file employees, interns and even volunteers. For some trainings, it is preferable to train management first: Not only does this send a powerful message to the troops that the employer takes this very seriously, but there may be issues specific to management. For example, managers should be separately trained on their express responsibilities regarding the prevention and response to discriminatory and harassing behavior, leave policies, and wage and overtime issues. Other issues, such as ethics, may be addressed concurrently organization-wide.

When Should Employees Be Trained?

Obviously, the frequency of training depends upon the type and scope of training, the size of the workforce, the employer's budget and the specific needs of the organization. The primary goal of training is to *educate* the workforce, thereby reducing the occurrence of inappropriate or otherwise illegal behavior. Ensure that new employees are trained as soon as practicable. If fiscally possible, provide annual trainings to the full workforce: employees should be kept abreast of changes in the laws, their application and interpretation. Assuming a full-scale initial training is provided, it may be enough to provide much shorter follow-up sessions. If, however, you have significant employee turnover, it would be prudent to provide full annual trainings to new employees.

Where Should the Trainings Be Conducted?

Efficiency militates in favor of on-site training, if you have the space available. Employees attending the training may be swiftly withdrawn from the class if needed to deal with work-related issues and returned if possible. This also keeps costs lower. However, allowing employees to wander in and out of the trainings at will certainly undercuts the credibility and utility of the program. Off-site training may send a stronger positive message concerning the seriousness of the topics and the employer's commitment. It may also allow the employees to focus on the issues at hand without constant interruption by work demands. Finally, it may also be a way to ensure that the less enthusiastic employees actually attend the programs and do not find pressing excuses to avoid attendance.

Should the Trainings Be Mandatory?

Yes. In reality, if employees are told they may "voluntarily" attend trainings, frequently employees will be reluctant to take the time from a very busy day to attend. Other employees are just viscerally hostile to the very idea of the trainings, believing that the laws are frivolous, irrelevant or already fully understood. Some of the employment issues are indeed sensitive and the concept of public discussion of such issues may alarm some individuals. Labeling

the trainings as mandatory—and actually requiring attendance—not only publicly affirms the commitment of the employer to compliance, but also aids in minimizing potential legal exposure.

Who Should Conduct the Trainings?

In-house Personnel. Your own human resources personnel may conduct the trainings. One upside is cost: presumably that trainer is on your payroll anyway and would not require additional compensation for simply doing their job. Another upside is that the trainer would have detailed familiarity with your organization and a good understanding of the issues particularly significant and relevant to your workforce. The downside is two-fold: First, familiarity breeds contempt, and your workforce may not accord your in-house trainer any particular respect; second, the trainer should have legitimate expertise in the areas being taught, and a benefits-and-compensation human resources generalist may have neither the requisite substantive knowledge on employment laws, nor necessarily any teaching aptitude.

Outside Trainers. The exponential growth in employment-related litigation has fueled a similar growth in companies and individuals who provide training on employment-related issues, both in-class and on-line. (Full disclosure mandates telling you that this writer is the principal of Interfacet, Inc., an organization that provides in-class training.) On-line training may be an option, particularly for larger workforces. It should provide a measure of consistency, individualized documentation that the training actually took place, and flexibility in scheduling of the training. However, on-line training may lack the opportunity for personal engagement and real focus provided by the best in-class trainers. Employees easily may complete an on-line training but fail to genuinely understand and incorporate the concepts into their actions. The best in-class trainings do provide that extra measure. When choosing the trainer, do your homework. Check references: When and where have the trainers previously trained this type or size of workforce? What are the trainers' backgrounds? Are they truly knowledgeable in the subject or simply training from a scripted PowerPoint presentation or a single "train-the-trainers" session? Ask if you can observe them at another training. Request a proposed, detailed agenda. Ascertain any potential hidden costs, such as travel or materials. Make sure the trainings are tailored to your organization: A "cookie-cutter" training may do more harm than good. Finally, you may always negotiate on price and scheduling.

How Big Should the Classes Be?

Size of class. For in-class trainings, given the constraints of time and money, try to limit the size of classes to 30 attendees and under, if possible. In practice, group dynamics may change in profound ways based on group size. Interestingly, individual employees who are resentful of having to take the workshop typically act more hostile in a larger group, particularly if they have a group of "silent supporters." In a smaller group, that individual is held accountable for his or her comments and a good trainer will be able to at least partially defuse hostility by personalizing the training and making it meaningful to each attendee. In larger groups, attendees tend to pay less attention, as they feel the presenter will pay less attention to *them*.

On What Subjects Should Municipal Employees Be Trained?

Discrimination and Harassment Prevention

Myriad federal, state and local laws prohibit employers—private and public—from taking adverse action against employees based on a laundry list of "protected characteristics." In New York State alone, based on federal and state law, this list includes: age, alienage/citizenship, arrest/conviction record, carrier status, color, creed, disability, genetic predisposition, marital status, military status, national origin, race, religion, sex and sexual orientation. But some local governments extend the protections even further. The Westchester County Human Rights Law includes "ethnicity" and "familial status" as protected characteristics. The New York City Human Rights Law also covers gender and gender identity,[2] and status as victim of domestic violence, stalking and sex offenses. As social and political winds change, the lists continue to grow: in Washington, D.C., for example, matriculation, personal appearance, family responsibilities, smoking and political affiliation are all protected characteristics under local law; in Michigan, weight is protected.

The Supreme Court, the federal Equal Employment Opportunity Commission (EEOC) and lower courts have made it crystal clear that to avoid liability for discrimination, employers should not simply hand out anti-discrimination/harassment policies but must actually provide training to each employee on how to prevent and avoid employment discrimination, sexual harassment and other forms of workplace harassment.[3] After a decade of confusion over harassment issues, in 1998, the Supreme Court, in companion cases, *Faragher v. City of Boca Raton*[4] and

Burlington Industries, Inc. v. Ellerth[5] crafted a new standard for vicarious employer liability for sexual harassment: Employers are strictly liable for the tangible acts of supervisors in violation of Title VII. Under *Faragher/Ellerth*, employers may avoid liability only by proving that (a) they have taken adequate steps to "prevent" and "correct" inappropriate behavior and (b) that the complaining employees unreasonably failed to utilize internal grievance mechanisms.[6]

Following up in *Kolstad v. American Dental Association*,[7] the Supreme Court held that employers who could demonstrate they had made "good-faith" compliance efforts could escape vicarious liability for punitive damages even though their managers had taken adverse and discriminatory actions in violation of company policies. Since then, courts widely have interpreted the "prevention" piece of the *Faragher/Ellerth* affirmative defense and the "good-faith" compliance efforts under *Kolstad* as requiring not only the development and dissemination of anti-discrimination/harassment policies but *training* the workforce (general and supervisory) to those policies. This applies broadly not only to gender-based discrimination and harassment, but to discrimination based on race, age, disability and other "protected characteristics."[8]

General anti-discrimination training should provide an understanding of the overarching laws and their rationales; the scope of discriminatory behaviors (including harassment as a form of discrimination); what constitutes inappropriate behavior, whether visual, verbal, written or physical; how to determine if behavior is acceptable; why intent is irrelevant in perception of harassment; how to assess the "totality of the circumstances"; how to avoid communication which may inadvertently offend; the consequences of false claims; and the prohibition against retaliation. In addition, managers and supervisors should be trained on their specific responsibilities in identifying, preventing and responding to allegations of discrimination.

Workplace Ethics

Following widespread and widely publicized allegations of fraud and corruption in the private sector, "ethics" litigation soon may be called the discrimination litigation of the "00" decade. That trend will not be limited to private employers. As this article goes to press, on July 18, 2005, U.S. Attorney General Patrick J. Fitzgerald, expanding an investigation into corruption at City Hall in Chicago, announced that two city officials were charged with rigging hirings to get around a court-ordered ban on political patronage abuses. The officials stand accused of participating in a plot that included sham interviews and the falsification of interview scores to ensure that well-connected applicants got jobs.

Since 1991, federal sentencing guidelines have offered a reduced sentence to organizations, including municipalities, convicted of a federal crime if that entity can demonstrate that notwithstanding the violation, it had an "effective" compliance program in place (provided that a high-level employee was not involved in the crime). Effective November 1, 2004, the United States Sentencing Commission changed the definition of an "effective" program from one that provides due diligence to prevent and detect criminal violations, to one that also must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[9] Commentary to the Guidelines specifically notes that "Section 8B2.1(b)(4) makes compliance and ethics training a requirement, and specifically extends the training requirement to . . . all the organization's employees."[10]

Clearly, simply providing employees an ethics policy or code of conduct is not enough. "Small" organizations (fewer than 200 employees) may provide training through informal meetings with staff members to communicate the employer's compliance and ethics program, but organizations with 200 or more employees should provide more *formally planned and implemented* training programs. Moreover, this communication and training obligation is ongoing, requiring "periodic" updates.[11]

The periodic training should cover (at a minimum and depending on the target employees): impartiality in performing official duties; misuse of position; representation to courts and other agencies; confidential information; conflicts of financial and political interest; need for financial disclosure; proper accounting; organizational property; gifts and favors between employees and from outside sources; honoraria; seeking other employment; concurrent outside employment; supplementation of salary; reporting misconduct; and post-employment activities.

Such training not only protects the employer and employees against criminal liability, but visibly enhances the actual and perceived ethical profile of the government worker, who all too often is unfairly suspected of graft, corruption and dishonesty. It articulates guidelines for new employees who might not be familiar with some ethical issues specific to the public sector; reinforces the good habits of long-time public servants; provides a "common playing field" for employees on which to understand their obligations; and discourages behavior which, although previously tolerated, may no longer be acceptable in the post-Enron world.

Cultural Diversity and Communication

Evolving diversity at the workplace and in the general population leads to much greater possibility of miscommunication (and litigation) amongst employees and with their "customers." Most of the anti-discrimination laws apply not only to the workplace but to places of public accommodation, which in many circumstances would include government offices or government-operated locations, e.g., a public amusement park, a consumer complaint bureau which welcomes residents in or a town library. For example, in a local public library, users, based on differing backgrounds, may assume the librarians will obtain the requested books and wait passively for that service to the astonishment or frustration of the staff who prefer the users do it themselves. Other users may choose to leave young children in the library, not realizing the library staff is not able to provide child care. Still other users, seeking to show respect, may avoid eye contact with the librarian when asking a question and inadvertently annoy that staff member. A librarian, trying to be user-friendly, may diminutize or mispronounce names, unintentionally showing disrespect to the user.

A workforce educated in the ways in which cultural diversity affects perceptions and communications will be far less likely to engage in inappropriate behavior. Employees should learn to: understand the relationship between culture, language and communication styles; identify their own communication styles and workplace problems that arise from miscommunications; and develop active listening and speaking skills to improve communication and understanding.

Drug-free and Violence-free Workplace

Did you know that 9.4 million illicit drug users work? That an estimated 6.5 percent of full-time and 8.6 percent of part-time workers are current illicit drug users? That an estimated 6.2 percent of adults working full time are heavy drinkers? That alcoholism is estimated to cause 500 million lost workdays annually? That current illicit drug users and heavy alcohol users are more than twice as likely to have skipped one or more work days in the past month than their co-workers?[12]

The costs of drug use at the workplace are astounding: dramatically lowered productivity, lost wages, increased medical and security costs. The federal Drug-Free Workplace Act of 1988 *requires* some federal contractors and all federal grantees to establish a program to educate their employees on the dangers of drug abuse at the workplace, and the availability of counseling, rehabilitation and EAP programs. In fact, *all* prudent employers should provide such training.

Workplace violence also contributes significantly to workplace costs. According to the U.S. Department of Justice, Bureau of Justice Statistics, from 1993 through 1999, in the United States, an average of 900 workers were murdered and 1,700,000 were assaulted annually while at work or on duty. Government employees are at particular risk: they had higher violent victimization rates (28.6 per 1,000 workers) than employees of private companies (9.9 per 1,000 workers) or the self-employed (7.4 per 1,000).[13] Rates of workplace violence may be lowered by effective policies and training.[14] A policy by itself is not enough. Training should educate and train employees on how to recognize, report, avoid, defuse if possible, and respond to violent behavior and its early warning signs.

Supervisory Skills

Many supervisors are promoted because they did a fine job in their rank-and-file positions. But making good widgets does not automatically mean a supervisor knows how to be an effective supervisor. Yet supervisory skills are critical—failure may not only hurt morale and performance, but violate internal policies and statute, increasing potential employer liability for supervisory acts or omissions (discrimination, wrongful termination, retaliation, due process and other employee lawsuits). Such training should include how to: conduct lawful interviews; prepare and deliver useful performance evaluations; administer progressive discipline and work with difficult employees; prepare documentation critical to positive and adverse employment actions; terminate employees whether due to disciplinary issues, reductions in force or other lay-offs; and how to respond to requests for references, post-employment.

Leave Issues

Many supervisors have little idea how their employers' own sick and vacation leave policies, the Family and Medical Leave Act (FMLA), the Americans With Disabilities Act (and its state corollary), Workers' Compensation law and disability insurance benefits operate, either singly or together. Consequently and all too frequently, these benefits and rights are misunderstood and misadministered, resulting in inconsistent or plain wrong applications, angry and frustrated employees and legal claims.

The FMLA requires covered employers to provide eligible employees up to 12 weeks of unpaid leave for certain medical reasons. FMLA's regulations also contain strict guidelines on how employers

should document and track FMLA requests. The ADA does not provide specific leave rights but, in addition to prohibiting employers from discriminating against otherwise qualified employees on the basis of disability, it requires employers to make "reasonable accommodations" to assist employees in performing their jobs. Such accommodation may include leave time, depending on the always fact-specific analysis. Workers' Compensation laws are designed to compensate employees injured at work, insulating the employer against personal injury liability. Finally, employees may be entitled to receive wage-replacement disability insurance benefits if they become temporarily or permanently disabled while employed. Training should clarify employer and employee obligations under each law, explain the interactions among the laws, and provide a procedural flow chart to ensure supervisors meet their obligations timely and in order.

Overtime and Wage Violations

The Fair Labor Standards Act (the FLSA), enacted in 1938, establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. In 1976 the Supreme Court declared FLSA coverage for public sector employers unconstitutional in "areas of traditional governmental functions."[15] However, less than ten years later, the Court reversed itself, finding such a distinction unworkable.[16] Although in 1999 the Supreme Court subsequently held that Congress lacked the authority under the 11th Amendment, when it enacted the FLSA, to waive a *state's* sovereign immunity from being sued in court by individuals, *local* governments appear still to be covered employers under that law.[17]

Wage and hour claims are proliferataing, rapidly overtaking discrimination and harassment charges. Municipal employers may face civil enforcement actions privately initiated by one or more employees, as well as by the U.S. Department of Labor, for any FLSA violations. In addition, the U.S. Justice Department may initiate criminal prosecutions against municipal officials who commit willful violations of the FLSA, and the Department of Labor may sue to collect civil monetary penalties.

Supervisors and managers need to know how to lawfully assign employee work hours and ensure that employees are paid properly. Training should include the Fair Labor Standards Act, classification of employees, how wages and overtime pay are calculated, determination of hours worked, meals and rest periods, compensatory time, record keeping, how to respond to a wage and hour investigation, and what constitutes violations of the FLSA.

Conclusion

It may seem daunting, even counter-intuitive, to train your workforce on so many issues. In practice, however, both employers and employees benefit greatly from education: better morale, greater productivity, and decrease in litigation risks. In the vernacular, don't be penny-wise, pound-foolish. Invest first in training, not in litigation.

Endnotes

1. Mark Twain, *Pudd'nhead Wilson,* 1894.
2. "Gender identity" is defined by the New York City Commission on Human Rights as "an individual's sense of being either male or female, man or woman, or something other or in-between." Guidelines Regarding "Gender Identity" Discrimination, A Form of Gender Discrimination Prohibited by The New York City Human Rights Law.
3. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002, June 18, 1999; *available at* http://www.eeoc.gov/policy/docs/harassment.html#VC2).
4. 524 U.S. 775 (1998).
5. 524 U.S. 742 (1998).
6. The Supreme Court in "*Faragher/Ellerth*" established a new legal standard for determining whether employers would be held liable for sexual harassment perpetrated by their supervisors. The Supreme Court articulated two separate branches of analysis depending on whether the supervisor's conduct involved a "tangible" or "intangible" employment action. If a supervisor committed a tangible employment action, such as discharge, demotion, or failure to promote, the employer would be *strictly* liable and have no defense. Where supervisors took no tangible employment action but rather created a sexually hostile work environment, the employer would be liable unless it proved a two-part affirmative defense: that it took reasonable steps to **prevent** workplace harassment and **correct** problems and that the plaintiff unreasonably failed to use the employer's preventive measures to allow the employer to correct the problem.
7. 527 U.S. 426 (1999).
8. For example, in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.* 188 F.3d 278 (5th Cir. 1999), Wal-Mart was held liable for punitive damages for failing to properly train its workforce, most importantly its supervisors, about Title VII and the Americans With Disabilities Act. In *EEOC v. Wal-Mart Stores, Inc.,* F.3d 1241 (10th Cir. 1999), after evidence showed that Wal-Mart had failed to train its supervisors or even its personnel officer on the ADA and reasonable accommodation requirements, the Tenth Circuit held that while the adoption of an anti-discrimination policy was important in deciding whether to insulate an employer from vicarious punitive damages liability, "that alone is not enough." *See Mathis v. Phillips Chevrolet, Inc.* 269 F.3d 771 (7th Cir. 2001), in which the court ruled that an employer's failure to train supervisors how to avoid discrimination amounted to "reckless indifference" such that punitive damages should be awarded. *See also MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923 (8th Cir. 2004).

9. United States Sentencing Guidelines § 8B2.1.
10. *Available at* http://www.ussc.gov/2004guid/2004cong.pdf.
11. USSG § 8B2.1(b).
12. *Available at* http://www.dol.gov/asp/programs/drugs/workingpartners/stats.
13. As measured by the Bureau of Justice Statistics' Nation Crime Victimization Survey, for the period 1993–1999, police officers experienced such crimes at the highest rate of all workers (260.8 per 1,000 police officers); correction officers (155.7 per 1,000); mental health custodians (69.0); special education teachers (68.4); junior high school teachers (54.2); bus drivers (38.2); high school teachers (38.1). It is reported that the risk of workplace violence is related to a matrix of factors, many of which apply to municipal employees, including routine face-to-face contact with large numbers of people, dealing with the public, the handling of money, jobs that require routine travel or do not have a single work site. Duhart, Detis, "National Crime Victimization Survey: Violence in the Workplace, 1993 – 1999," U.S. Department of Justice, Bureau of Justice Statistics (*Available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vwoo.pdf).
14. *Available at* http://ohp.nasa.gov/conference_info/2005/ohconf/post/wed_nicogos.pdf.
15. *National League of Cities v. Usery,* 426 U.S. 833 (1976).
16. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).
17. *Alden v. Maine*, 527 U.S. 706 (1999). *See Alston v. State of New York*, 97 N.Y.2d 159, 162, 737 N.Y.S.2d 45, 47 (2001), wherein the New York State Court of Appeals approvingly cited *Alden v. Maine* but noted that "unlike states, municipal corporations . . . are not entitled to sovereign immunity [citations omitted]."

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Local Law Procedures

By Ian G. MacDonald

With the enactment of the New York State Municipal Home Rule Law (MHRL) in 1963, the New York State Legislature consolidated and streamlined provisions from the County Law, General City Law, Town Law and Village Law and thereby equipped municipalities with a tool to enact local laws and exercise home rule powers in an efficient and effective manner.

The procedures for enactment of local laws are contained in Article 3 of MHRL and are exclusive. These procedures may not be varied or amended except as specifically stated and then only by following the law to the letter.[1]

The reader will note that this writer is a former county attorney in a charter form of government with an elected chief executive officer. While an attempt has been made to distinguish between the two basic forms of government and the procedures appertaining thereto throughout, it behooves the careful practitioner to identify the category of the municipal client. The key factor in each instance is whether the officer such as the county executive, chairman of a board of supervisors, the supervisor of a town or the mayor of a city or village is vested with the power to approve or veto local laws or ordinances.[2]

Introduction of Local Laws

All local laws may be introduced in one of two ways. The first and most familiar is introduction by a member of the municipality's governing board at a regular or special meeting.[3] This is usually accomplished by delivery of copies to each member at the meeting and an announcement by the clerk that the local law has been introduced. The statute authorizes an alternate method of introduction with the following language: ". . . or as may be otherwise prescribed by the rules of procedure of the legislative body."[4] The statute is silent as to exactly what that procedure might be. A delivery service, such as the U.S. Mail or a nationally recognized overnight courier, is a likely alternative and less subject to challenge. If the governmental body maintains mail "slots" for its legislators, then placement there is a possibility, but more subject to challenge. The method used must be such that it will provide adequate notice to all members in a timely fashion, particularly minority party members. In addition, provision should be made for notice to the media to insure that the public is on notice of its introduction. Introduction at a public meeting is actual notice to persons attending the meeting and constructive notice to the public at large.

The local law must be in final form on the desks of the legislators at least seven days prior to enactment, or if mailed in final form to the members at least ten days prior to enactment.[5]

This mailing procedure is separate from that of introduction and requires some interpretation. In a forum such as a county legislature or board of supervisors, a committee may make substantive amendments after introduction. This is a generalization. Some legislative bodies have rules of procedure that are more flexible than others. In some municipalities, amendments can only be made by the full legislative body. If amendments can be made in committee, the question then is whether the law must be "laid on the desks" at the next meeting of the full body, or simply mailed to all of the members after the committee's amendment(s). In the case of municipal bodies meeting only once a month, the former procedure can result in a delay as long as two months which can be critical when dealing with time-sensitive matters such as senior citizen tax exemptions or the like. Use of the mailing option will eliminate this problem.

If the law may be introduced by mail in accordance with the legislative body's procedural rules, it would follow that those rules could also provide for mailing after a committee's amendments. Final enactment will still be restricted by the ten-day rule, but the necessity to have it "lay on the desks" in final form at a meeting of the full body will be eliminated and much time will be saved.

No matter which method is used, it is important to note that Sunday must be excluded in computing the seven- or ten-day requirement.[6]

Certificate of Necessity

A certificate of necessity procedure can also be used to save time.[7] It permits enactment the same

day the local law is introduced. It requires a two-thirds vote of the entire legislative body for enactment. This can at times be difficult and is used in cases where there is little or no controversy.

The procedure is simple, but with a caveat. The statute lists the officers who can make the certification and covers every municipal body.[8] The certification states the need for the law's immediate passage and enables the legislative body to act without any further delay, but only by a two-thirds vote of its total membership. The caveat is for those entities not having an elective chief executive officer as defined by Subdivision 4 of Section 2 of the MHRL. In those instances, there is still the need for a public hearing before the legislative body prior to the enactment of the law.[9] It can be held the same day as the enactment, but must satisfy all the requirements of the statute for setting and holding a public hearing such as five days' notice by publication. The date, time and place of the public hearing must be set by the legislative body. This will require an additional meeting for the hearing and vote. With the proper attention, it can be accomplished in a relatively short period of time provided it is given a high level of attention. There is very little room for error. One misstep (such as improper notice) could possibly cause time delays greater than by following the normal procedure.

Public Hearing

One of the interesting anomalies of local law enactment procedures deals with the conduct of public hearings. Governmental entities without an elected chief executive officer conduct a public hearing prior to enactment of the local law.[10] Governmental entities with an elected chief executive officer enact the local law prior to a public hearing.[11] After enactment, the law is delivered to the executive who then must conduct a public hearing and must do so within 20 days of receipt of the law.[12] The executive has 30 days from receipt of the law within which to approve, disapprove or return it unsigned.[13] Failure of the executive to act within the 30-day period is the same as an approval.[14] The legislative body may recall the law from the executive anytime within the 30-day period prior to action by the executive.[15]

The notice provisions are identical for both the legislative body and the elected chief executive officer. That means five days pursuant to Section 20, or three days if the governmental entity has enacted a local law providing for that number and in the enactment of that local law, a public hearing was conducted on five days' notice.[16] Although the statute doesn't say, publication in a newspaper of general circulation in the community is the accepted procedure.[17] Failure to meet the five- or three-day notice requirement is fatal.[18] One important thing to note is that unlike the seven- and ten-day rule for final adoption, Sundays may be included in the computation.

The notice must contain the important elements of date, time and place as well as a brief description of the local law. Basically, the notice must be sufficiently descriptive to apprise the public of the content of the law.[19]

The public hearing, whether before the legislative body or the executive, can be conducted in the same manner as other public hearings. At a minimum, a record should be made of those appearing and an abstract of the comments made. A backup tape recorder is also helpful. In instances where the substance is highly controversial, a public stenographer can be used, but it is an expense and not required.

The public hearing before the elected chief executive officer is on the same notice and conducted in the same manner as before the legislative body, with one major exception. It is usually conducted in the office or conference room of the executive and gets very little attention either from the public or the press, except where there is some controversy. The public hearing conducted by the legislative body is at a public meeting and is therefore more likely to attract public participation, although it is common to see little or no participation in most matters.

Permissive Referendum

Section 24 of the MHRL lists the substantive legislative actions that permit referendum on petition. If this is the case, then the local law will not take effect until 45 days have elapsed from the date of its adoption, or unless approved by the affirmative vote of a majority of the qualified electors of the local government voting on a proposition for its approval if a petition is filed requesting such a vote. The text of the local law should contain a statement that it is subject to permissive referendum. In addition, a notice should be published with the date of adoption and a statement to the effect that it will take effect unless a permissive referendum petition containing the requisite signatures is filed with the clerk within 45 days of its adoption. A brief summary of the law should be included, and, in the case of counties operating under Section 214(b) of the County Law, a full text of the local law. The petition may be made upon separate sheets and signed and authenticated in the manner provided by the Election Law,[20] with names

totaling at least 10 percent of the total number of votes cast for governor in the last gubernatorial election within such local government's boundaries.[21] The term "qualified electors" means those persons registered and qualified to vote at a general or special election.

Village attorneys should be aware of Article 9 of the Village Law which provides that a local law passed subject to referendum on petition shall be conducted as a permissive referendum in accordance with that article. Compliance with that article is deemed compliance with MHRL.[22]

Where a local law is subject to permissive referendum, the legislative body may at its option elect to submit it to the voters on its own motion. The procedures that follow enactment are the same as with mandatory referendum.

Mandatory Referendum

Section 23 of the MHRL lists the instances where local laws are subject to mandatory referendum. The examples are all listed and include adoption of a new charter by a city and the change of the veto power of an elected chief executive officer. The State Legislature in creating the list of actions that trigger a mandatory referendum made a determination that those actions have a greater impact than those listed under permissive referendum.

Proposition Preparation and Submission

Where the local law is to be submitted to the voters, whether as the result of a permissive referendum petition, mandatory referendum or at the option of the legislative body, the procedure is the same. The clerk, with the assistance of the county attorney, city attorney, town or village attorney respectively, must prepare the proposition and then submit it to the Board of Elections for placement on the ballot. The proposition is worded in the form of a question and though brief enough to place on a ballot or in a voting machine should apprise the voter of its content.[23] Publication of the notice and preparation of all election materials and the conduct of the election are all the responsibility of the Board of Elections.[24]

The proposition can be submitted at a general or special election, which must be held no earlier than 60 days after the enactment of the law being submitted. If the general election is less than 60 days after enactment of the law, a special election must be held. In a municipality the size of a county, a special election can be expensive and that factor should be considered and balanced against the importance of the law.

Withdrawal

The legislative body may rescind its action in two instances: 1) withdrawal of the law from the elected chief executive officer before approval and 2) withdrawal of the proposition before its submission to the voters. In the former, the legislative body may recall the law and then reconsider it, presumably to repeal it.[25] In the latter instance, the legislative body may reconsider and repeal the law provided it is done at least 15 days prior to the date of the vote.[26] While MHRL provides for this, it almost never happens.

Filing

All local laws must be filed in the Office of the Secretary of State within 20 days of their adoption before they will become effective. In addition, they must also be filed in the office of the clerk of the municipality and, in the case of counties, in the county clerk's office, all within the same time frame. Failure to file within the 20-day period is directory only and is not fatal.[27] In any event, the law will not be effective until so filed.[28] Where the local law is subject to mandatory referendum, it may not be filed with the Secretary of State until approved by the voters. If subject to permissive referendum, it may not be filed until the time has elapsed for filing of petitions.[29]

The full text of the local law must be filed without any brackets, italics, underscoring or lines running through any of the text. The municipal attorney must certify that the text is correct and of full procedural compliance.[30]

County attorneys should be aware of the publication requirements of County Law Section 214, Subdivision 2, which requires publication of the full text of any law that is adopted in the official newspapers designated by the legislative body, the first publication being within ten days of its effective date. If the adoption of the law is subject to permissive referendum, the first publication must be within ten days of its adoption. In all cases, the publication must appear in the official papers once a week for two successive weeks. A county, either in its charter or by separate local law, may vary this requirement or supersede it altogether and rely solely on the procedures in the MHRL.[31]

Endnotes

1. *Pillion v. Magee*, 175 Misc. 698, 25 N.Y.S.2d 82 (Sup. Ct., Erie Co. 1941).
2. MHRL § 2(4).
3. MHRL § 20(4).

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. MHRL § 20(5).
10. *Id.*
11. *Id.*
12. *Id.*
13. MHRL § 21.
14. *Id.*
15. *Id.*
16. MHRL § 20(5).
17. *See 41 Kew Gardens Road Associates v. Tyburski*, 124 A.D.2d 553, 507 N.Y.S.2d 698 (2d Dep't 1986).
18. *Mantello v. City of Troy*, 172 Misc. 2d 664, 656 N.Y.S. 2d 826 (Sup. Ct., Rensselaer Co. 1997).
19. Op. NY St. Cptr. 65-733.
20. MHRL § 24 (1)(a).
21. MHRL § 24 (1)(b).
22. *Id.*
23. MHRL § 25.
24. *Id.*
25. MHRL § 26.
26. *Id.*
27. MHRL § 27(1).
28. *Id.*
29. *Id.*
30. MHRL § 27(2).
31. MHRL § 27; Op. Atty. Gen. (Inf.) No. 97-12.

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