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A Message from the Chair

Patricia Salkin

What a great Annual Meeting in January! Special thanks to Linda Kingsley and Jennifer Siegel McNamara for putting together a wonderful CLE program full of terrific and practical information for all Section members. The panels, which addressed topics from emergency preparedness to new developments in labor law and a hot topics program on municipal inspectors general, RLUIPA and building codes and green development, all left attendees with great takeaway tips and ideas. The discussion on consolidation of municipalities offered a critique and cautions about the recently enacted changes in the law in New York, and the ethics panel was once again provocative and timely. Perhaps the highlight of the day was a session with attorney-actor Matthew Arkin, who helped those present hone their courtroom/meeting presentation skills. Even those who were skeptical at the start raved about this session. The program also featured a number of first time presenters for our Section, something we hope to continue in the coming year.

The biggest change for our Section came with the approval of a report from the Nominating Committee, filling the new seats created by a recent change in our Section bylaws to expand the Executive Committee. Welcome to the following new members: Lisa Bova-Hiatt, who is the deputy chief in charge of condemnation in the Tax and Bankruptcy Litigation Division of the New York City Law Department; Lisa M. Cobb, who is associated with the law firm of Vergilis, Stenger, Roberts, Davis & Diamond, LLP in Wappingers Falls, New York, where she practices primarily in the areas of appellate law, municipal law and litigation; Michael E. Kenneally, Jr., who is associate counsel at the Association of Towns of the State of New York; Steven Leventhal, who is also a CPA and a member of the Roslyn general practice firm of Leventhal and Sliney, LLP; Bernis Nelson, who was recently appointed city attorney for the City of Newburgh; Natasha Phillip, who is an attorney with the Department of State in the office of Local Government Services; Daniel Spitzer, a partner at Hodgson Russ LLP in the Buffalo, New York office whose practice concentrates on a variety of issues involving environmental law, renewable energy, sustainable

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development, land use law, municipal law, and real estate development; and Robert A. Spolzino, who rejoined Wilson Elser Moskowitz Edelman & Dicker, LLP in White Plains, New York after eight years as Justice of the New York State Supreme Court, the last five of which were spent as a Justice of the Appellate Division. In addition, current Executive Committee Members Thomas Jones, Town Attorney for Amherst, and Carol Van Scoyoc, First Deputy Corporation Counsel of the City of White Plains, were re-elected to another term.

This year the Executive Committee will focus energy on building our subcommittee infrastructure. We have discovered that many of you are not aware that you can join a substantive subcommittee and get involved with helping to plan CLE programs, writing for the Section journal and other publications, working on the Section Web site (maybe even helping to launch a blog), and getting involved with other Section activities. If you would like to join one of our subcommittees, please send an e-mail to our Section Administrator, Linda Castilla (lcastilla@nysba.org), and we will connect you with the Committee Chair. As a reminder, our Committees are: ethics and professionalism, employment relations, municipal finance and economic development, land use and environmental, green development, legislation, technology, and membership.

Are you and your associates admitted to the U.S. Supreme Court? If not, consider joining our October 2010 group admission ceremony that will coincide with our Fall meeting in Washington, DC. Program Co-chairs Sharon Berlin and Steve Leventhal are already working hard to put together a memorable CLE program. We are limited to 50 seats at the U.S. Supreme Court for the admission ceremony (although we would love to see 150 Section members attend the full Fall meeting). The sign-up will be first come, first served. By the conclusion of the Annual Meeting in New York City, more than half of the 50 seats were already spoken for. If you would like to get on the list, please contact Linda Castilla at lcastilla@nysba.org so that you receive the packet of forms to be completed. This is a special and unique opportunity and I urge you to take advantage of the opportunity.

I look forward to seeing you at upcoming Committee and Section meetings and programs. In the meantime, please feel free to contact me if you have questions, ideas and suggestions (psalk@albanylaw.edu).

Patricia E. Salkin

From the Editor

Municipal officials are often confronted with difficult decisions whether to demolish a fire-damaged building that poses an imminent threat to public health, safety and welfare, and, if so, whether prior notice and a hearing must be provided to the property owner before the demolition is carried out. A recent decision by the United States Court of Appeals for the Second Circuit clarifies the standard for reviewing such municipal determinations in the face of federal constitutional challenges.[1]

In the early morning hours of June 6, 2006, fire badly damaged an old hotel located downtown in the Village of Rouses Point, New York. The roof and top floors were completely destroyed and debris hung off the façade of the hotel. The adjoining road, State Route 11, was closed because of the building's instability and proximity to the street. The building, owned by WWBITV, Inc., a Delaware corporation wholly owned by Susan Clark, was not operated as a hotel but was used to store video equipment.

Ms. Clark arrived at the scene approximately two hours after the fire began and remained there for several hours until the fire was largely extinguished, before returning home. Later that morning, the Village Board of Trustees held a special meeting to discuss the situation. Notice of the meeting was posted at the Village's offices, but Ms. Clark was not personally notified.

At the meeting, the Village Board authorized the Village's fire chief to take the necessary steps to stabilize the building's remains and to insure that the street and sidewalk were safe for public passage. A contractor was hired by the Village to demolish the most heavily damaged portion of the building.

Demolition commenced early that same afternoon. When Clark learned that the hotel was being razed, she rushed back to the hotel, but her efforts to stop the demolition were unsuccessful and the work was completed that day. An undamaged annex to the building was left standing, but several months later, the annex was condemned by the Village and demolished.

Four days after the fire, Susan Clark and her husband sued the Village, the mayor, the code enforcement officer and the Village fire chief in both their official and individual capacities. Asserting claims under 42 U.S.C. § 1983, Plaintiffs alleged that their substantive and procedural due process rights were violated and that the municipality's actions constituted an unlawful seizure under the Fourth Amendment of the U.S. Constitution and an unlawful taking of their property without just compensation under the Fifth Amendment. The District Court dismissed certain of Plaintiffs' federal claims, and declined to exercise jurisdiction over a pendent inverse condemnation state law claim. Subsequently, the District Court granted Defendants' motion for summary judgment dismissing the remaining claims. The Second Circuit affirmed the District Court's rulings.

Plaintiffs' principal claim was that the demolition of the hotel without affording Plaintiffs any form of prior hearing deprived them of property without due process of law in violation of the Fourteenth Amendment. Generally, "due process requires that before state actors deprive a person of her property, they offer her a meaningful opportunity to be heard."[2] However, the Supreme Court has held that "in emergency situations, a state may satisfy the requirements of due process merely by making available 'some meaningful means by which to assess the propriety of the State's action at some time after the initial taking.'"[3]

Here, Plaintiffs argued that this exception did not apply because issues of material fact existed as to whether there was a "genuine emergency and whether a pre-deprivation hearing would have been practicable."[4] The Circuit Court disagreed. Citing its prior decision in *Catanzaro v. Weiden*,[5] the Second Circuit opined that, as here, "where there is competent evidence, allowing [an] official to reasonably believe that an emergency does in fact exist…the discretionary invocation of an emergency procedure results in a constitutional violation only where such invocation is arbitrary or amounts to an abuse of discretion."[6] In evaluating the propriety of municipal action under these circumstances, "an official's belief that the public is in imminent danger must be awarded significant deference."[7]

Here, the hotel's proximity to an important state road required closure of that thoroughfare and damage to the hotel's façade created a danger of falling debris. "In such a situation, no reasonable trier of fact could conclude that the Village officials' decision to take emergency action was arbitrary or abusive."[8] Plaintiffs' allegations that the public could have been adequately protected with less drastic measures, such as boarding up the building or cleaning up the debris, were held to be insufficient to defeat summary judgment. Rather, the Court declined to engage in "hindsight analysis" or to second guess the municipality's means of dealing with an emergency because to do so "would encourage delay and risk increasing the public's exposure to

dangerous conditions."[9] Given the Plaintiffs' failure to produce sufficient evidence that would lead a reasonable trier of fact to conclude that the Village's actions were arbitrary or capricious, summary judgment was properly granted to the Defendants.

In this issue of the *Municipal Lawyer*, Patricia Salkin's "Message from the Chair" reviews the Section's recently concluded Annual Meeting program in New York City, introduces new members of the Executive Committee and previews the Section's upcoming 2010 Fall meeting in Washington, DC.

In their "Land Use Case Law Update," Henry M. Hocherman and Noelle V. Crisalli of Hocherman, Tortorella and Wekstein LLP examine two recent appellate rulings on eminent domain involving the Atlantic Yards project in Brooklyn and the expansion of Columbia University in upper Manhattan.

The Federal Communication Commission's new "Shot Clock" rule is analyzed by Daniel M. Laub of Cuddy & Feder, LLP. Under that rule, state and local authorities reviewing wireless telecommunication applications are required to act within 90 days of the filing of a complete application for a collocation and within 150 days for a new tower.

The New York City Council's approach to ensuring compliance with conflict of interest laws while engaging in the discretionary funding process is the subject of an article by Elizabeth Fine and James Caras, the General Counsel and Deputy General Counsel, respectively, for the New York City Council. Finally, Darrin B. Derosia of the New York State Department of State provides a summary of 2009 New York State legislative enactments and gubernatorial vetoes of interest to local governments.

Lester D. Steinman

Endnotes

1. *WWBITV, Inc. v. Village of Rouses Point*, 589 F.3d 46 (2d Cir. 2009).
2. *Id.* at 50, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).
3. *Id.* at 50, citing *Parratt v. Taylor*, 451 U.S. 527, 539 (1981).
4. *WWBITV, Inc.* at 51.
5. 188 F.3d 56 (2d Cir. 1999).
6. *WWBITV, Inc.* at 51, citing *Catanzaro v. Weiden, supra* note 5, at 63. Compare *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983) holding that in view of a three-month delay between the declaration of emergency and the demolition, there was a genuine dispute as to whether an emergency existed to justify the absence of a pre-demolition hearing.
7. *Id.*
8. *WWBITV, Inc.* at 51.
9. *Id.*

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

After a long drought during which there was little exciting to write about, this quarter brings us two constitutional cases in which the Court of Appeals (on appeal from the Second Department) on the one hand, and the First Department, on the other, address the issue decided in *Kelo v. City of New London*,[1] namely, when and under what circumstance the State may take property from Peter and give it (or sell it, or lease it) to Paul. Both decisions are fascinating on a number of fronts, both are extremely well-written, and their juxtaposition in time is especially interesting in that they reach different results in contexts which are not all that different. Both cases involve the New York State Urban Development Corporation ("UDC") as respondent, doing business as Empire State Development Corporation ("ESDC").[2] Although the different outcomes in the two cases may well be attributed to the stark difference in their factual contexts, one important subtext emerges from the two decisions in the form of a marked difference in the two courts' views on the degree of deference to be accorded the determination of an administrative agency underlying the taking of private property.

In *Goldstein v. New York State Urban Development Corporation*,[3] the Court of Appeals affirmed the Second Department, which upheld a taking of property for development by a private developer of a large mixed-use project (the "Atlantic Yards Project") involving, among other things, a sports arena as well as market-rate and low-income housing. In *Kaur v. New York State Urban Development Corporation*,[4] the First Department annulled a determination by the UDC approving the acquisition of private property in the vicinity of Columbia University for use by the university, a private educational institution, to expand its campus. *Goldstein* explores a taking on very *Kelo*-like facts in the light of the New York State Constitution; *Kaur* is a glaring example of what genuinely bad facts can do. A brief discussion of *Kelo* is in order.

In *Kelo*, the City of New London, relying on a Connecticut statute that expressly authorized the taking of private land (without the requirement that it be "blighted") to foster a broad plan of economic development, had approved an integrated development plan intended to revitalize the City's economy.[5] The City had managed to acquire most of the property within

the redevelopment zone by arm's length purchase from willing buyers and initiated condemnation proceedings when certain property owners within the redevelopment area refused to sell.[6] Without discussing *Kelo* at length, it is sufficient for the purposes of understanding *Goldstein* and *Kaur* that the Supreme Court recognized, in the context of a broad, well-planned, and well-documented economic redevelopment plan, that "public use" as used in the United States Constitution does not necessarily mean public ownership or even unlimited public access, and that economic revitalization is, in and of itself, a sufficient public use to justify a taking, notwithstanding that major portions of the properties to be taken would not be "used" by the public but will end up in private hands.[7]

In *Goldstein*,[8] the Court of Appeals held that UDC properly exercised the power of eminent domain in acquiring private property for incorporation in a "land use improvement project" as that term is defined in the Urban Development Corporation Act ("UDCA")[9] on findings that the area in which the Atlantic Yards project is located is "substandard and unsanitary" or in common parlance "blighted." In *Goldstein*, this question is expressly decided with reference to the New York, and not the Federal, Constitution.

It was not disputed that a portion of the Atlantic Yards Project is and has been a "blighted" area designated by the City of New York as the Atlantic Terminal Urban Renewal Area ("ATURA") since 1968. At issue in the case, however, are properties located to the south of ATURA which lay within the project footprint but which had not been previously designated as "blighted."[10] The developer of the Atlantic Yards Project, Forest City Ratner Companies ("FCRC"),[11] acquired many of the properties within the project area by arm's length purchase. There remained some properties that it was unsuccessful in acquiring, and it was those properties that UDC sought to acquire by condemnation.[12] But for the fact that *Goldstein* involves a single developer in a project initiated by that developer (in *Kelo*, the project was initiated by the City and the developer(s) had not been identified at the time of initiation), the facts of the two cases are much the same. The difference is that the Connecticut statute recognizes economic revitalization as an end in itself so that a finding of blight is not required, while the New

York statute and Constitution appear to view economic revitalization as a means of eliminating "blight," so that presumably there must be a finding that blight exists in order for economic revitalization of an area to justify a taking. As *Goldstein* shows, the difference is more apparent than real.

Petitioners, owners of condemned property in the non-ATURA portion of the Atlantic Yards Project, initially commenced an action in Federal Court, arguing that the taking was not supported by a public use and thus violated the Fifth Amendment of the Federal Constitution.[13] The petitioners in that action also asserted a pendent State claim seeking a review of the UDC's action pursuant to the Eminent Domain Procedure Law (EDPL § 207).[14] Petitioners' federal claims were rejected by the District Court, and that decision was affirmed by the Second Circuit. The District Court declined to exercise its supplemental jurisdiction so that, as respects the State claim, the dismissal was without prejudice to being re-filed in State Court.[15]

The petitioners then brought their State claim directly to the Appellate Division, the petition alleging two surviving claims: first, that the proposed taking was not for "a public use," but rather for the benefit of a private party and thus would violate Article I, Section 7(a), of the State Constitution as well as EDPL § 207(C)(1); and second, that the condemnation proceeding itself was not in conformity with the requirement of Article XVIII of the State Constitution in that the residential portions of the project, although partially funded by State funds, were not limited exclusively to low-income individuals.[16] Petitioners' central argument was that, insofar as the condemned properties would be used by a private developer, such properties would not be put to "public use" within the meaning of Article I, Section 7(a) of the State Constitution, which provides that "private property shall not be taken for public use without just compensation."[17] The question is whether the term "public use" in the State Constitution is to be interpreted so literally and narrowly as to limit the State's power of eminent domain to the taking of property that will be owned by the State and used by the public, or whether "public use" can include a taking for a broader public purpose such as economic development, with the property reverting to private ownership. The Appellate Division rejected Petitioners' argument, recognizing that "public use" had taken on a much broader meaning. The Court of Appeals agreed.[18]

Initially, the Court noted that even if Petitioners' narrow definition of "public use" were correct the State Constitution expressly recognizes that the alleviation of blight is a valid public purpose for which the power of eminent domain may be used both by the State directly and by public corporations organized for that purpose.[19] That having been said, the Court examined the question of what degree of inutility or dilapidation has to exist in order to justify a finding of "blight." Citing its own earlier decisions, the Court recognized that, over time, "it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formally applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[20]

The Court then went on to address the degree of deference that a reviewing Court should accord an administrative agency or public corporation charged with the duty (or the power) to determine when an area or a property is sufficiently "blighted" to justify the exercise of the power of eminent domain. In *Goldstein,* the Court of Appeals accords great deference to those determinations. Citing its own decision in *Kaskel v. Impellitteri*,[21] the Court found that where an agency's findings were "not [made] corruptly or irrationally or baselessly, there is nothing for the courts to do about it."[22] The Court recognized that it was quite possible to differ with UDC's findings that the properties in question are subject to incipient blight, but the Court makes a clear statement that it is limited in the degree to which it may second-guess what it views as essentially "a legislative prerogative":

> It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and business. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.[23]

A close reading of *Goldstein,* including the Court's deferential description of the breadth of the record underlying UDC's determination, indicates that the Court was persuaded more by the fact that the properties in question were part of a coherent, well-documented plan of community redevelopment and economic revitalization than it was troubled by the question of whether the contested properties were in fact "blighted" by any definition of that term. Indeed, it may be argued that after *Goldstein*, and in the absence of legislative action to the contrary, blight in the traditional sense has ceased to be the genuine question, and that the term "blighted" with respect to any specific property has become a shorthand term for—*located in or sufficiently close to an area as to which the need (or the*

opportunity) for economic development has been identified, adequately documented, and addressed by a broad plan—almost without regard to the condition of the property. In deferring to the "legislative prerogative" the Court may, in fact, have legislated, so broadening the New York statute as to turn it into the Connecticut statute upheld in *Kelo.*

Kaur[24] involves the planned expansion by Columbia University into an area of West Harlem known as Manhattanville. With the exception of some publicly accessible space and a market along 12th Avenue, the proposed project would create more than 6,000,000 gross square feet of space for the University—an institution which the Court was quick to point out is a private institution although it is, admittedly, engaged in the business of education, which is generally recognized as a public good.[25]

In reading Justice Catterson's decision (writing only for himself and Justice Nardelli; Justice Richter filed a concurring opinion and Justices Tom and Renwick dissented) one immediately detects that this is a case decided on egregiously bad facts; the Court's contempt for respondent UDC (and by extension, Columbia), and the process by which UDC reached its determination, is not hidden.[26] The Court found that "[t]he process employed by ESDC predetermined the unconstitutional outcome, was bereft of facts which establish the neighborhood in question was blighted, and ultimately precluded the petitioners from presenting a full record before either the ESDC or, ultimately, this Court. In short, it is a skein worth unraveling."[27]

Indeed, the precedential value of *Kaur* may be compromised by its uniquely extreme factual context. While it is often said that bad facts make bad law, this may be an instance in which bad facts end up making no law at all.

Petitioners were owners of commercial properties in the area of Manhattan known as Manhattanville. Beginning in 2002, Columbia commenced a program of acquiring property in the area in order to implement a plan to expand its facilities. By late 2003, Columbia controlled 51 percent of the properties in the project area, and in March of 2004 initiated meetings with UDC regarding its expansion project and the condemnation of land. Columbia retained an environmental consultant ("AKRF") to assist it in planning and in the approval process and entered into an agreement with UDC to pay UDC's costs in connection with the project.[28] In 2006 UDC retained Columbia's consultant, AKRF (the inherent conflict in this relationship greatly irritates the Court), to evaluate conditions at the project site. AKRF retained an engineering firm to evaluate the subject properties. Ultimately, AKRF and its engineering firm issued studies which relied mostly on the underutilization (based upon the theoretical Floor Area Ratio ("FAR") permitted under existing zoning as compared to the FAR of existing buildings) of the properties in the area for a finding of blight. The AKRF studies, as well as engineering studies relating to the physical condition of the properties in the project area, were relied upon by UDC in making its blight determination.[29]

While the *Kaur* Court acknowledged the standard of review articulated by the Court of Appeals in *Goldstein,* albeit without citing *Goldstein* ("if an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed")[30] the Court in fact refused to accord any deference to the agency's findings, although there was no allegation of corruption, and it can hardly be said that the determination was "without foundation," unless one gives no credibility to the agency's consultants and no credit to the agency's determination. The Court found that "ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent. A public use or benefit must be present in order for an agency to exercise its power of eminent domain."[31] Citing both the Fifth Amendment to the U.S. Constitution, Article I, Section 7 of the State Constitution, and Section 204(B)(1) of the EDPL.

Having given lip service to the rule that a court can, in this context, overturn an administrative determination only on a determination that it was "corrupt or without foundation," the Court went on to cite *Yonkers Community Development Agency v. Morris,*[32] to state that "it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so."[33] The clear implication is that an agency's findings are not, in and of themselves, a sufficient basis on which the Court can uphold such a taking—the Court is free to (in fact, is required to) examine and evaluate the record. The First Department is unwilling to be as deferential as the Court of Appeals in *Goldstein* is to a blight determination by the condemnor.

In reading *Kaur* it becomes clear that apart from what it considered to be a flawed process in the case, the Court was moved in the broader sense by a clearly expressed suspicion of any process that permits property to be taken from one and given to another, and by a desire to circumscribe that process by applying a set of rules which will protect against "improper motive in transfers to private parties with only discrete secondary benefits to the public."[34] Justice Catterson found that set of rules in a concurring opinion written by Mr. Justice Kennedy in *Kelo.* Briefly summarized, those

rules require (1) a pre-existing determination that a distressed condition exists; (2) the formulation of a comprehensive development plan meant to address that condition; (3) a substantial commitment of public funds to the project before most of the private beneficiaries are known; (4) the condemnor's review of a variety of development plans; (5) the condemnor's choice of a private developer from a group of applicants rather than picking out a particular developer beforehand; (6) the identities of most of the private beneficiaries being unknown at the time the condemnor formulated its plan; and (7) the condemnor's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into its purposes.[35]

Strict application of the Kennedy rules would most likely disqualify any project (such as Atlantic Yards and Columbia) that is initiated by a developer rather than by the State, the obvious intent of the rules being to prevent the State from becoming the powerful procurement agent of a favored private party.

Here, the Court states that "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic."[36] The Court goes on to find that on the facts in *Kaur,* Columbia and UDC have failed on essentially all seven prongs of the Kennedy test, in effect finding that Columbia was using UDC to accomplish what it could not accomplish negotiating at arm's length. Here, there was no pre-existing determination of blight or distress with respect to the contested properties; there was no comprehensive development plan; no funds were committed to the project before the private beneficiary was known, indeed, all the funds came from the private beneficiary; there was no variety of development plans from which to choose; the city's choice of a private developer was limited to Columbia, the protagonist in the play; the identities of all the private beneficiaries (namely Columbia) were known; and, in the Court's eyes, respondents failed entirely to adhere to elaborate procedural requirements.[37] Ultimately, the Court finds no valid public purpose in the taking.[38] Finally, the Court iced the cake by finding the UDCA so vague as to be unconstitutional as applied in this case because the UDC had failed to adopt, retain, or promulgate any regulations or written standards relating to a finding of blight.[39]

UDC has appealed, and briefs are due in the Court of Appeals in May. The question remains whether the Court of Appeals will take the opportunity to adopt the Kennedy test in affirming the First Department's decision or will side with the *Kaur* dissent which cites *Goldstein* in recognizing the "structural limitations upon [the Court's] review of what is essentially a legislative prerogative"[40] and which would accord great deference to "two blight studies [which] documented substandard and insanitary conditions by photographic evidence and other indicia."[41] The dissenters find that Petitioners present merely "a difference of opinion" with the conclusions to be drawn from the evidence, in which event the courts are bound to defer to the agency.[42] Although at first blush a reversal would seem likely as being consistent with the Court of Appeals' holding requiring extreme deference to the agency's findings except in the most egregious of circumstances, this may be an opportunity for the Court, having defined one end of the deference spectrum with reference to the record in *Goldstein,* to define the other end by rejecting the agency's findings in *Kaur*. In any event, one would guess that the Court of Appeals will not adopt the Kennedy test. Had it done so in *Goldstein*, the respondents would likely have failed on four of the seven prongs of the test.

A Hardship That Is Common to Surrounding Residentially Zoned Lots Is Not Sufficient to Constitute a "Unique Hardship" in the Context of an Application for a Use Variance

In *Vomero v. City of New York,*[43] the Court of Appeals held that the subject property's location in close proximity to commercial uses on a main thoroughfare was not sufficient to support a finding of uniqueness under the use variance standard because nearby properties shared similar conditions and thus such conditions were common to the neighborhood rather than unique to the subject property.

In *Vomero*, GAC Catering, Inc. ("GAC") purchased a residentially zoned corner parcel at the intersection of Hylan Boulevard and Otis Avenue on Staten Island directly across Otis Avenue from a catering facility also owned by GAC.[44] At the time GAC purchased the residentially zoned property, it was improved with a single-family residence. Shortly after it purchased the residentially zoned property, GAC demolished the house located on the property and applied to the City's Department of Buildings for a building permit to construct a two-story building that it intended to use as a photography studio in connection with its nearby catering business. The Department of Buildings denied the building permit on the grounds that the proposed photography studio use was not a permitted use of the property.[45]

GAC applied to the New York City Board of Standards and Appeals (the "BSA") for a use variance to permit the proposed photography studio use of the property. In support of its application, GAC submitted evidence showing that many of the corner properties in the surrounding neighborhood have become commercial and therefore its proposed use was not out of character with the surrounding neighborhood, and that the property was unique because of its purported irregular

shape and its location at the corner of Hylan Boulevard and Otis Avenue, which area, GAC explained, was predominately developed for commercial use. GAC also submitted a financial analysis in support of its contention that it could not realize a reasonable return if it were to use the property for a use permitted under the City's Zoning Resolution.[46]

The BSA found that GAC satisfied the applicable use variance standard and granted the variance. GAC's next door neighbor commenced this Article 78 proceeding challenging the approval.[47]

The Supreme Court, Richmond County, granted the petition and annulled the grant of the variance.[48] It held that the evidence in the record demonstrated that (1) GAC could realize a reasonable return on the property if it were to use or sell the property for a permitted use; (2) GAC's hardship was self-created since it admitted that it purchased the property with knowledge of the residential zoning in place (which, in the City of New York, apparently is relevant but not outcome determinative on an application for a use variance);[49] (3) granting the variance would have a negative impact on the character of the community notwithstanding the predominately commercial character of the surrounding neighborhood since the granting of the variance would further weaken the continuing viability of residential properties in the immediate area surrounding the property; and (4) that hardship was not unique to the property since GAC's property was similarly situated with respect to lot size and proximity to commercial uses to the surrounding residentially zoned and developed lots with frontage on Hylan Boulevard in the Otis Avenue/Bryant Avenue block. The court noted that the only difference between GAC's property and the other residentially zoned properties on Hylan Boulevard in the Otis Avenue/Bryant Avenue block was that GAC's property was on the corner (apparently not enough of a distinction in and of itself to make the property unique).[50]

The Second Department, with two justices dissenting, reversed the Supreme Court's annulment of the variance and dismissed the petition, holding that the BSA's decision granting the requested use variance had a rational basis in the record and was not arbitrary and capricious.[51] With regard to whether a "unique physical condition" rendered the property unusable for a permitted use, the majority focused on the fact that "other properties in the area, which have similar characteristics to and are in locations similar to the property at issue here, had 'unique physical conditions' such that 'practical difficulties or unnecessary hardships' would arise with conforming uses" and that there was no evidence in the record to distinguish GAC's property from such other properties.[52] On the issue of uniqueness, the dissent agreed with the lower court that the property was not materially different from surrounding residential properties and thus any hardship the zoning classification of the property imposed was not unique to the property.[53]

The Court of Appeals reversed the decision of the Second Department and reinstated the Supreme Court, Richmond County, decision, reasoning that

> The physical conditions of the parcel relied on by the board did not establish that the property's characteristics were "unique" as defined by New York City Zoning Resolution § 72-21(a). Proof of uniqueness must be "peculiar to and inherent in the particular zoning lot" (N.Y. City Zoning Resolution § 72-21[a]), rather than "common to the whole neighborhood."…The fact that this residentially zoned corner property is situated on a major thoroughfare in a predominantly commercial area does not suffice to support a finding of uniqueness since other nearby residential parcels share similar conditions.[54]

The holding in *Vomero* is not new law; it simply reinforces decades of case law which has consistently held that where a condition in a neighborhood affects several similarly situated properties in a substantially similar manner, that characteristic may not be relied on by any one of those property owners to support a finding that his or her property is unique in the context of the statutory use variance analysis.[55] *Vomero* should not be read as a wholesale preclusion of the consideration of the nature of the use of properties surrounding a property that is the subject of an application for a use variance when determining whether the subject property is unique. In fact, the Court of Appeals expressly states that GAC's proximity to commercial uses was not unique "*since other nearby residential parcels share similar conditions*."[56] This qualifying language demonstrates that the Court did not hold that the nature of the surrounding area was itself insufficient or irrelevant to support a finding of uniqueness under the use variance standard; rather, the Court simply held that based on the facts in the record before it GAC's property was not unique.

Fourth Department Case Notes

This quarter the Fourth Department decided several land use and zoning-related cases on such issues as, among others, the deference that a court must show a zoning board's interpretation of a zoning ordinance, religious land uses, and protest petitions.

With respect to the interpretation of a town's zoning ordinance, the Fourth Department reminds us in *McLiesh v. Town of Western*[57] and *Emmerling v. Town of Richmond Zoning Board of Appeals*[58]—that "'[a]lthough a

zoning board's interpretation of a zoning ordinance is entitled to deference, its interpretation is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court.'"[59] In both cases, the Fourth Department held that the respondent zoning boards of appeals' interpretations of their respective town zoning codes were contrary to the language and intent of such codes and thus were arbitrary and capricious.

In *McLiesh*, the petitioner sought to erect an accessory structure (a detached garage) on his property. The respondent zoning board of appeals determined that the garage had to be set back from the petitioner's property lines in accordance with the principal structure setback requirements, notwithstanding the fact that the town code had different (and apparently less stringent) setback requirements for accessory structures. The zoning board then denied petitioner's application for an area variance from the principal structure setback requirements for the garage. Petitioner commenced this Article 78 proceeding and the Supreme Court, Oneida County, granted the petition, holding that the zoning board's determination that the principal structure setbacks applied to this accessory structure was arbitrary and capricious, and directed the zoning board to grant petitioner the requested area variance to build the garage (apparently the garage did not comply with the setback requirements for principal or accessory structures under the town's code). The Fourth Department affirmed the Supreme Court's finding that the zoning board's application of the principal structure setback requirements to petitioner's application was arbitrary and capricious; however, it reversed the lower court's direction to the board to grant the variance and remanded the case back to the zoning board for a *de novo* review of the application in the context of the accessory use setback requirements.[60] In *Emmerling*,[61] the petitioners sought to erect a fence, which was classified in the town's zoning code as an accessory use, on their property. The zoning board of appeals determined that petitioners required site plan approval from the town's planning board before they could obtain a zoning permit to erect the fence. Petitioners challenged the board's determination that they required site plan approval on the grounds that the town's code exempted accessory uses from site plan review. The Fourth Department agreed with petitioners that the "clear wording" of the town's code exempted their application to construct a fence on their property from the requirement that they obtain site plan approval from the planning board and held that the zoning board's decision otherwise was arbitrary and capricious.[62]

In *Libolt v. Town of Irondequoit Zoning Board of Appeals*,[63] petitioner, a religious order, established a home for men who were convicted of and incarcerated for non-violent drug- and alcohol-related offenses and recently released from prison to facilitate their reentry into society. The zoning district in which the home was located permitted single-family homes and churches, but did not permit halfway houses. The town issued petitioner a notice of violation on the grounds that it was operating a halfway house on the property in contravention of the zoning ordinance.[64] Petitioner appealed the determination that it was using the property for a prohibited halfway house to the respondent zoning board of appeals. The zoning board of appeals held that the petitioner was not using the property as a single-family residence, and confirmed the determination that the petitioner was using the property as a halfway house.[65] Petitioner brought an Article 78 proceeding challenging the zoning board's determination on the grounds that it was arbitrary and capricious and that such determination violated petitioner's rights under the First Amendment to the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The Court upheld the zoning board's determination that petitioner's use did not fall within a category of uses permitted on the subject property. With regard to petitioner's claim that the zoning board's decision violated the order's rights under the First Amendment, the Court held: "The ZBA's determination was in furtherance of the compelling governmental interest in maintaining the R-1 district as a single-family residential zone."[66] The Court also rejected petitioner's RLUPIA claim, holding that the zoning board's decision did not impose "a substantial burden on the religious exercise of a person, including a religious assembly or institution[.]"[67]

Finally, with regard to protest petitions, in *Gosier v. Aubertine*,[68] the Court held that "the signature of only one spouse with respect to property held as tenants by the entirety is sufficient for the property to be included in order to meet the 20 percent threshold required for a valid protest petition," even where the names of both spouses are included on the tax roll.[69] Petitioners, residents of the Town of Lyme, were opponents of legislation pending before the Lyme town board that would restrict the development of wind energy facilities within the town. Accordingly, petitioners signed a protest petition pursuant to Town Law § 265 with respect to the proposed amendment and submitted the protest petition to the town board. The town assessor's office reviewed the protest petition and determined that it was invalid because the valid signatures on the protest petition did not amount to 20 percent of the properties affected by the proposed amendment. The assessor's office came to this conclusion by, among other things, excluding as invalid signatures of only the husband or wife for properties owned as tenants by the entirety where both spouses were listed on the tax roll, reasoning that both spouses were required to sign the protest petition in order for the signature of either one to be valid. The town board, agreeing with the as-

sessment office's determination, adopted the disputed legislation by a vote of 3-2.[70]

Petitioners commenced an Article 78 proceeding to have the town board's determination that the protest petition was invalid annulled on the grounds that with respect to properties held by tenants by the entirety the signature of one spouse constitutes a valid signature for the purpose of the protest petition and that the town board's determination otherwise was arbitrary and capricious. The Supreme Court, Jefferson County, granted the petition, holding that the signature of either a husband or wife is a valid signature on a protest petition for property held by a husband and wife as tenants by the entirety, even where both names appear on the tax roll, and that the protest petition was valid. The Court also annulled the adoption of the legislation since it was not adopted by the required supermajority vote to overcome a valid protest petition challenge. The Fourth Department affirmed, relying primarily on the "'unique relationship between a husband and wife each of whom is seized of the whole [property] and not of any undivided portion of the estate, such that 'both and each own the entire fee.'"[71]

Endnotes

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).
2. For simplicity's sake, Respondent UDC together with ESDC will be referred to as "UDC" in the discussion of both cases which follow.
3. *Goldstein v. New York State Urban Development Corporation*, 13 N.Y.3d 511 (2009).
4. *Kaur v. New York State Urban Development Corporation*, 892 N.Y.S.2d 8 (1st Dep't 2009).
5. *Kelo*, 545 U.S. at 473-474.
6. *Id.* at 475.
7. *Id.* at 478-480.
8. *Goldstein*, *supra* note 3.
9. Urban Development Corporation Act, McKinney's Unconsolidated Laws of New York § 6253(6)(c)).
10. *Goldstein*, 13 N.Y.3d at 518.
11. The authors and the law firm with which they are affiliated have represented Forest City Ratner Companies in various matters, none of them related, however, to the subject of this litigation.
12. *Goldstein*, 13 N.Y.3d at 518.
13. *Id.*
14. *Id.*
15. *Id.* at 518-519.
16. *Id*. at 519. The *Goldstein* case actually raises three important issues—the two discussed in the foregoing sentence, as well as a discussion of procedural issue under EDPL § 207(A), providing that a proceeding challenging an EDPL § 204 condemnation determination must be filed in the appropriate Appellate Division within 30 days following the determination's completion and publication. Although the latter two issues are discussed thoroughly and at length in the decision, that discussion is beyond the spatial limitations of this "update." This discussion is limited to a determination of the central *Kelo* question, namely, when and under what circumstances private property can be taken from one person for use by another.
17. *Goldstein*, 13 N.Y.3d at 523.
18. *Id.* at 523-528.
19. *Id.* at 524.
20. *Id.* at 525 (*quoting Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478, 481-482 (1975)).
21. *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953).
22. *Goldstein*, 13 N.Y.3d at 526 (*quoting Kaskel*, 306 N.Y. at 78).
23. *Id.* at 526-527.
24. *Kaur v. New York State Urban Development Corporation*, *supra* note 4.
25. *Kaur*, 892 N.Y.S.2d at 11-12, 23-25.
26. Columbia is the alma mater of one of your authors. Interestingly enough, of the 19 Justices in the First Department, four went to Columbia Law School; none were on this panel.
27. *Kaur*, 892 N.Y.S.2d at 11.
28. *Id.* at 12.
29. *Id.* at 13.
30. *Id.* at 16.
31. *Id.* at 15-16.
32. *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 (1975).
33. *Kaur*, 892 N.Y.S.2d at 16 (*quoting Yonkers Community Development Agency, supra; and citing Matter of City of Brooklyn*, 143 N.Y. 596, 618 (1894), *aff'd*, 166 U.S. 685 (1897)).
34. *Kaur*, 892 N.Y.S.2d at 18.
35. *Id.* at 18-19.
36. *Id.* at 19.
37. *Id.* at 19-20.
38. *Id.* at 23.
39. *Kaur*, 892 N.Y.S.2d at 25-26.
40. *Id.* at 34.
41. *Id.* at 34.
42. *Id.* at 34.
43. *Vomero v. City of New York*, 13 N.Y.3d 840 (2009).
44. *Vomero v. City of New York*, 13 Misc. 3d 1214(A), 824 N.Y.S.2d 759 (Sup. Ct., Richmond Co. 2006) (Table Case).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *See Vomero v. City of New York*, 54 A.D.3d 1045, 1046-1047, 864 N.Y.S.2d 159, 160-161 (2d Dep't 2008).
50. *Vomero v. City of New York*, 13 Misc. 3d 1214(A), 824 N.Y.S.2d 759, *supra* note 44.
51. *Vomero*, 54 A.D.3d at 1046.
52. *Id.*
53. *Id.* at 1050.
54. *Vomero*, 13 N.Y.3d at 841.
55. *Clark v. Board of Zoning Appeals of Town of Hempstead*, 301 N.Y. 86, 90 (1950); *Douglaston Civic Ass'n, Inc. v. Klein*, 51 N.Y.2d 963, 965 (1980) ("Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship…What is required is

that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land."); *Citizens for Ghent, Inc. v. Zoning Bd. of Appeals of Town of Ghent*, 175 A.D.2d 528, 530, 572 N.Y.S.2d 957, 959 (3d Dep't 1991) ("While respondents point to the close proximity of an industrial park, the nearness of a heavily traveled highway, and the unsuitability of the soil to distinguish the proposed site, the record evidence is that neighboring properties share these very same characteristics. Thus, any claim of uniqueness is dispelled."); *Kallas v. Board of Estimate of City of New York*, 90 A.D.2d 774, 455 N.Y.S.2d 288 (2d Dep't 1982).

56. *Vomero*, 13 N.Y.3d at 841.
57. *McLiesh v. Town of Western*, 68 A.D.3d 1675, 891 N.Y.S.2d 825 (4th Dep't 2009).
58. *Emmerling v. Town of Richmond Zoning Board of Appeals*, 67 A.D.3d 1467, 888 N.Y.S.2d 703 (4th Dep't 2009).
59. *McLiesh v. Town of Western*, *supra*; *Emmerling*, 67 A.D.3d at 1467-1468.
60. *McLiesh v. Town of Western*, *supra*.
61. *Emmerling*, *supra* note 58.
62. *Emmerling*, 67 A.D.3d at 1468-1469.
63. *Libolt v. Town of Irondequoit Zoning Board of Appeals*, 66 A.D.3d 1393, 895 N.Y.S.2d 806 (4th Dep't 2009).
64. *Libolt*, 66 A.D.3d at 1393-1394.
65. *Id.* at 1394.
66. *Id.* at 1395.
67. *Id.*
68. *Gosier v. Aubertine*, 891 N.Y.S.2d 788 (4th Dep't 2009).
69. *Id.*
70. *Id.*
71. *Id.*

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The New York City Council's Approach to Ensure Compliance with Conflicts of Interest Laws in the Discretionary Funding Process

By Elizabeth Fine and James Caras

The budget for the City of New York was close to $60 billion for fiscal year 2010. About one percent of these monies funded local organizations around the City that were designated by Members of the New York City Council and by certain other City elected officials. These local initiatives provide essential funding for many organizations that are central to the fabric and functioning of the City.

In recent City budgets, discretionary funding has provided $12 million for indigent defense legal services, over $10 million for City Senior Centers, including money for the actual facilities, meals served and transportation, over $20 million for after school programs, as well as the City's only shelter bed program for gay and lesbian homeless youth and the City's only rape crisis center. Indeed, the Mayor's agency heads often anticipate that the Council will provide funding for programs on which the agencies have come to rely on an ongoing basis. Local organizations in New York have come to rely on this discretionary funding in planning their City programs and services.

Discretionary funding for local organizations grew steadily in New York City, from a relatively small program in the 1980s, to increasing throughout much of the 1990s, and is currently a more significant amount of funding, albeit still a very small percentage of the overall City budget. The press and government watchdog groups demanded greater transparency and stronger safeguards for the spending of City funds. Indeed, there were a small number of individuals and organizations that abused or misused the City funds. While these instances were only a tiny fraction of the thousands of groups that received discretionary funding, this abuse threatened to undermine the confidence of the public in the entire program. The New York City Council has taken steps to address these concerns through the adoption of a set of best practices for discretionary funding.

Safeguards now in place over the City's discretionary funding process are far more rigorous than those we have been able to find in any other jurisdiction in the country where a legislature has the authority to

directly fund organizations. These reforms ensure that (1) the organizations funded are legitimate not-for-profit organizations; (2) the organizations are actually capable of performing the services for which they receive funding; (3) the elected official(s) sponsoring the funding for each organization have no conflicts of interest relating to the organization; and (4) the process for funding each organization is transparent to members of the public.

The lynchpin of these reforms has been the introduction of a "pre-qualification" process for all recipients of City Council discretionary funds. As part of this process, groups are rigorously vetted to ensure that they are properly registered charities (or properly exempt from registration), that they have not been the subject of investigations, audits or evaluations that reveal a lack of integrity or ability to provide services, and that the funding will be used for a proper City purpose. To ensure proper implementation of the City's Conflicts of Interest Laws to the discretionary funding process, this process also requires Council Members and organizations to provide certifications concerning conflicts of interest.

This article will review the City's procurement and Conflicts of Interest Laws, how these laws apply to the discretionary funding process and the safeguards that have been implemented to ensure compliance with those laws. While the Council continues to assess and improve its practices in this area, the measures that the Council has taken to date are significant and serve as a model for other legislative bodies around the country that seek to uphold the highest standards in their own local discretionary funding programs.

I. New York City Procurement Law Authorizing Discretionary Funding

In New York City, discretionary funding is specifically provided for by rule of the Procurement Policy Board (PPB), which is charged under the City Charter with making rules to govern the procurement process.[1] The general policy of the PPB Rules is that government purchases of goods and services should be accom-

plished through a competitive process. However, the PPB Rules create an exception to this general rule. PPB Rule 1-02 states that "[t]he source selection requirements of these Rules shall not apply to *contract awards made from line item appropriations and/or discretionary funds to community-based not-for-profit organizations or other public service organizations identified by elected City officials other than the Mayor and the Comptroller*." (Emphasis added.) Thus, the PPB Rules specifically allow the Council and Borough Presidents to allocate funding directly to not-for-profit organizations.

II. New York City Laws and Rules Relating to Council Members' Roles in Discretionary Funding

New York City's Conflicts of Interest Laws are designed in large part to make certain that City officials act in the interests of the City and not in their own personal interests. By applying the Conflicts of Interest Laws strictly to the discretionary funding processes, the Council has sought to ensure—and reassure the public—that Council Members make discretionary funding decisions based on the City's needs, and not based on their relationships or personal financial interests.

New York City Conflicts of Interest Laws govern the activities of all City officials and employees, including members of the New York City Council. The laws are contained in Chapter 68 of the New York City Charter. The New York City Conflicts of Interest Board (COIB) implements the laws through the Rules of the Board, its advisory opinions, and through enforcement actions.

There are several broad provisions of Chapter 68, as well as Board rules that apply generally to public officials and have implications for Council Members when taking action on discretionary funding.

Two sections of the New York City Charter provide overarching direction on the use of office by a public servant. First, Section 2604(b)(2) prohibits any public servant from engaging in "[A]ny business, transaction or private employment or having any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." Second, Charter section 2604(b)(3) prohibits a public servant from using his or her position "to obtain any financial gain, contract, license, privilege or other personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant."[2] These provisions apply to a wide range of public servant's activities, and COIB has relied on these provisions in an array of enforcement actions. For example, COIB has cited these sections of the law in enforcement actions against individuals who (i) used City time or resources to pursue an online degree, (ii) had subordinates perform their personal errands, (iii) used their City positions to seek private clients, (iv) used City computers and e-mail accounts in an amount substantially in excess of the *de minimis* amount permitted by the City, and (v) in many other situations where public servants have failed to uphold the fundamental principles of public trust reflected in these key provisions of the Charter.[3]

Chapter 68 of the Charter also addresses the unique role and challenges faced by elected officials. In particular, the Charter explicitly recognizes the need for flexibility in the application of Conflicts of Interest Laws so that elected officials, and in particular Members of the City Council, may exercise their official duties. For example, Council Members are not required to recuse themselves from voting on a matter when a personal private interest is at stake, but instead are often allowed to disclose that interest on the record.[4] This is to allow the Council Member to exercise his or her essential functions.[5]

Through a series of advisory opinions, including most notably a 2009 Advisory Opinion, COIB has interpreted the Charter and has given the language practical effect in the context of Council Members' actions on discretionary funding.[6] Additionally, COIB has always recognized certain fundamental facts about the role that Council Members play and the communities that Council Members serve. In particular, COIB recognizes that Council Members often represent communities where they grew up, where they have family and friends who are civic-minded and who are also leaders in the community, working in government, business, the non-profit sector and often serving on the boards of local organizations. Council Members themselves often have numerous ties to businesses and organizations in their communities, and even on occasion have outside employment at these organizations. COIB has sought, in its many advisory opinions, to strike an appropriate balance between the need to guard against inappropriate personal advantage and the potential to disenfranchise the constituents of the elected official. The recommendations of the Board differ depending on what action the Council Member is taking, whether it is an essential function of their job, such as voting on the budget, as opposed to an official action which is less essential or is ceremonial. What may be considered a permissible action for a Council Member when voting on legislation may not necessarily be allowed if instead the Council Member is sponsoring legislation or discretionary funding.[7]

III. The Roles of Council Members in the Discretionary Funding Process

Members of the City Council have two primary responsibilities when it comes to discretionary fund-

ing: sponsoring funding, and voting on budget-related legislation that provides funding. In its 2009 Advisory Opinion, COIB has articulated guidelines for Council Members to follow that are specific to Council Members' official actions in each of these two contexts.

First, Council Members sponsor specific organizations for funding. Every Council Member is allotted a certain amount of funding for local initiatives and programs for youth and for the elderly in their districts. The Council Members have broad discretion to decide how to allocate the funds to organizations providing services to their constituents. They also have a role in selecting organizations for funding pursuant to various city-wide and other Council initiatives.

COIB has set out specific guidelines and restrictions on what Council Members may and may not sponsor depending on their own involvement with the organizations, or the affiliation of a person with whom they are associated. In general, a Council Member may not sponsor funding for an organization where such sponsorship would conflict with the discharge of his or her official duties or would result in a privilege or personal gain for the Council Member or a person or firm associated with the Council Member. COIB analyzed how this general principle applies to different factual scenarios where the Council Member, a person "associated" with a Council Member, or a member of the Council Member's staff has an affiliation with an organization for which the Member proposes to sponsor funding.

COIB ruled that a Council Member may not sponsor funding for any organizations where he or she has a paid position with an organization, is an unpaid member of the board of directors of the organization, or where a person "associated" with the Council Member has a paid position with the organization and is reasonably likely to benefit from that funding.

On the other hand, COIB concluded that a Council Member may sponsor funding for an organization where the Member serves on the board of directors *ex officio* as part of his or her Council duties, where the Member is an honorary, unpaid or non-voting member of the board of directors with no legal rights or responsibilities, and where the Member is a dues-paying member of an organization where the dues are nominal and the membership is sizable. COIB also determined that a Council Member may sponsor funding for an organizations when a person "associated" with the Council Member is a paid employee or paid officer or director of the organization, as long as there is no reasonable likelihood that the associated person will benefit from that funding, where a person "associated" with the Council Member is an unpaid member of the board of directors, or where the Council Member's staff person has an affiliation with the organization.

The second key responsibility for Council Members in the discretionary funding process is the act of voting on the final City budget at budget adoption, and when funding is designated for an organization, transferred from one agency to another, or transferred from one organization to another. The Charter recognizes the responsibility of voting on matters as an essential Council Member function.[8] Accordingly, COIB applies the Conflicts of Interest Laws differently for voting than for sponsoring legislation. In particular, pursuant to Advisory Opinion No. 2009-2, COIB has determined that even where a Council Member may not sponsor funding, it is nonetheless permissible for the Council Member to vote on the funding, because this vote is an essential function the withholding of which would disenfranchise the Council Member's constituents. However, the Council Member must, in certain circumstances, disclose the affiliation with the organization on the record of the Council proceedings and must follow up such disclosure with notice to the Conflicts of Interest Board.[9] In particular, a Council Member must disclose on the official records of the Council and to COIB when the proposal up for a vote contains funding for an organization at which the Member has a paid position, is an unpaid member of the board of directors, or where a person "associated" with the Council Member has a paid position and is reasonably likely to benefit from that funding.

COIB's guidance in Advisory Opinion 2009-2 provides greater clarity for Council Members on what discretionary funding they may and may not sponsor, and what they must disclose on the official records of the Council. The New York City Council has reviewed this guidance and developed its own protocols to ensure compliance. Today, Council Members not only are able to comply with the law, but often refrain from proposing funding for organizations to avoid even the appearance of a conflict of interest.

IV. Council Discretionary Budget Conflicts of Interest Compliance Program

The Council has taken a number of steps to comply with City laws, rules and guidance from the Conflicts of Interest Board and to ensure that Council Members also comply with these requirements.

First, prior to sponsoring funding for a program, each Council Member must complete an application that includes a conflicts of interest disclosure section. In this section, the Council Member must either certify that he or she has no potential conflicts of interest with the group proposed to be funded or complete a form describing the relationship that the Council Member or any individual on the Council Member's staff has with any person involved with the organization. The Council's General Counsel's Office then assists the Council

Member in determining whether the relationship prohibits the sponsorship of the proposed funding. The Council's General Counsel's Office works closely with staff at COIB in making these determinations.

Second, as a further check for potential conflicts of interest, each organization applying for discretionary funding must affirm whether or not any elected official of the City, or person associated with an elected official, is an employee, consultant, director, trustee or officer of the organization or has any other financial interest in the organization.

Third, Council Members now are asked to sign a written disclosure prior to the adoption of the budget or the adoption of any legislative action which effectively changes groups receiving discretionary funding. They are asked to review all the groups proposed to receive discretionary funding in any given Council action—both those that they are sponsoring as well as those sponsored by their colleagues. They must either attest that they have no conflicts with the groups being awarded discretionary funding in the action on which they are voting or disclose any potential conflicts. In accordance with the requirements of Chapter 68 and the opinions of the COIB, relationships between Council Members and groups receiving discretionary funding sponsored by other Council Members are generally not prohibited and do not preclude the Council Member with the relationship from voting on the funding action. However, certain of these relationships are required to be disclosed in the official record of the proceedings at which the vote is taken. For example, Council Members have disclosed that they were voting on a resolution providing funding for schools that their children attend, hospitals where family members work, and universities where they themselves serve as adjunct professors. These written disclosures prior to the adoption of the budget or subsequent Council actions relating to discretionary funding enable the Council's Office of the General Counsel to work with Council Members and COIB to ensure that proper disclosures are made where necessary.

V. Challenges and Next Steps

The Council's discretionary budget compliance program has proven enormously effective in many regards. In particular, it has served to increase awareness of the City's Conflicts of Interest Laws. The Conflicts of Interest Laws do not necessarily prohibit a Council Member from funding groups because of these relationships, but each factual situation where there is a relationship must be analyzed based on COIB's guidance. Council Members are much more conscious of what organizations they may sponsor for funding, and when they must disclose a relationship on the official records of the Council. At the same time, however, further challenges remain with respect to building a strong system to guard against inappropriate conflicts of interest in the discretionary funding process.

First, the process is extremely burdensome for the Council Members. Each Member has a changing staff and often a vast network of relatives and other individuals with whom he or she is "associated" in the community. These individuals are entering and leaving jobs and joining boards. A Council Member can face a daunting challenge just keeping track of all these relationships. Additionally, when the Council budget contains as many 5,000 groups, a Council Member is responsible for knowing, and in some cases disclosing, whether he or she is "associated" with any one at any of those 4,000 to 5,000 groups. The list of groups is not ready to be distributed until 24 hours prior to the adoption of the City's budget, leaving Council Members little time to review this list. Council Members are therefore having trepidations about signing a form because of the potential to overlook a potential conflict of interest.

Second, the process is burdensome for the Council staff. Passing a budget is an intense and time-sensitive process. It is often a race against time. It was absolutely critical to add a vetting process for the organizations to ensure their legitimacy and capacity to provide services. Add to that the need to cross-check these groups with the Council Members' relationships, and it becomes an enormous undertaking. Adding another layer of due diligence adds to the pressures at the time of adoption.

Third, because of other transparency measures adopted by the Council, budget resolutions are considered on a regular basis, and the disclosure process now takes place year-round, resulting in volumes of paperwork and substantial repetition.

Fourth, there are questions still about what should be covered under the Conflicts of Interest Laws and whether they go far enough. Some have suggested a broader definition of "associated" person for the purpose of discretionary funding. Others have suggested that there be an ongoing disclosure requirement for the organization and Council Member during the life of the City contract. Every step to strengthen requirements adds to the burden of compliance, and, at some point, the system will either collapse of its own weight or the possibility of innocent error will undermine the effort to be in compliance.

The Council will continue to consider these challenges. In the meantime, the process in place has sent an important message to the public that City funds are being used to fund necessary services and programs in the community, and is worthy of emulation by legislative bodies around the state and the nation.

Endnotes

1. *See* NYC Charter Section 311 and PPB Rule 1-02.
2. A person or firm "associated" with a public official includes a spouse, domestic partner, child, parent, or sibling, or a person with whom the public servant has a business or other financial relationship. It also includes a firm in which the public servant has a position or ownership interest. *See* Sections 2601(5) and (12) of the Charter. Additionally, a public servant is considered to have a position with a firm if he or she is an officer, director, trustee, an employee, holds a management position in a firm, or serves as the firm's attorney, agent, broker or consultant. *See* Charter Section 2601(b)(18).
3. *See, e.g.*, http://www.nyc.gov/html/conflicts/downloads/pdf2/Enforcement_Case_Summaries.pdf. *See* NYC Charter Section 2604(b)(1)(a). NYC Charter Section 2604(b)(1)(a) states with respect to conduct prohibited by the Charter that "in the case of an elected official such action shall not be prohibited, but the elected official shall disclose the interest to the conflicts of interest board, and on the official records of the council or the board of estimate in the case of matter before those bodies."
4. *See, e.g.*, Advisory Opinions Nos. 92-22 and 94-28, permitting Council Members to take actions, such as voting on legislation, even if such actions benefited persons with whom they were associated. It also ensures that individuals, organizations and businesses should not uniformly be disadvantaged, or essentially disenfranchised, because of the private interests or relationships of the elected official.
5. *See* COIB Advisory Opinion No. 2009-2.
6. *Id.*
7. *Id. at* pages 5-8.
8. *See* NYC Charter Section 2604(b)(1)(a).
9. *Id.*

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Wireless Facilities, Zoning and the FCC's "Shot Clock" Ruling

By Daniel M. Laub

I. Introduction

On November 18, 2009, the Federal Communications Commission ("FCC" or the "Commission") issued a Declaratory Ruling and Order ("Declaratory Ruling" or "Ruling")[1] interpreting § 332(c)(7)(B) of the 1996 Telecommunications Act of 1996 ("Telecommunications Act").[2] The FCC Ruling was an outgrowth of a 14-month proceeding[3] commenced by CTIA—The Wireless Association ("CTIA"), an industry trade association.[4] Numerous parties provided comments and analysis for the FCC including wireless carriers, state and local government officials and other interested stakeholders. Central considerations addressed by the FCC in its Ruling were (1) adoption of reasonable time frames in which zoning authorities must act on applications for wireless telecommunication towers or antenna sites; (2) prohibition of service claims under the Telecommunications Act; and (3) whether local zoning regulations requiring variances for wireless telecommunications infrastructure were *per se* violations of the Telecommunications Act.[5] Of note, the FCC may, in accordance with § 5(e) of the Administrative Procedure Act, issue a declaratory ruling terminating a controversy or removing uncertainty in Congressional intent on motion or on its own motion.[6] The FCC, as the principal agency implementing the Telecommunications Act, has broad discretion whether to issue a Ruling[7] and as such has full effect of federal law.

The origins of the FCC Ruling run much deeper than the face of CTIA's petition itself and address over a decade of issues and conflicting case law that were repeatedly played out in local zoning and the federal courts. Local zoning of "personal wireless service facilities" is specifically addressed in § 704 of the Telecommunications Act. Congress' 1996 omnibus overhaul of federal regulation over communications companies created a pro-competitive and deregulated regulatory framework focused on the deployment of advanced telecommunications services and information technologies. The intent was to encourage rapid infrastructure build-out and market competition. In many cases the Telecommunications Act was a success and allowed wireless technology to evolve and become an essential part of our national life as envisioned by Congress. Yet, the Telecommunications Act was also subject to conflicting interests that have become a disservice to both the carriers and local government.

Carriers are now in the midst of deploying broadband technology to provide high-speed Internet access in the wireless environment. These broadband services include those that make use of the FCC re-auctioned 700 MHz spectrum that previously belonged to television broadcasters.[8] Licensees for the 700 MHz band are subject to strict build-out requirements requiring rapid deployment of infrastructure within tight time frames.[9] In addition, the American Recovery and Reinvestment Act of 2009 tasked the FCC itself with creating a National Broadband Plan in 2010 to ensure that all people of the United States have access to broadband capability.[10] The importance of wireless access to our nation is rapidly increasing as is the infrastructure that supports it. Recently, President Obama issued a proclamation identifying wireless facilities as part of America's "critical infrastructure" and included the "the assets, systems, and networks, whether physical or virtual, so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, public health or safety."[11]

Personal wireless service carriers are experiencing unprecedented need to rapidly develop and site wireless telecommunications infrastructure. This Declaratory Ruling is yet another important marker in wireless regulation and clarifies the balance between legitimate areas of State and/or local regulatory control over wireless infrastructure and the public's interest in timely deployment of wireless services to meet the public's need. Essentially, the FCC has reaffirmed the utilitarian nature of wireless communications and its critical role in our nation's commerce and security.

II. The "Shot Clock"[12]

A. Time Limits on Zoning Decisions Imposed by FCC Ruling

The "Shot Clock" requires state and local authorities to act within 90 days of the filing of a complete application for a collocation (the addition of a facility on a structure already hosting one or more wireless facilities) and 150 days for a complete application for a new tower. This part of the Ruling is a direct interpretation of 47 U.S.C. § 332(c)(7)(B)(ii) (as amended by the Telecommunications Act) mandating:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a *reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added.)

The Telecommunications Act left a "reasonable period of time" undefined. Despite the requirement to allow for wireless infrastructure development, the FCC found that "the record shows that unreasonable delays are occurring in a significant number of cases at a local level."[13] Indeed, the facts before the FCC indicated that nationwide there were then more than 3,300 pending "personal wireless service facility siting applications" before local jurisdictions, and of those approximately 760 were pending final action for more than one year, and more than 180 such applications were awaiting final action for more than three years.[14] Ultimately, the FCC found that the "record evidence demonstrates that unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services" and "that the record amply establishes the occurrence of significant instances of delay."[15]

With those findings, the FCC's Ruling established a presumptive "reasonable period of time" time for review of wireless telecommunications facility applications. Under the Ruling, an applicant for a wireless telecommunications facility must be advised by a zoning agency within 30 days of submission if an application is incomplete. Where an applicant is not so advised, the Shot Clock for decision is set. For collocations on existing structures the regulating agency/authority must render a decision within 90 days. It should be noted that this provision applies to proposals on rooftops, water tanks and other structures which already host existing wireless telecommunication facilities pursuant to the National Programmatic agreement.[16] For new tower facilities, the regulating authority must render a decision within 150 days.

If a decision on a complete application is not issued within the applicable time frame an applicant may seek a court order. By defining a "reasonable period of time" as above, "a failure to act" occurs as per Telecommunications Act § 332(c)(7)(B)(v). If brought to federal court, the regulating entity would have the burden to prove why the extended review period was not unreasonable in light of the particular circumstances of the application. While the FCC specifically ruled that applications are not granted automatically because the deadlines have passed, the Shot Clock is a standard of unreasonable delay with few exceptions.[17]

A key dynamic of the Telecommunications Act is to facilitate the construction of personal wireless facilities by preventing local zoning authorities from unreasonably delaying wireless providers in the application process. *Sprint Spectrum, LP v. Town of Easton*.[18] Many may be surprised to find that presumptive time frames have already been noted by the courts and applied to New York municipalities. With respect to unreasonable delays, Judge Colleen McMahon of the United States Southern District of New York stated that "an application has been presumptively unreasonably delayed if it has not been acted on within six months.…" *Sprint Spectrum L.P. d/b/a Sprint PCS v. The Village of Tarrytown et al*.[19] As such, the FCC time frames are fundamentally consistent with existing case law.

When does the Shot Clock start and when does it stop? Within 30 days of being filed, a regulating authority must advise that an application is not complete. The Shot Clock commences once the application is deemed complete. As to ending, the FCC concluded that prior to an expiration of the Shot Clock, time may be added by *mutual* consent. The Declaratory Ruling clearly indicates that a rigid application of the deadlines, where the parties are working cooperatively "toward a consensual resolution," would be contrary to both the public's interest and Congressional intent.[20] In such instances the commencement of the applicant's 30-day period for filing suit in court will be tolled.

B. Pending Petition for Reconsideration of FCC Ruling and Shot Clock Completeness Questions

At the time of writing, the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association (the "Petitioners") have requested the FCC to reconsider its Ruling or at least clarify portions thereof.[21] An accompanying Stay Request asking the Commission to stay the Ruling in its entirety pending review of their Petition for Reconsideration and Clarification and any judicial appeals was denied by the FCC.[22] One of the concerns cited by Petitioners is that the Declaratory Ruling does not allow local authorities to toll the adopted time limits for reasons other than incompleteness.[23] The Petitioners assert that the proposed timelines will encourage issues to be "hidden" while the initial 30-day review is under way and that incomplete facets of the application may only become evident *after* the Shot Clock begins ticking. The Petitioners go on to contend that application processes will therefore become more demanding, require more information for a complete application, and the costs and required formalities of every application will increase.[24] In sum, Petitioners argue that the FCC's Declaratory Ruling, and in particular the 30-day completeness review deadline, will "slow down the review process due to increased

rejections and withdrawn applications and will also prevent local governments from giving full consideration to the concerns of their citizens because of the increased time pressure they will face to review applications."[25]

Absent in this analysis is the incentive wireless service providers have to resolve legitimate issues raised and avoid costly application delays and litigation. Indeed, wireless infrastructure providers may in fact incur additional delay if litigation ensues and the court determines that additional time was, in fact, reasonable under the circumstances.[26] Ultimately, it is true that once the Shot Clock begins authorities will not *independently* have the capacity to press pause and will not *independently* dictate the tempo of an application's processing. Instead, the FCC's Declaratory Ruling clearly permits tolling by mutual consent allowing the parties to *jointly* agree to extend the time for decision where legitimate issues are yet to be resolved.[27] Moreover, the Petitioners failed to recognize that the FCC refused to implement requested CTIA provisions regarding automatic approval which would have been similar to New York State's subdivision law. Indeed, it should be noted that the FCC selected a more flexible approach than proffered by CTIA. For new towers, CTIA requested a deadline of 75 days for "final action" from the date of filing. For applications seeking to collocate antennas on existing structures already hosting such facilities, the deadline recommended was 45 days.[28]

Where local governments fail to recognize or make necessary adjustments in response to the FCC's Ruling, the likelihood of mutual assent for time extensions between applicant wireless carriers and local approval bodies is far murkier. Different from fact-specific issues related to specific applications, "institutional delay" can result from multi-step processes requiring multiple boards and referrals for even the most straightforward of applications. Local processes requiring multiple approvals or referrals to various bodies can be time-consuming. For example, referral of a special permit application from a Village Board to a Planning Board for review and referral back to the Village Board can take months even when it is a collocated facility with few factual issues related to a given proposal. This is particularly true where boards meet only once a month and may be exacerbated in those instances when meetings are delayed or canceled. As such, local code provisions should be reviewed and revised to better streamline the applications of wireless service providers in accordance with the Shot Clock.

In New York, the State Environmental Quality Review Act ("SEQRA") creates a specific question regarding the FCC's time frames. Under SEQRA, a municipality cannot deem an application complete until it is deemed Type II exempt, a negative declaration has been issued or a Draft Environmental Impact Statement has been accepted. Even for a modest collocation, municipalities in the past would wait for two or three months after submission for any SEQRA action, during which time a board would circulate intent to be lead agency prior to any negative declaration. However, in the vast majority of cases wireless applications, even for towers, do not trigger an EIS or a substantive legal question. Given the analysis of the FCC in its Ruling, the stress on expeditious review and the pre-eminence of Federal law, municipalities will have to issue SEQRA decisions in keeping with the Shot Clock.

III. Carrier vs. Industry Need and "Effective Prohibition of Service"

While not an issue in the Second Circuit governing New York, the FCC did conclude that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)" of the Telecommunications Act.[29] The FCC declared that the approval and successful deployment of one company's wireless service in a particular geographic area is not grounds on which an application of a competitor can be denied. Denial of an application to provide coverage solely on the basis that the area is already serviced by another wireless telecommunications carrier constitutes an illegal prohibition on the provision of service under the Ruling.

To date, most circuits agreed that an application could not be denied based on the mere fact that a competitor carrier already provides service to a particular area, as in *Second Generation Properties, L.P. v. Town of Pelham*[30] *and MetroPCS, Inc. v. City and County of San Francisco.*[31] However, some circuits found no prohibition or "effect of prohibiting" solely because another carrier was already providing service. In *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.,*[32] the Third Circuit concluded that "evidence that the area the new facility will serve is not already served by another provider" is essential to showing a violation of the "effect of prohibiting" clause. Similarly, the Fourth Circuit, in *AT&T Wireless PCS, Inc. v. City Council of Va. Beach,*[33] found that the statute only applies when the state or local authority has adopted an outright prohibition on wireless service facilities generally. The Declaratory Ruling resolves this conflict and clarifies that governmental action violates the "effect of prohibiting clause" where service of a functionally equivalent provider is denied simply because a competitor already services a given area. Among the reasons cited

in the Ruling, the FCC indicated that this understanding comports best with the underlying purpose of the Telecommunications Act in promoting a nationwide network of competing carriers offering quality wireless service with the best prices for consumers.[34]

IV. Ordinances That Require Zoning Variances Are Not *Per Se* Illegal

In its Petition, CTIA requested that the Commission preempt, under § 253(a) of the Telecommunications Act, local ordinances and State laws that require a wireless service provider to obtain a variance, regardless of the type and location of the proposal. The reasoning put forth was that any such condition is "an impermissible barrier to entry under Section 253(a)" and therefore preempted.[35] The FCC deemed the record insufficient to preempt ordinances that require variances to obtain siting approval and illegal on their face. The Petition did not, according to the FCC, present sufficient facts or evidence of specific controversies to base such action or ruling. As such, the FCC found that "consideration of blanket variance ordinances should occur within the factual context of specific cases."[36]

This, therefore, remains an open question since the FCC indicated particular factual circumstances of requiring zoning variances can be deemed *per se* illegal. Municipalities should revisit local codes and requirements that push rational wireless applications into a procedural need for a variance. This is particularly true for the installation of collocated facilities which in many, if not most, instances should be available as-of-right.

V. Conclusion

In issuing its Declaratory Ruling, the FCC interpreted key provisions of the Telecommunications Act and furthered Congress' dual interests in promoting the rapid and ubiquitous deployment of wireless services and capabilities while preserving the area of authority Congress reserved to state and local governments. Local governments and carriers now have clear guidance as to the reasonable timing of the review of wireless facility siting applications under the Telecommunications Act. The pressing needs of infrastructure deployment will require carriers to seek federal court review for unnecessary procedural delays. In addition, applications of carriers new to a market or geographic area may not be denied simply because other carriers already provide service there. Finally, while those regulatory schemes automatically requiring variances are not *per se* illegal, such schemes can be found illegal under specific factual circumstances. Municipalities will do well to review current code provisions and procedural practices to determine how the regulation of wireless facilities siting complies with the FCC's Ruling.

Endnotes

1. WT Docket No. 08-165—Declaratory Ruling on Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance ("Declaratory Ruling").
2. Telecommunications Act Codified in 47 U.S.C. § 332(c)(7)(B).
3. Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance.
4. *See* www.ctia.org.
5. *See* http://www.ctia.org/.
6. 47 C.F.R. § 1.2. *See also* Administrative Procedure Act 5 U.S.C.A. § 554 regarding adjudications: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."
7. *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973); *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, CC Docket No. 95-116, Order, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).
8. Declaratory Ruling, para. 35. *See also* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150.
9. *Id*.
10. Public Law 111-5: American Recovery and Reinvestment Act of 2009. *See also* http://www.broadband. gov/about_broadband.html.
11. Barack Obama Presidential Proclamation 8460, Critical Infrastructure Protection.
12. The term "Shot Clock" has been consistently used in regard to this part of the FCC's ruling and refers to the timer included in several sports used to hasten the speed of play. This has a particular relevance for New Yorkers, as the shot clock was brought to fruition by the owner of the National Basketball Association's Syracuse Nationals (later to become the Philadelphia 76ers) to try and speed up the pace of play following the National Basketball Association's 1953–54 season. *See* http://www.nba.com/analysis/00422949.html.
13. Declaratory Ruling, para. 33.
14. Declaratory Ruling para. 33, citing Petition p. 15.
15. Declaratory Ruling para. 34.
16. *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas. Collocation defined as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."
17. Declaratory Ruling, para. 32 and footnote 99.
18. 982 F. Supp. 47, 50 (D. Mass. 1997).
19. No. 02 Civ. 6446 (S.D.N.Y. September 12, 2002). In footnote number 1, Judge McMahon stated that "as a rule of thumb, I believe that an application has been presumptively unreasonably delayed if it has not been acted on within six months of the date of filing.… The presumption is rebuttable, of course, but in all the cases I have heard on this issue, no one has succeeded in rebutting it."
20. Declaratory Ruling, para. 49.
21. Petition for Reconsideration or Clarification, The National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American

Planning Association, WT Docket No. 08-165 ("Petition for Reconsideration").

22. WT Docket No. 08-165. Order in the matter of Emergency Motion for Stay of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association dated January 29, 2010.
23. Petition for Reconsideration at 6.
24. *Id*. at 7-9.
25. *Id*. at 9-10.
26. Declaratory Ruling at 38. *See also* WT Docket No. 08-165 Opposition of CTIA—The Wireless Association to Emergency Motion for Stay, at 8.
27. Declaratory Ruling, para. 49.
28. *Id.* at para. 10.
29. *Id.* at para. 56.
30. 313 F.3d 620, 633-34 (1st Cir. 2002) (rejecting a rule that "any service equals no effective prohibition").
31. 400 F.3d 715, 731-33 (9th Cir. 2005) (adopting the First Circuit's analysis).
32. 196 F.3d 469, 480 (3d Cir. 1999).
33. 155 F.3d 423, 428-29 (4th Cir. 1998).
34. Declaratory Ruling, para. 61.
35. Petition at 35-37.
36. Declaratory Ruling, para. 67.

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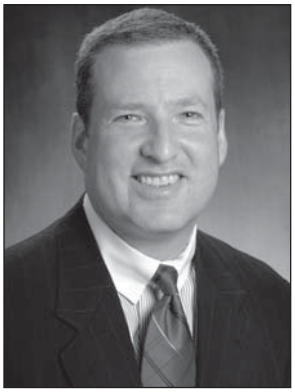
2009 New York State Legislative Update

By Darrin B. Derosia

Chapter 7

COBRA Election Coverage in Accordance with Federal Stimulus Law



Creates a special enrollment period for individuals losing health insurance coverage in order to make belated COBRA elections in accordance with the American Recovery and Reinvestment Act, which authorizes a nine-month, 65% reduction in health insurance premiums if continuation coverage is elected.

Chapters 18-23 and 383

Traffic Light Cameras

Increases the number of traffic light cameras authorized for use in New York City, and permits the cities of Buffalo, Rochester, Yonkers and Syracuse, as well as Nassau and Suffolk counties, to install up to 50 red light cameras in such municipalities. The cameras act as traffic safety mechanisms which capture the license plates of vehicles that are passing through an intersection once the traffic light turns red.

Chapter 24

Local Government Judgment Collection

Provides that a money judgment obtained by the State or a municipality against a debtor may be executed against specified personal property that was previously made exempt under the Exempt Income Protection Act.

Chapter 25

Mobility Tax

Establishes an employer payroll tax, or mobility tax, that applies to all public, non-profit, and private employers in the 12-county Metropolitan Commuter Transportation District (the MTA region). The rate of the tax is 34 cents for every $100 in salaries and wages. For local governments, the tax is effective as of March 2009 and payments must be made quarterly to the NYS Department of Taxation and Finance. The first payment was due in November 2009.

Chapter 26

Open Meetings Law Notice Requirements

Amends the Public Officers Law to require that a public body, when it has the ability to do so, conspicuously post notice of time and place of its meetings on its, or the municipality's, Internet Web site.

Chapter 27

FOIL Requests via Electronic Mail

Requires each public agency to accept requests for records submitted by electronic mail, provided it has the reasonable means to do so, and to respond to such requests, to the extent practicable, by electronic mail. Also requires the agency to use forms developed by the Committee on Open Government, to the extent practicable.

Chapter 28

Binding Arbitration

Extends for another two years, to June 30, 2011, the section of Civil Service Law that provides for compulsory binding arbitration of an impasse in collective labor negotiations involving police officers or paid firefighters.

Chapter 29

Injunctive Relief in Labor Disputes

Extends for another two years, to June 30, 2011, the section of Civil Service Law that provides authorization for injunctive relief in connection with an alleged improper practice under the Taylor Law.

Chapter 30

School Retiree Health Insurance

Extends for another two years, to May 15, 2011, the prohibition on changes in health insurance benefits or health insurance costs for school district retirees.

Chapter 35

Expansion of Unemployment Insurance Benefits

Conforms New York State's unemployment insurance law to Federal law pursuant to the American Re-

covery and Reinvestment Act, by expanding eligibility for the receipt of unemployment insurance benefits by those separating from employment for a "compelling family reason." Such reasons include domestic violence, family illness, or a removal from the labor market to accompany a spouse to a different location as a result of the spouse's acceptance of new employment.

Chapter 36

Operation of a Fire Truck Without a CDL

Permits the operation of a fire truck without a commercial driver's license (CDL) during emergency situations or during the performance of official duties related to emergency governmental functions.

Chapter 46

Coordinated Assessment Programs

Amends the Real Property Tax Law to simplify the establishment and administration of coordinated assessment programs. The law reduces time requirements for adopting agreements or withdrawal therefrom, and clarifies other procedures to encourage greater participation in such programs which are intended to streamline local assessment functions. The law provides for a six-year term for an assessor in such coordinated programs.

Chapters 50 and 56

State Aid to Local Governments

The 2009-10 state budget maintains the basic AIM program at the prior year level. This means that most municipalities will get the same amount of AIM funding in 2009-10 as they received in 2008-09. The additional legislative aid that was shared by 33 cities in 2008-09—which after the Deficit Reduction Plan was reduced to $9.28 million—was eliminated in the 2009-10 budget.

Chapters 50 and 56

Aid for Municipalities with Video Lottery Terminals (VLTs)

This year's budget changed the way state aid is distributed to municipalities that are "host communities" to video lottery gaming operations. The new system considers the poverty rate in each of these municipalities, as compared to the statewide average. For some host communities, such as the City of Yonkers, aid will stay about the same; for others with lower poverty rates aid will be slashed or even, as in the City of Saratoga Springs, eliminated.

Chapters 50 and 56

Local Government Efficiency Grant Program (LGEG)

Funds available in the budget for grants under the Local Government Efficiency Grant program were reduced by 50%, to $11.5 million for the 2009-10 fiscal year. Grants previously awarded will not be affected. The categories of grants are: high priority and general efficiency planning grants, efficiency implementation grants, and 21st Century demonstration projects promoting transformative regional initiatives. The maximum grant amounts vary by category and there is a 10% local match required. In addition to the grants, nearly $2 million of the $11.5 million LGEG funding will be available for governmental consolidation incentives in the form of additional AIM funding. Specifically, municipalities that consolidate or dissolve are eligible to receive funds equal to 15% of the municipalities' combined property tax revenue from the previous year, capped at $1 million.

Chapter 55

Transportation Aid

The 2009-10 state budget maintains Consolidated Highway Improvement Program (CHIPS) funding at 2008-09 levels, providing a total of $363 million in 2009-10 for the CHIPS capital program.

Chapter 55

Restore NY

The 2009-10 budget includes the unspent funds for the third round of the Restore NY program, providing the full $150 million in grant money that was authorized in 2008-09 for the revitalization of commercial and residential properties. Specifically, this program supports municipal efforts to demolish, deconstruct, rehabilitate, or reconstruct vacant, abandoned, condemned, or surplus properties.

Chapter 55

Empire Zones

The 2009-10 budget modified the Empire Zones Program to reduce the overall cost of the program and to ensure it is serving the purpose for which it was intended. All existing participants must demonstrate that they are producing at least $1 in wages and investments for every $1 that the state spends. New participants will be subject to a 20:1 benefit cost ratio (the ratio will be 10:1 for manufacturers). In addition, the current program will sunset on June 30, 2010—one year earlier than originally scheduled.

Chapter 56

AIM Accountability Requirements

The state budget requires all cities, as well as those villages (currently, only the Village of Johnson City) that meet all four of the fiscal distress factors that are used to allocate AIM funding, to continue to prepare multi-year financial plans and provide written certification to the Division of the Budget that they have completed such plans. Cities are not required to complete the fiscal accountability reports or the fiscal improvement plans, since these were predicated on the receipt of additional AIM funding. In addition, there are no restrictions on how a municipality may use the AIM funds since those too were tied to the receipt of AIM increases.

Chapters 62 and 104

Private Sale of Tax Liens

Authorizes the cities of Utica and Middletown to sell some or all of the delinquent tax liens held by the cities to private entities. Any contract regarding sale of the tax liens must be executed by December 31, 2009, and this authority sunsets on December 31, 2011. The cities of Schenectady and Amsterdam received similar authority in 2004 and 2006, respectively.

Chapter 74

Local Government Consolidation and Dissolution

"The New N.Y. Government Reorganization and Citizen Empowerment Act" creates a new article 17-A of the General Municipal Law and repeals various sections of law, mostly in the Town and Village Law, with respect to consolidation and dissolution of local governments, including improvement, fire, library, and other special districts. The new article 17-A creates completely new procedures for dissolving or consolidating these "local government entities" including lower thresholds for citizen petitions, particularly with respect to village dissolution. The new article does not apply to cities or counties. The Act also amends Municipal Home Rule Law to extend counties' ability to transfer functions among municipalities within the county by charter amendment or local law, to include actual abolishment of a municipality upon the transfer of all of its functions. For more information on this new law, see the Department of State's Web site at http://www.dos.state.ny.us/lgss/publications.htm#SharedServices.

Chapter 79

Temporary Retirement Benefits

Extends for two years, to July 1, 2011, temporary benefits of a Public Retirement System and the Local Police and Fire Retirement System.

Chapter 80

Domestic Violence Victims

Prohibits employer discrimination against victims of domestic violence or stalking.

Chapter 165

Military Ballots

Makes permanent certain Election Law provisions relating to voting ballots by military and special federal personnel in primary, general, and special elections.

Chapter 186

Local Finance

Extends, until 2012, certain provisions of the Local Finance Law including: authority for municipalities to issue variable rate bonds and notes; an extension of the time for maturity of first installment of serial bonds allowing municipalities to pay the first installment up to two years after issuance; and suspension of the five percent down payment requirement. Extends other provisions related to certificates of participation, lease financing, and original issue discount bonds.

Chapter 230

Village Tax Lien Sales

Extends for three additional years, through 2012, the authority for villages to hold annual tax lien sales as a means of enforcing the collection of delinquent taxes.

Chapter 235

Tax Exemption for Cold War Veterans

Provides municipalities with the option to increase the dollar amounts in certain circumstances of the real property tax exemption for Cold War veterans and extends the exemption to property held in trust for the veteran, and to cooperative apartment ownership.

Chapter 236

COBRA Continuation Coverage

Expands the length of time, from 18 to 36 months, for individuals to elect to continue health insurance coverage when such coverage has been lost due to an involuntary termination of employment by a municipality having fewer than 20 employees.

Chapter 239

Historic Property Tax Credit

Increases the rate of credit for eligible commercial properties under the State's Historic Properties Rehabilitation Tax Credit Program from 6% to 20% of qualified rehabilitation costs that are eligible for the program. The cap on credits available for commercial projects was increased from $100,000 to $5 million and on residential from $25,000 to $50,000. The rehabilitation tax credit will now be offered as a rebate, providing a stronger financial incentive for homeowners without significant income tax liability, and eligibility for residential structures was widened.

Chapter 240

Health Insurance Coverage for Unmarried Children

Allows unmarried children up to age 29, regardless of financial dependence, but not covered by an employer policy, to be covered under their parents' group health insurance.

Chapter 259

Treatment of Reverse Mortgage Proceeds

Provides that proceeds received from reverse mortgages are not considered income for the purpose of senior citizens' partial property tax exemption under the Real Property Tax Law. However, any interest or dividends realized from the investment of reverse mortgage proceeds is income, and monies used to repay a reverse mortgage may not be deducted from income.

Chapter 263

Temporary Location of Court

Provides that in the case where an emergency prevents holding of court in regular location, the Governor or the Chief Judge may designate a different temporary location; the expense of such temporary relocation would be a charge on the Office of Court Administration.

Chapter 304

Electronic Sale of Bonds Pilot Program

Establishes an electronic public bond sales pilot program for the County of Westchester. The three-year program is intended to reduce the time and costs associated with municipal bond sales by allowing the county to use internet bidding platforms operated by nationally recognized electronic securities bidding firms.

Chapter 305

Accidental Death Benefits for Police and Firefighters

Increases computation of certain accidental death benefits for surviving dependents of police and paid firefighters.

Chapter 344

Sustainable Energy Loan Program

Authorizes the City of Binghamton to establish a sustainable energy loan program to assist homeowners and businesses within the city in the installation of energy efficiency improvements. Permits the borrower to repay the city through an assessment on the real property that was the subject of the loan.

Chapter 349

Funds for Proceedings Relating to Siting of Utility Transmission Facilities

Upon an application to the PSC for an electric utility transmission line over a certain size, the applicant must submit a fee that will be part of a fund made available to host communities in order to defray costs associated with intervening in proceedings regarding the electric transmission projects. The funds may be used to hire expert witnesses, consultants, and legal representation.

Chapter 353

Veterans Disability Pension Tax Exemption

Clarifies exemption for a person with disabilities to specifically recognize as including a person who is certified to receive a U.S. Department of Veterans Affairs disability pension.

Chapter 359

Large Print Versions of Utility Bills

Requires telephone, cable, and utility companies, including municipally owned ones, to notify customers of availability, upon request, of billing statements in large print.

Chapter 364

Consolidating Court Facilities

Authorizes the towns of Elba, Oakfield, and Batavia to hold their justice court proceedings in a suitable courtroom facility within any of the three towns or in the City of Batavia. Requires approval of the various town boards.

Chapter 385

Prohibition on the Use of the Term "Oriental" on Municipal Forms

Bans the use of the term "Oriental" on any municipal form or pre-printed document and requires a replacement for identification purposes with the term "Asian" or Pacific Islander heritage, by January 1, 2010.

Chapter 389

New York Main Street Program

Amends the New York Main Street program by authorizing local governments to directly participate in the program, increasing the maximum funding award from $200,000 to $500,000, and authorizing those awarded funding to spend up to 7.5% of the award for administrative and planning expenses. The program supports the renewal of New York's cities, villages and towns by funding streetscape improvements, façade renovations, and building and residential rehabilitation.

Chapter 390

Transfer of Police and Fire Retirement Service Credit

Allows certain members of the NYS Police and Fire Retirement System who had previously transferred service credit from the NYS Employees' Retirement System to transfer all service credit earned back to the ERS.

Chapter 406

UDC Funding of Energy Conservation Projects

Establishes an energy conservation and efficiency project definition in the Urban Development Corporation Act (NYS Unconsolidated Laws, Title 16, Chapter 24, Subchapter I), and would enable entities to apply to the Urban Development Corp. for the funding of such projects.

Chapter 409

Reduction of Carbon Emission in Town Refuse Districts

Authorizes a town board, upon receipt of a petition, to adopt a program of reducing carbon emission in a refuse or garbage district, through energy efficiency audits and installation of energy efficient equipment, other than domestic appliances, and to charge fees for same.

Chapter 410

OGS Authority to Purchase and Deliver Energy

Authorizes the Office of General Services (OGS) to purchase and deliver, as centralized services, renewable energy and renewable energy credits, along with electricity, from the New York Power Authority and other suppliers. This will allow qualified local governments, public authorities, and public benefit corporations to purchase "green energy" through OGS.

Chapter 415

Local Disaster Preparedness Planning

Requires that Local Disaster Preparedness Plans of a county, town, city or village be developed such that one plan does not conflict with any others in the county; provides that conflicts within the county be resolved by the county, and conflicts with local governments outside of the county be resolved by State Emergency Management Office.

Chapters 487 and 488

Green Jobs/Green New York Act

Establishes the Green Jobs/Green New York initiative to reduce New York's energy consumption and create green jobs throughout the state. The bill would provide funding, some of which will flow through a revolving loan fund, to communities, homes, small businesses, and not-for-profits for energy audits, energy efficient retrofits for property owners, and green jobs training. The bill would also establish a Green Jobs/Green New York Advisory Council to advise the New York State Energy Research and Development Authority (NYSERDA) on the creation and implementation of the program.

Chapter 494

Local Government Mandate Relief

Adopts several of the recommendations of the former NYS Commissions on Local Government Efficiency and Competitiveness and Property Tax. Eases provisions for municipalities to establish cooperative health benefit plans; facilitates shared services with respect to highways among municipalities and between municipalities and State agencies; allows multiple counties to have a single public health director and board of health; increases threshold for local competitive bidding on public works contracts from $20,000 to $35,000; equalizes the treatment of collateral sources in tort actions against public employers; protects parties to the settlement of a tort claim from certain unwarranted lien, reimbursement and subrogation claims; and authorizes the Municipal Bond Bank to issue bonds for municipalities under the American Recovery and Reinvestment Act.

Chapter 497

Municipal Sustainable Energy Loan Program

Authorizes municipalities to establish, by local law, sustainable energy loan programs using federal grant assistance or federal credit support made available through the New York State Energy Research and Development Authority. Municipalities can provide the criteria for the loans as well as the terms and conditions of repayment, but must include approved energy efficiency improvements and must verify and report to the New York State Energy Research and Development Authority all installation and performance of improvements financed under the program. Approved energy audits must be conducted to verify appropriateness and feasibility before loans may be made by the municipality.

Chapter 504

Tier 5 of the NYS Public Employer Retirement Plan

This law creates a new Tier 5 benefit plan for new members that join the NYS and Local Employees' Retirement System or the NYS and Local Police and Fire Retirement System. New York City and Teachers' Retirement systems are affected as well. Some of the significant changes in Tier 5 are: most employees will contribute 3% of pay for their entire career rather than having contributions end after ten years; vesting in the system after ten years instead of five; larger early retirement reductions for members retiring prior to age 62 and the waiver of reduction with 30 years of service is eliminated for most employees; annual overtime pay in excess of $15,000 would not be included in the definition of wages and final average salary. For more information, see the State Comptroller's Web site at http://www.osc.state.ny.us/retire/employers/tier-5/index.htm.

Chapter 506

Public Authorities Reform Act

Creates a new independent authorities budget office to be housed within the Department of State with expanded enforcement, oversight, and regulatory duties. The Act amends the 2005 Public Authority Accountability Act's reporting requirements that the state and local authorities must comply with. The Act imposes additional constraints on state and local authorities such as requiring state comptroller approval of contracts exceeding $1 million. The Act restricts authorities from disposing of property for less than fair market value, with limited exceptions, and provides for greater transparency requirements with respect to contracts and transactions.

SOME VETOES WORTH NOTING

Veto No. 3

Open Meetings Law—Penalty Provisions

The Municipal Law Section opposed A.2046-A / S.3453, which would have amended Public Officers Law § 107 to authorize courts to invalidate actions of public bodies, not only when the action was taken, but also when "substantial deliberations relating thereto" occurred in violation of the Open Meetings Law. Additionally, the bill would have authorized courts to impose a civil penalty of up to $500 against any public body that violates the Open Meetings Law.

Veto No. 5

Tier 2 Membership for Newly Hired Police and Firefighters

Would have extended Tier 2 membership eligibility for any police officer or firefighter hired after June 30, 2009. Newly hired police and firefighters will now receive Tier 3 membership, a lesser retirement benefit which requires a 3% contribution during the employment of the individual. First enacted in 1981 as a means to keep new police and firefighters in Tier 2 rather than Tier 3, the law indicated that it was "temporary" until a review could be conducted. Despite that legislative statement, the law has been extended routinely since that time.

Veto No. 12

SCRIE Income Ceiling Increase

Would have increased the income ceiling for the Senior Citizen Rent Increase Exemption and Disability Rent Increase Exemption programs by excluding the cost of certain medical expenses from the definition of income for purposes of such programs.

Veto No. 23 and Veto No. 48

Accelerated State Aid Payments for Certain Cities

Would have accelerated state aid payments to the cities of Syracuse and Rochester, providing them with additional aid in their fiscal years ending June 30, 2010.

Veto No. 28

Historic Property Neglect

Would have amended the General Municipal Law to authorize counties, cities, towns, and villages to prohibit neglect of historic properties which results in substantial deterioration of the property. The bill was vetoed on the grounds that not only do municipalities already have the authority to prohibit neglect of historic properties under their police power and the State Property Maintenance Code, but also there were concerns about the narrow definition of "substantial deterioration," which some feared could be interpreted as either preempting a local definition of a neglected property or triggering maintenance only when a building is on the verge of collapse, thus defeating the underlying purpose of the legislation.

Veto No. 30

Workplace Violence Study by the NYS Department of Labor

Would have authorized the NYS Department of Labor to study hostile workplace behavior and its consequences.

Veto No. 60

Accessibility Requirements at Polling Sites

Would have amended the Election Law to require all polling sites that fail to meet the existing state and federal Americans with Disabilities Act accessibility standards to make the necessary changes and/or modifications within six months from the time such a place was deemed inaccessible. The bill would have applied even to places that have received waivers from ADA compliance.

Veto No. 62

Westchester Workforce Housing Incentive Program

Would have amended the General Municipal Law to establish the Westchester Workforce Housing Incentive Program, which would have required 10% of the total units of any new construction of five or more residential units to be affordable housing units.

Veto No. 66

Public Authority Subcontracting

Would have established mandatory guidelines for public authorities to follow prior to entering into a contract for professional, maintenance, clerical, or technical services. The guidelines would include conducting a cost benefit analysis, and preparing a statement indicating compliance, which would be provided to the employee organization representing the authority's employees. The organization could challenge the statement, including initiating court proceedings to invalidate such contracts.

Darrin B. Derosia is an associate counsel in the NYS Department of State.

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