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Municipal Lawyer

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A Message from the Chair

Robert B. Koegel

Were you there?

At West Point for our Fall Section meeting, that is. Some 55 of our Section members, or over 5% of our 1,000+ membership, plus spouses and guests, signed up for the program. That's a pretty average turnout, I'm told, but we can do better. We can get more attorneys together, learning from one another and getting to know one another socially.

From what I heard, the meeting was a great success. As usual, we put on a program to cover what we perceive to be primary subjects of interest to our Section members. We began Saturday morning with hot topics in land use law, moderated by Henry Hocherman. Still wound up after his 3-day-old decision in *Westchester Day School II*, Kevin Plunkett made a spirited presentation on the Second Circuit's affirmance of the trial court's order directing the municipality to issue a permit authorizing a school expansion under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Dwight Merriam spiced up his delivery on zoning for home-based businesses with shots from an adult-entertainment internet business run from a house in Tampa (no kidding). Dan Spitzer had us tilting at windmills, or more precisely, considering the issues of siting wind turbines.

We moved on to hot topics in public sector labor law, led by Sharon Berlin.

Past-NYSBA President Vince Buzard covered the validity of freezing wages of government employees in cases of extreme financial hardship. With his inimitable deadpan style, Rich Zuckerman gave another informative and entertaining caselaw update on a potpourri of public labor law subjects.

On Sunday morning, we took up ethics, hosted by our indefatigable committee chair, Mark Davies. George Cregg discussed the recent Public Authorities Accountability Act. Paul Rephen gave a federal caselaw update on government attorney-client confidentiality. Robert Ryan introduced us to the brand new statute creating the Commission on Public Integrity, whose reach we have yet to see. We finished with an environmental topic, global warming, and state initiatives to address it, given by Peter Iwanowicz, the Director of DEC's new Climate Change Office.

Our noses weren't in the books all weekend. Friday night cocktails featured Dr. James Johnson, Executive Director of the Hudson Valley Institute, beclad in Revolutionary War garb, illuminating us on the colorful history of the region. Following a sump-

Inside

tuous lunch on Saturday, we listened to John Clarkson, Executive Director of the newly formed New York State Commission on Local Government Efficiency and Competitiveness, tell us about grand schemes to consider changes to the organization and workings of all municipal units of governance. And on Saturday night, we were privileged to hear the Hon. Eugene F. Pigott, Jr., Associate Judge of the New York Court of Appeals, tell us about how the Court works and how to make more convincing arguments before it.

Does any of that interest you? Do you care about these subjects, and if not, what do you care about? Is there a topic you really want to learn about, or tell others about? Is there a place where you'd like to meet, and things you'd like to do while you're there? What can we do to make you join us at our meetings?

I know our Section members are plugged into one another via our Section's listserv, a feature I've extolled in the past. Just the other day, somebody asked if a planning board could reconsider an approval, based on misinformation discovered after the approval. Within minutes, opinions from many Section members were streaming in, followed by the posting of a legal memorandum on the subject, then the news that one municipality was presently litigating the issue, capped with the comment that the outcome of the case should be reported to all. I continue to marvel at this enthusiasm, but . . . how do we get you to our meetings?

E-mail me at rbk@remgiff.com.

Robert B. Koegel

From the Editor

In his Message from the Chair, Bob Koegel mentions a recent discussion on the Section's listserv regarding the propriety of predicating a land use denial on an applicant's misrepresentations. Indeed, that issue was recently addressed in *Caspian Realty Inc. v. Zoning Board of Appeals of the Town of Greenburgh*.[1]

In *Caspian Realty*, the Petitioner sought and obtained site plan approval from the Planning Board to construct a one story building to be used for the retail sale of furniture and home accessories. That site plan approval was predicated upon the use of only one floor of the building for retail space, encompassing 6,200 square feet with a floor area ratio (FAR) of 1.34. Based upon the Town's Zoning Ordinance, if the building had a FAR in excess of 1.35 and a square footage greater than 6,200 square feet, variances would be required. Nevertheless, as construction progressed, Petitioner began preparing the lower level of the building for retail use. Subsequent to the issuance of a certificate of occupancy and the opening of business, the Town Building Department was notified that both levels of the building were being used for retail display in violation of the Zoning Ordinance.

Petitioner was issued zoning violations. During the pendency of proceedings on those violations in the Justice Court, the Petitioner applied to the Zoning Board of Appeals ("ZBA") for variances to increase the FAR from 1.34 to 2.36 and to reduce the number of required parking spaces from 62 to 33 to legalize the use of the lower level for retail purposes.

The ZBA denied Petitioner's variance application. The Petitioner then instituted an Article 78 proceeding to annul the ZBA's determination on the grounds that the ZBA ignored the criteria set forth in Town Law § 267-(b)(3)(b) and relied instead on the Petitioner's alleged misrepresentations to the Town which enabled the Petitioner to utilize the lower level of the building for retail space without proper approvals.

Notwithstanding its finding that the Petitioner "deliberately misrepresented the extent of its intended use for the property to the Planning Board," the Court held that "such misrepresentations are not a factor which may be considered in deciding such a [variance application]."Distinguishing prior precedents that upheld denials of applications based upon misrepresentations [*Matter of Holy Spirit Association for the Unification for World Christianity v. Rosenfeld*],[2] or lack of candor and honesty [*Ostroff v. Sacks*],[3] the Court stated that these cases were decided prior to the 1992 enactment of the current version of Town Law Section 267-b. Unlike the earlier statute, the current statute contains the five-part balancing test for area variances which the Courts have held to be the exclusive test for the granting or denying of an area variance.[4]

While not condoning Petitioner's violation of the Town's zoning ordinance, the Court opined that the "appropriate procedure of enforcing compliance with the Code is through the issuance of zoning violations and criminal proceedings thereon in the Justice Court." Accordingly, the Court remanded the matter to the ZBA to "properly consider and apply" the criteria for granting an area variance in Town Law § 267-(b)(3)(b).

In this issue of the *Municipal Lawyer*, Mark Davies, Executive Director of the New York City Conflicts of Interest Board, continues his three-part series outlining the essential components of an effective local ethics law. In Part II of the series, he focuses on transactional and applicant disclosure, particularly annual financial disclosure, and includes a Model Annual Disclosure Form for municipalities.

Henry M. Hocherman and Noelle V. Crisalli of Hocherman, Tortorella and Wekstein, LLP survey recent decisions involving land use, including cases applying the State Environmental Quality Review Act and Eminent Domain Procedure Law. Also, Paul Humphreys, a second-year student at Pace Law School, discusses the growing use of video camera surveillance by municipalities and the constitutional issues that it implicates.

Please do not hesitate to showcase your expertise and experience by writing an article for the *Municipal Lawyer*.

Lester D. Steinman

Endnotes

1. 17 Misc. 3d 694, 842 N.Y.S.2d 887 (Sup. Ct., West. Co. 2007) (Zambelli, A.J.S.C.).
2. 91 A.D.2d 190, 201, 458 N.Y.S.2d 920 (2d Dep't 1983).
3. 64 A.D.2d 708, 407 N.Y.S.2d 546 (2d Dep't 1978).
4. *See Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995); *Baker v. Brownlie*, 248 A.D.2d 527, 670 N.Y.S.2d 216 (2d Dep't 1998).

Video Surveillance on Public Streets: A New Law Enforcement Tool for Local Governments

By Paul Humphreys

I. Introduction

Since the early 1970s, municipalities across the United States have experimented with video surveillance of public places.[1] Of those municipalities that have implemented public surveillance systems, many dismantle the system after it fails to result in a significant reduction in crime or increase in arrests.[2] Somewhat ironically, increasingly more United States cities are installing large scale public video surveillance systems.[3] Aided by the Federal government, grant money to bolster homeland defense has made implementing video surveillance in public places even more enticing for some municipalities.[4] Although more cities now than ever utilize public video surveillance systems, few cities actually regulate their use.

II. The Law in the Area of Public Surveillance

New York's Attorney General has opined that no laws prevent a municipality from installing a public surveillance system.[5] New York has criminalized unlawful surveillance, but exempts video surveillance systems where the presence of such a system is "clearly and immediately obvious" or where "a written notice is conspicuously placed on the premises stating that a video surveillance system has been installed for the purpose of security."[6] New York also prohibits business owners from installing or maintaining video surveillance in a restroom, toilet, washroom, shower, or hotel room.[7] The legislature does allow for video surveillance of a fitting room, provided that written notice has been conspicuously posted and, in cities with one million or more residents, the notice is in English and in Spanish.[8]

To date, it appears that no state or federal court has addressed the constitutionality of a large scale public video surveillance system. The Fourth Amendment of the U.S. Constitution and article 1, section 12 of the New York State Constitution guarantee that an individual will not be subject to unlawful searches and seizures.[9] Most of the case law interpreting video surveillance focuses on whether an individual who was the target of government surveillance had a reasonable expectation of privacy. The Supreme Court has made clear its test to determine whether a person has a "reasonable expectation of privacy," and generally, a person has no reasonable expectation of privacy in a public space.[10] Although the Court has not specifically opined about large scale video surveillance, its Fourth Amendment jurisprudence suggests that large scale video surveillance of public places may not present a colorable Fourth Amendment challenge.[11] For example, the Supreme Court has stated that "a person . . . on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[12] The Southern District of New York has also held that what a person knowingly exposes to the public receives no Fourth Amendment protection.[13]

Although Hawaii's state courts have not outright endorsed a video surveillance system in public places, a Hawaii appeals court did make it clear that it would admit evidence in legal proceedings gained through such a system. The Hawaii Intermediate Court of Appeals refused to suppress evidence captured on Honolulu's public video surveillance system that the defendant claimed constituted an unlawful search under Hawaii's constitution.[14] In *Augafa*, a police officer noted on a public surveillance camera the presence of the defendant, whom he had on a prior occasion arrested on drug charges, sitting in front of a bar but not engaged in any suspicious activity.[15] The officer conducted an outstanding arrest warrant search and discovered that defendant had several outstanding traffic warrants.[16] During the arrest, a cocaine rock fell from the defendant's hands.[17] The Intermediate Court of Appeals of Hawaii rejected the defendant's "fruit of the poisoned tree" argument and overruled the district court's holding that in the absence of state or local enabling legislation for this type of technology, the court had to suppress the evidence.[18] The appellate court reasoned that even if the defendant had had a subjective expectation of privacy, his expectation was not objectively reasonable because he was in public view on a public street where the presence of others could have reasonably been anticipated.[19] Since the defendant's expectation of privacy was not objectively reasonable, the court refused to suppress the video surveillance tapes or any evidence gained as a result of viewing the defendant on the public surveillance camera.

No New York case law addressing the implementation of a municipality's video surveillance program has been found, but the Third Department has held that one has no reasonable expectation of privacy when actions he exposes to the plain view of the public are recorded on video.[20] In *Wemette,* the defendant's neighbor videoed the defendant on his front porch with his genitals exposed and wearing only his socks.[21] At his

trial for public lewdness, the County Court denied the defendant's motion to suppress, in which he argued that because his neighbor, acting as an agent of the police, had filmed him without a video surveillance warrant, the court must suppress the video evidence.[22] The Third Department upheld the trial court's decision and reasoned that regardless of whether the neighbor had acted as an agent of the police, because the neighbor had merely videoed actions that the defendant had exposed to the public, "there was no infringement of any reasonable expectation of privacy."[23]

While statutory provisions regarding public video surveillance are scant, New York, along with other states, has legislated in a similar area of the law by empowering municipalities to develop and maintain traffic cameras.[24] New York Vehicle and Traffic Law provides that a city with a population of one million or more may "install and operate traffic-control signal photo-monitoring devices at no more than fifty intersections within such city at any one time."[25] Any city that adopts such a traffic management system must submit a report to the governor that includes the location of the traffic cameras, the number of violations recorded, the amount of fines collected, the number and results of violations adjudicated, and the quality of the adjudication process.[26] The legislature first enacted this traffic law in 1988, and the law has not yet been challenged in court. Even though traffic cameras and public surveillance cameras serve different functions, the traffic camera legislation may provide a snapshot of what components the state might one day include in public video surveillance legislation—reporting requirements, location limitations, and evaluation criteria.

III. Issues Related to Public Surveillance

While public video surveillance is becoming commonplace for many large and small municipalities, legal scholars and civil libertarians have voiced concerns about video cameras located in public places. As technology advances and allows for better quality images, digital storage of images for an indefinite period of time, and possibilities of biometric identification systems, scholars and concerned citizens have expressed the need for government regulation of video surveillance systems.[27]

A. The Fourth Amendment and the Right to Privacy

Much of the criticism of public surveillance systems focuses on the right to privacy built into the Fourth Amendment's prohibition against illegal search and seizure. As noted above, most case law in this particular area deals with individualized surveillance rather than public video surveillance. Video surveillance of public spaces doubtfully violates any Fourth Amendment principles because, as noted in *Katz*, one has no reasonable expectation of privacy in public.[28] "Where defendants have complained of being filmed in public environments, courts have almost always found the Fourth Amendment inapplicable."[29] State courts interpreting their own constitutions have also adopted a similar stance that a person enjoys no right to privacy in public.[30]

B. Public Surveillance and the First Amendment

Another area of concern for scholars and civil libertarians includes the opportunity for a public video surveillance system to infringe upon one's First Amendment rights, namely, the right to free expression and the right to free association. The American Civil Liberties Union (A.C.L.U.), the New York Civil Liberties Union (N.Y.C.L.U.), and The Constitution Project have noted that the current state of technology that allows video information to be kept and indexed allows local governments to track individuals of interest. Rights groups also fear that because cameras are generally located in public places where people may freely associate, may protest and may engage in free speech, the idea that a person's acts are being recorded might chill a person's ability to engage in constitutionally protected activities.[31] Other scholars also caution that video surveillance systems and the ability to track someone's movements throughout an entire city threaten the right to remain anonymous.[32]

C. Bias and Public Video Surveillance

"Zoom" and "tilt" features on modern cameras in a large surveillance network present opportunities for system operators to act either consciously or subconsciously on their own biases. The fact that one's movements may be closely tracked by modern video equipment coupled with the potential for abuse give rise to civil libertarians' demands that public video surveillance systems have strict monitoring and oversight procedures.[33]

D. Effectiveness of Public Video Surveillance

Several studies and reports have suggested that public video surveillance systems are not as effective at deterring crime as may have once been thought. The N.Y.C.L.U. reported in its report "Who's Watching?" that the effectiveness of public surveillance cameras in New York City may have had a negligible effect in lowering the crime rate.[34] In its 2003 Video Surveillance Report to the U.S. House of Representatives, the United States General Accounting Office also questioned the effectiveness of public video surveillance and noted that most of the data about effectiveness is largely anecdotal, not empirical.[35] This report further stated that because so many other factors affect the crime rate, it is very difficult to state with any certainty a causal connection between a decline in criminal activity and the presence of video cameras.[36]

IV. What Other Cities Have Done

A handful of municipalities have passed legislation that enables the police department or other city officials to establish and regulate a public video surveillance system. The Washington, D.C., City Council has enacted comprehensive regulations to govern the Metropolitan Police Department's (MPD) use of the city's video surveillance system. Cameras may be used to "help manage public resources during major public events and demonstrations" and to help coordinate traffic.[37] Section 2502 provides that the MPD must notify the public when it plans to deploy video surveillance cameras and allows a 30-day period for the public to submit comments to the Chief of Police regarding placement of the cameras.[38] The MPD must provide at semi-annual meetings updates to the public pertaining to the video surveillance system.[39] The District has also provided system usage guidelines that detail what an operator may actually view while using the video surveillance system. Operators may not target or observe individuals based solely on their race, gender, sexual orientation, ethnicity, disability, or other classifications protected by law.[40] Additionally, operators may not use audio in conjunction with the video surveillance system in the absence of the appropriate court orders or focus on handbills, fliers, or other materials being distributed or carried by individuals exercising their First Amendment rights.[41] Operators who violate any of the usage policies may be subject to criminal prosecution and/or administrative sanctions, which may include termination.[42] In the absence of written approval by the Chief of Police, the MPD may only keep video recordings for 10 business days and then recordings must be either destroyed or recorded over.[43] Reasons for which recordings may be kept include use in training exercises, use as evidence of criminal activity, and use as evidence of an occurrence that may subject the MPD to civil liability.[44]

The San Francisco City Council has developed the Community Safety Camera Ordinance, which includes limitations on the location of cameras, notice requirements, reporting requirements, and procedures for law enforcement to gain access to video recordings.[45] The San Francisco ordinance also creates a balancing test for whether a camera may be installed in a particular location. To gain approval to install a camera, the city must show that the camera will be placed in an area of substantial crime where "the potential to deter criminal activity outweighs any concerns asserted by the affected community, and there exists significant support from the affected community for the camera."[46] The Police Commission must notify citizens at least 20 days before a public hearing to consider installing a new camera.[47] Notice of a hearing and placement of the camera must be posted in the neighborhood of the proposed camera location.[48] Only San Francisco Police Department members may obtain copies of video recordings through a written requisitioning process.[49] Other agencies requiring access to video recordings must obtain a court order.[50]

Stamford, Connecticut, has enacted legislation similar to San Francisco's. The Stamford ordinance creates a Public Safety Camera Review Committee that consists of various elected and appointed local government officials. The Committee may approve a camera if the purpose of installing a camera in a public place falls within three limited categories—traffic monitoring, homeland security, and law enforcement and crime prevention.[51] The Stamford ordinance provides that video feeds may be obtained by court order, subpoena, or proper Freedom of Information Act request.[52] Finally, until a policies and procedures manual has been adopted and approved by various city officials and the city Board of Representatives, cameras may be used only for traffic monitoring.[53]

Other cities have installed public video surveillance system in the absence of enabling or regulatory legislation. For example, Chelsea, Massachusetts, partnered with the United States Department of Homeland Defense to install cameras throughout town to monitor criminal activity as well as highly trafficked bridges that could be of interest to terrorists.[54] According to Chelsea's city manager, the city did not need to enact legislation to enable the city to undertake implementing a video surveillance network.[55] Through approving the funding, the Chelsea City Council enabled the city to install its surveillance cameras.[56]

V. Conclusion

Currently, no federal or state statute prohibits a municipality in New York State from creating a public video surveillance network. While neither the New York state courts nor the United States federal courts have fully considered a public surveillance network, the courts have made it clear that one's right to privacy in a public place is severely limited. Interests to consider surrounding public surveillance systems include access to recorded data, oversight, notice, and effectiveness. San Francisco's Community Safety Camera Ordinance and Washington, D.C.'s video surveillance regulations seem to most effectively address each of the aforementioned concerns.

Endnotes

1. Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, Note, 31 VAL. U.L. REV. 1079, 1103-1111 (1997).
2. *Id.*
3. David A. Fahrenthold, *Federal Grants Bring Surveillance Cameras to Small Towns,* WASH. POST, Jan. 19, 2006, at A1.
4. Fahrenthold, *supra* note 3, at A1.
5. 1997 N.Y. Op. Att'y Gen. (Inf.) 1112 (1997). Updated research has revealed no legislative action in the area of large scale

video surveillance in public places. *But cf.* S.B. 4157, 2007 Leg., 230th Sess. (N.Y. 2007) (amending New York education law and traffic law to mandate installation of video cameras on all new New York City school buses); A.B. 4628, 2007 Leg., 230th Sess. (N.Y. 2007) (amending New York education law to require New York City high schools to install video surveillance cameras at entrances).

6. N.Y. PENAL LAW §§ 250.45, 250.65 (McKinney 2007). The legislature characterizes unlawful surveillance as viewing, broadcasting, recording, selling, or disseminating images of a person's "intimate parts" at a time or place when the person has a reasonable expectation of privacy and without consent. A place where one has a reasonable expectation of privacy is defined as a place where a "reasonable person would believe that he or she could fully disrobe in privacy." *See also* S.B. 2838, 2007 Leg., 203th Sess. (N.Y. 2007). Senate Bill 2838 seeks to expand the definition of public surveillance and to criminalize the unlawful sale or distribution of public surveillance images.
7. N.Y. GEN. BUS. § 395-b(2-a) (McKinney 2007).
8. *Id.* at § 395-b(3)(b).
9. U.S. CONST. Amend. IV; N.Y. CONST. Art. I, § 12.
10. *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J. concurring). The Supreme Court has subsequently used the test from *Katz* developed in Justice Harlan's dissent. To determine whether a person has a right to privacy in a public place, the court undertakes a two-part inquiry: 1) did the person exhibit a subjective expectation of privacy? and 2) was the person's expectation objectively reasonable based on societal standards of privacy?
11. *But cf.* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 252–3 (2002). A public video surveillance system might not present a Fourth Amendment challenge, but a public video surveillance network with the capacity to record *audio* in addition to visual material would have both First and Fourth Amendment implications. *See* 1997 N.Y. Op. Att'y Gen. (Inf.) 1112 (1997) ("Any surveillance that includes an audio component would fall within the definition of [eavesdropping] and the warrant requirements for eavesdropping would apply.").
12. *United States v. Knotts,* 460 U.S. 276, 281 (1983).
13. *United States v. Glisson*, 2003 U.S. Dist. LEXIS 12633, at *5 (2003) (refusing to suppress video surveillance of a liquor store that recorded defendant's alleged drug activities).
14. *Hawaii v. Augafa*, 992 P.2d 723, 728 (Haw. Ct. App. 1999).
15. *Id.* at 726–8.
16. *Id.*
17. *Id.* at 727.
18. *Id.* at 726–9.
19. *Id.* at 733–5.
20. *People v. Wemette,* 285 A.D.2d 729, 728 N.Y.S2d 805, 807 (3d Dep't 2001).
21. *Id.* at 729, 728 N.Y.S.2d at 806.
22. *Id.* at 729, 728 N.Y.S.2d at 807.
23. *Id.*, 728 N.Y.S.2d at 807.
24. *But see generally* N.H. REV. STATE ANN. § 236:130 (2007) (prohibiting the state of New Hampshire or its subdivisions from using a camera or imaging device to determine the ownership of a motor vehicle or the identity of the vehicle's occupants on the state's roadways); *Minnesota v. Kuhlman,* 729 N.W.2d 577 (Minn. 2007) (holding the Minneapolis ordinance that created a system of photo enforcement of traffic signals invalid because the ordinance was preempted by a Minnesota state act).
25. N.Y. VEH. & TRAF. LAW § 1111-a(a) (McKinney 2007). Photo-monitoring device includes videotape or other recorded images.
26. *Id.* § 1111-a(m)(1)–(7).
27. *See generally* GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES, THE CONSTITUTION PROJECT (2006); aclu.org, What's Wrong with Public Video Surveillance?, http://www.aclu.org/privacy/spying/14863res20020225.html (last visited June 1, 2007).
28. 389 U.S. at 360.
29. Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity,* 82 TEX. L. REV. 1349, 1378-80 (2004).
30. *Id.*
31. GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES, THE CONSTITUTION PROJECT, *supra* note 27, at 11.
32. Slobogin, *supra* note 11, at 237–312.
33. NEW YORK CIVIL LIBERTIES UNION, WHO'S WATCHING? VIDEO CAMERA SURVEILLANCE IN NEW YORK CITY AND THE NEED FOR PUBLIC OVERSIGHT at 13–16.
34. *Id.* at 5–6.
35. GENERAL ACCOUNTING OFFICE, GAO-03-748, VIDEO SURVEILLANCE, INFORMATION ON LAW ENFORCEMENT'S USE OF CLOSED-CIRCUIT TELEVISION TO MONITOR SELECTED FEDERAL PROPERTY IN D.C. 30-1 (2003).
36. *Id.*
37. D.C. MUN. REGS. tit. 24, § 2500.1 (2007); 49 DCR 11443 (2007).
38. D.C. MUN. REGS. tit. 24, §§ 2502.1, 2502.3; 49 DCR 11443.
39. D.C. MUN. REGS. tit. 24, § 2502.8; 49 DCR 11443.
40. D.C. MUN. REGS. tit. 24, § 2501.4; 49 DCR 11443.
41. D.C. MUN. REGS. tit. 24, §§ 2501.6, 2504.4; 49 DCR 11443.
42. D.C. MUN. REGS. tit. 24, § 2503.3; 49 DCR 11443.
43. D.C. MUN. REGS. tit. 24, § 2505.5; 49 DCR 11443.
44. D.C. MUN. REGS. tit. 24, § 2505.6; 49 DCR 11443.
45. SAN. FRAN., CAL., ADMIN. CODE, § 19 (2006).
46. *Id.* at § 19.4 (a)–(d).
47. *Id.* at § 19.4 (b).
48. *Id.* at § 19.5.
49. *Id.* at § 19.6.
50. *Id.* at § 19.6(d).
51. STAMFORD, CONN., CODE ch. 7, sec. 2 (2007).
52. *Id.* at ch. 7, sec. 2 (E).
53. *Id.* at ch. 7, sec. 4.
54. Suzanne Smalley, *Chelsea to Mount Security Cameras Citywide*, BOSTON GLOBE, June 4, 2005, at A1.
55. Telephone interview with Jay Ash, City Manager, City of Chelsea, MA (June 1, 2007).
56. *Id.*

Paul Humphreys is a second-year law student at Pace Law School. Research for this article was conducted during a summer internship with the Edwin G. Michaelian Municipal Law Resource Center of Pace University.

Enacting a Local Ethics Law—Part II: Disclosure

By Mark Davies

The previous issue of the *Municipal Lawyer* contained the first part in this three-part series discussing the enactment of a local ethics law. That part dealt with the code of ethics. This part will focus on disclosure, in particular on annual (financial) disclosure. The third and final part will address administration of local ethics laws.

This article will first review the three kinds of disclosure and then discuss adopting an effective disclosure system, including creating a reasonable annual disclosure form.

Types of Disclosure

Although most officials associate disclosure only with annual financial disclosure, two other kinds of disclosure also exist: transactional disclosure and applicant disclosure.

Transactional Disclosure

First and foremost of the three kinds of disclosure is transactional disclosure (and recusal) by an official when the official actually faces a conflict of interest. For example, if I serve on a village planning board and work for a local company that appears before the planning board seeking permission to subdivide its property, I must disclose that conflict of interest on the public record and recuse myself from participating in the matter. Recusal, one should note, requires more than just abstaining from voting. Instead, recusal requires that I have no involvement in the matter at all—that I not participate in discussions or communications (including, but not limited to, e-mails, telephone conversations, and conference calls) concerning the subdivision, that I not attend meetings with village officials and others to discuss the subdivision, and that I not receive copies of any documents concerning the subdivision. Stepping down into the audience and voicing my views "as a member of the public" is wholly impermissible. Indeed, I should leave the room while the subdivision is discussed. While lawyers are familiar with this kind of recusal, many officials are not and must therefore be appropriately counseled by their municipal attorney.

Article 18 of the General Municipal Law (sections 800–813) contains only a limited transactional disclosure requirement. Under section 803, "[a]ny municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality . . . shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body."[1] Failure to disclose is a misdemeanor.[2] Section 803, however, does not require disclosure of interests that fall within section 802(2), including exempted stock holdings and small contracts.[3]

Section 803 must be approached with caution. First, failure to disclose may result in the contract being rescinded or voided.[4] Second, although section 803 requires only disclosure, not recusal, failure to recuse runs the risk of a court invalidating the action taken.[5] Third, that said, if the official has an interest in a contract with the municipality in violation of section 801, neither disclosure and recusal nor even sealed bids will cure the violation, which is a misdemeanor and renders the contract void ab initio.[6] Fourth, despite the mandate of section 803, the municipal official who serves on a board, such as a planning board or zoning board of appeals, should also disclose the conflict of interest on the records of that board. Furthermore, the local ethics law may require disclosure to the ethics board instead of to the municipal governing body, as discussed below. Fifth, section 803 requires disclosure (and, *Tuxedo* suggests, recusal) where the spouse of the official has an interest in a contract with the municipality. Since "interest" is defined to include the person's employer or business or a corporation in which the person has a substantial stock holding, the municipal official must disclose (and recuse) if his or her spouse's employer or business or a corporation in which his or her spouse has a substantial stock holding may receive a financial benefit as a result of the contract.

Finally, section 803 requires disclosure only of interests in contracts. An official, however, should disclose and recuse himself or herself as to any conflict of interest, not just as to one that involves an interest in a contract with the municipality. The *Landau* and *Tuxedo*

cases, cited above, suggest that failure to do so may result in a court invalidating an action of the official who failed to disclose and recuse.

Transactional disclosure remains the most critical form of disclosure because it involves an actual conflict of interest and alerts the municipality, contractors, vendors, permittees, the media, and the public to the actual conflict, thus helping to reassure them that the municipality is acting with honesty and integrity. When accompanied by recusal, transactional disclosure also avoids or at least ameliorates the conflict.

Applicant Disclosure

While transactional disclosure is made by officials, applicant disclosure is made by private citizens or companies who have or seek contracts, licenses, permits, funding, or benefits from the municipality. For example: "Sarah Lee, an owner of ABC Asphalt, which is bidding on this contract, is the brother of Sam Jones, the town's highway superintendent"; if the matter might come before the highway superintendent, he would be required to transactionally disclose the relationship and recuse. One may thus think of applicant disclosure as the counterpart to transactional disclosure, on which applicant disclosure provides a check. Applicant disclosure also gives those who deal with the municipality some stake in municipal officials' compliance with the ethics law.

Section 809 contains a limited form of applicant disclosure, requiring that land use applications, petitions, or requests state the name, residence, and nature and extent of the interest of any officer or employee of the municipality in the person, partnership, or association making the application, petition, or request "to the extent known to such applicant."[7] A municipal officer or employee is deemed to have an interest in the applicant when the official or an immediate family member is the applicant or has certain business connections with the applicant, with an exception for certain stock ownership.[8] The applicant must disclose not only interested officials of the municipality but also interested officials of any municipality of which the municipality is a part (e.g., an interested town official if the application is to a village within the town) and interested state officials. A knowing and intentional violation of section 809 is a misdemeanor.[9] Furthermore, although section 809 does not require recusal by the affected official, the Second Department in the *Tuxedo* case did—and invalidated the board action where the tie-breaking vote was cast by the interested official. Like section 803, section 809 remains too narrow.[10] As discussed below, the local ethics law should expand applicant disclosure beyond land use cases, though such non-land-use cases narrow the universe of those persons deemed to have an interest in the applicant.

Annual Disclosure

Annual financial disclosure remains the most common—and most hated—form of disclosure by municipal officials. Municipal officials hate it for three well-founded reasons: most financial disclosure is burdensome, intrusive, and irrelevant. Yet *sensible* annual disclosure plays a critical role in an effective municipal ethics law.

As discussed in the first part of this series, ethics laws focus not on punishment but on prevention; thus, they do not aim at catching crooks. Indeed, as has often been noted, no crooked municipal official will report a bribe on a financial disclosure form. But sensible annual disclosure alerts the municipality, media, vendors, the public, and the filer himself or herself to potential conflicts of interest—and accordingly helps avoid violations of the ethics code. For example, if a town board member reports on her annual disclosure statement that her husband works for a real estate development company, then everyone will know that she must recuse herself when that developer comes before the town board. Annual disclosure thereby provides a check on whether an official makes required transactional disclosures and recusals. In addition, annual disclosure requires the filer to focus, at least once a year, on the requirements of the code of ethics.

Unfortunately, New York State's financial disclosure law, set forth in General Municipal Law §§ 810–813, violates these fundamental principles. Section 811 requires annual financial disclosure in every county, city, town, and village in the state with a population of 50,000 or more.[11] Although Article 18 does not expressly state the minimum disclosure required (unless a municipality fails to adopt its own form and thus defaults into the state form set forth in section 812(5)), the Temporary State Commission on Local Government Ethics, the only state body ever charged with administering the financial disclosure law, concluded that a minimum does exist. [12] While less than the state form, that minimum remains excessively burdensome and unnecessary for most municipalities. The Commission did not expressly state that a minimum form exists for those municipalities, not subject to mandatory financial disclosure, which voluntarily adopt it. In any event, the Commission no longer exists; and municipalities, even those with a population in excess of 50,000, may conclude that they can safely reject the conclusion of a state body that sunsetted over 15 years ago and instead adopt an annual disclosure form that meets the needs of the municipality, provided that the form also complies with the purposes behind the financial disclosure law.[13]

With this background in mind, one may turn to the enactment of effective disclosure provisions in a local ethics law.

Drafting Disclosure Provisions for the Local Ethics Law

Transactional Disclosre

As discussed above, Article 18 contains, in section 803, only a limited transactional disclosure provision, which relates solely to disclosure of interests of a municipal official in certain contracts with the municipality. Transactional disclosure, however, should be required whenever a conflict of interest arises and the official must thus recuse himself or herself from acting on the matter. (Recusal is required by the code of ethics, discussed in part I of this series.) At the same time, the local ethics law should also set forth the requirements of section 803, to avoid requiring an official to consult two ethics laws, both local and state.

A transactional disclosure provision may thus read:

> § 201. Transactional disclosure generally.
>
> (1) Whenever a municipal officer or employee is required to recuse himself or herself under the code of ethics, he or she:
>
> (a) shall promptly inform his or her immediate supervisor, if any;
>
> (b) shall promptly file with the [municipal] clerk a signed statement disclosing the nature and extent of the prohibited action or, if a member of a board, shall state that information upon the public record of the board; and
>
> (c) shall immediately refrain from participating further in the matter.
>
> (2) The [municipal] clerk shall promptly cause a copy of the disclosure statement to be filed with the ethics board.
>
> (3) An officer or employee shall not be required to file a disclosure statement pursuant to this section if he or she, with respect to the same matter, has filed with the [governing body of the municipality] a disclosure statement complying with the requirements of section 202 of this article.

A restatement of section 803 may read:

> § 202. Transactional disclosure involving municipal contracts.
>
> (1) Where a municipal officer or employee, or his or her spouse, has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement, or other agreement, including oral agreements, with the municipality, the officer or employee shall publicly disclose the nature and extent of that interest in writing to his or her immediate supervisor and to the [municipality's governing body] as soon as he or she has knowledge of the actual or prospective interest.
>
> (2) The written disclosure shall be made part of and set forth in the official record of the proceedings of [the governing body]. The clerk of the [governing body] shall promptly cause a copy of the disclosure statement to be filed with the ethics board.
>
> (3) For purposes of this section, "contract" means any claim, account, or demand against or agreement with a municipality, express or implied.
>
> (4) For purposes of this section, "interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality. A municipal officer or employee shall be deemed to have an interest in the contract of (a) his or her spouse, minor children, and dependents, except a contract of employment with the municipality, (b) a firm, partnership, or association of which the officer or employee is a member or employee, (c) a corporation of which the officer or employee is an officer, director, or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by the officer or employee.
>
> (5) Notwithstanding the provisions of subdivision 1 of this section, disclosure shall not be required in the case of an interest in a contract described in subdivision 2 of section 802 of the General Municipal Law, unless disclosure is required pursuant to section 201 of this article.

Note that the official must file a disclosure statement where his or her interest in a contract with the

municipality would result in a violation of the local code of ethics, even though such disclosure is not required by section 803. In addition, the appropriate clerk must forward a copy of the transactional disclosure statement to the ethics board.

The penalties section of the ethics law should apply to any failure to file a required transactional disclosure statement, either pursuant to section 201 above or section 202 (a misdemeanor under Gen. Mun. Law § 805). Penalties will be discussed in part III of this series.

Applicant Disclosure

As discussed above, Article 18 also contains, in section 809, limited applicant disclosure, required only in certain land use applications. Applicant disclosure, however, should be expanded to include any instance where the applicant is requesting the municipality to act on a matter in which any official of the municipality, or his or her family member, employer, business, customers, or clients, may have a financial interest, *to the extent the applicant knows of the potential benefit*. For example, an applicant for a zoning variance should be required to list the names of any officer or employee of the municipality—or their associated persons—who may receive a financial benefit as a result of the granting of the variance. Note that the provision imposes upon the applicant no duty to investigate whether any such persons exist. Needless to say, however, an applicant will be hard pressed to argue that it was not aware that its 40% shareholder serves on the zoning board. To avoid requiring an official to consult two ethics laws, both local and state, the local ethics law should also set forth the requirements of section 809.

An applicant disclosure provision may thus read:

> § 203. Applicant disclosure generally.
>
> (1) Where a person requests the municipality or a municipal officer or employee to take or fail to take any action (other than a ministerial act) that may result in a financial benefit both to the requestor and to either any officer or employee of the municipality or one of the other persons listed in subdivision one of section [the code of ethics] of this article, the requestor shall disclose the names of any such persons, to the extent known to the requestor at the time of the request.
>
> 2. If the request is made in writing, the disclosure shall accompany the request; the officer or employee receiving the request shall promptly forward a copy of the disclosure to the ethics board. If the request is oral and made at a meeting of a board, the disclosure shall be set forth in the public record of the board and promptly forwarded by the clerk of the board to the ethics board. If the request is oral and not made at a meeting of a board, the disclosure shall be set forth in a writing filed with the clerk of the municipality, who shall promptly forward a copy to the ethics board.

A restatement of section 809 may read:

> § 204. Applicant disclosure in land use matters.
>
> (1) Every application, petition, or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license, or permit, pursuant to the provisions of any ordinance, local law, rule, or regulation constituting the zoning and planning regulations of the [municipality] shall state the name, residence, and the nature and extent of the interest of any state officer[14] or any officer or employee of the municipality or of [each municipality of which such municipality is a part], in the person, partnership, or association making the application, petition, or request (hereinafter called the applicant) to the extent known to the applicant.
> (2) For the purpose of this section, an officer or employee[15] shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them
>
> (a) is the applicant, or
> (b) is an officer, director, partner, or employee of the applicant, or
> (c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or
> (d) is a party to an agreement with such an applicant, express or implied, whereby he or she may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition, or request.

> (3) Ownership of less than five per cent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges shall not constitute an interest for the purposes of this section.[16]

The penalties section of the ethics law should apply to any failure to file a required applicant disclosure statement, either pursuant to section 203 above or section 204 (a misdemeanor under Gen. Mun. Law § 809(5)). Penalties will be discussed in part III of this series.

Annual Disclosure

Drafting a sensible, and acceptable, annual disclosure form presents little difficulty if one remembers the purpose and principles of an ethics law generally and of annual disclosure specifically, as discussed above. Consequently, in drafting such a form one must be guided by three rules. First, the disclosure form must be tied directly to the code of ethics, that is, it must ask *only* those questions that may reveal a potential, significant violation of the ethics code. For example, if the code of ethics would not prohibit a town board member from voting to purchase Dell computers when the member owns less than $10,000 worth of Dell stock, then a board member who owns $9,000 worth of Dell stock should not be required to disclose that stock on her annual disclosure form since that stock ownership cannot result in a conflict of interest. Second, accordingly, creating an annual disclosure form is an exercise in zero-based drafting: one begins with a blank sheet of paper and asks *only* those questions that may reveal a potential, significant violation of the ethics code. Third, one must never let the perfect be the enemy of the good. A short and simple annual disclosure form will reveal 95% of the potential conflicts of interest at the municipal level. Doubling the size of the form in an attempt to squeeze out another 3% will make the form far more intrusive, is thus hardly worth it, and, indeed, may well doom to failure the entire effort at ethics reform. If in doubt, leave it out.

Note that, as a corollary to the first rule, no need exists for an annual disclosure form to ask the *amount* of any interest. Whether the conflict is a $10,000 one or a $10 million one, it is still a conflict and still prohibited. Once the disclosure form is tied to the ethics code, amounts become irrelevant. By contrast, however, information about the filer's spouse is significant because a financial benefit to one spouse almost always benefits the other spouse. So, too, the employer, business, and local real estate interests of immediate family members become significant because the code of ethics prohibits the filer from taking an action that would benefit one of those interests since doing so would impermissibly benefit the family member.

With respect to who should be required to file an annual disclosure statement, one should require only those officials to file who run some significant risk of conflicts of interest. The determination by the Temporary State Commission of required filers under the General Municipal Law in political subdivisions with a population of 50,000 or more provides an excellent list:

- Elected municipal officials
- Agency heads, deputy agency heads, and assistant agency heads (i.e., those persons authorized to act for the agency in the absence of the agency head)
- Policymakers, including members of all boards and commissions
- Officers and employees whose duties involve the negotiation, authorization, or approval of contracts, leases, franchises, permits, licenses, grants, and the like or the adoption or repeal of any rule or regulation having the force and effect of law (note that this category would include only those officials who exercise discretionary authority)
- Candidates for local elective office
- Local political party officials (i.e., compensated chairs of local political parties)[17]

One may wish to add inspectors to the list since they often run significant risks of conflicts of interest. Note that certain tax assessors are subject to a separate state disclosure law and disclosure form.[18]

One should also note that state law, in regard to filing of annual disclosure statements, makes no distinction between volunteers and compensated officers and employees—and neither should the municipality. Indeed, at the local level, substantial power is wielded by volunteer board members at significant risk of conflicts of interest and who should therefore be required to file an annual disclosure statement. That said, in recognition of the difficulty of recruiting volunteer board members, the municipality may wish to require less disclosure of them—and, in fact, of all filers who are not elected officials or compensated policymakers.

Not surprisingly, the smaller the municipality, the greater the percentage of filers. Thus, in New York City less than two and a half percent of the public servants file an annual disclosure statement. In a small town or village, the percentage may approach ten times that, although the total number of filers will be quite small.

Immediately following this article is a model annual disclosure form that one may easily adapt to a municipality's local ethics code. Most officials can complete the form in less than 10 minutes, yet it will provide sufficient disclosure in all but the largest municipalities in the state. Since, as noted above, one of the purposes of annual disclosure lies in compelling the filer to focus, at least once a year, on the requirements of the code of ethics, the disclosure form should attach the code of ethics, or a summary of it, and require the filer to certify that he has read the code or summary within the previous two weeks.

As with transactional disclosure and applicant disclosure, so, too, with annual disclosure, the penalties section of the ethics law should apply to any failure to file a disclosure statement. In addition, penalties for late filing and for misstatements of assets and liabilities should be imposed.[19] Absent such penalties, few officials are likely timely to file an annual disclosure statement. Penalties will be discussed in part III of this series.

Conclusion

Disclosure—transactional, applicant, and annual—forms the second pillar of an effective local ethics law. Properly drafted and enforced, disclosure need not be onerous. Yet without it, the entire ethics law will collapse.

Endnotes

1. Gen. Mun. Law § 803(1). "Contract," "interest," and "municipal officer or employees" are all defined terms. *See* Gen. Mun. Law § 800(2), (3), (5), respectively. *See generally* Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*," 59 ALBANY L. REV. 1321, 1333–1335 (1996) (*available* on the Section's website, under Ethics for Municipal Lawyers).
2. Gen. Mun. Law § 805.
3. Gen. Mun. Law § 803(2). *See also* Gen. Mun. Law § 802(2)(a) (certain stock holdings), (e) (small contracts). 2005 N.Y. Laws ch. 499, § 1, repealed the former exemption that once disclosure has been made as to an interest in a contract with a particular person, firm, corporation, or association, no further disclosure by the municipal official is required as to additional contracts with the same party during the remainder of the fiscal year.
4. *See, e.g.*, *Landau v. Percacciolo*, 50 N.Y.2d 430, 429 N.Y.S.2d 566 (1980) (invalidating at county's request contract to sell land to county where county civil defense director, the broker on the deal, failed, in violation of section 803, to disclose his (non-prohibited) interest in the contract and where the purchaser knew of the interest and the nondisclosure).
5. *Cf. Tuxedo Conservation & Taxpayers Ass'n v. Town Board of Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979) (invalidating, as contrary to the "spirit" though not the letter of section 809, a special permit where the town board member who cast the tie-breaking vote was vice-president of an advertising agency that had the parent of the applicant as a client and that would be a strong contender to obtain all advertising contracts on the $200 million project if it was approved).
6. Gen. Mun. Law §§ 800, 804, 805. *See generally* Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, NYSBA/MLRC MUNICIPAL LAWYER, Summer 2005, at 10 (available on the Section's website, in Municipal Lawyer Ethics Columns under Ethics for Municipal Lawyers).
7. Gen. Mun. Law § 809(1).
8. Gen. Mun. Law § 809(2), (4).
9. Gen. Mun. Law § 809(5).
10. *See generally* Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*," 59 ALBANY L. REV. 1321, 1344–1346 (1996) (available on the Section's website, under Ethics for Municipal Lawyers).
11. *See generally* Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243 (1991) ("FD Article") (available as "Ethics in Gov't Act—Financial Disclosure Provisions" on the website of the New York City Conflicts of Interest Board, *at* http://www.nyc.gov/ethics, then Publications, then Directory of Ethics Materials for Municipal Ethics Boards, then Directory of NYS Municipal Ethics Materials).
12. *See* FD Article, *supra* note 11, at 249–251. The minimum form may be found in Appendix B to FD Article, *supra* note 11, at 269–272. In regard to defaulting into the state form, *see* Gen. Mun. Law § 811(2).
13. *See* also Gen. Mun. Law § 806(1)(a), which states that local codes of ethics "may provide for . . . disclosure of information. . . ."
14. In the County of Nassau, add "or party officer." *See* Gen. Mun. Law § 809(3).
15. In the County of Nassau, add "or any party officer." *See* Gen. Mun. Law § 809(3).
16. In the County of Nassau, add a subdivision (4): "*For purposes of this section, 'party officer' shall mean any person holding any position or office, whether by election, appointment, or otherwise, in any party, as defined by Election Law § 1-104(5).*" *See* Gen. Mun. Law § 809(3).
17. *See* FD Article, *supra* note 11, at 251–253. *See also* Gen. Mun. Law §§ 810(2), (3), (6), 811(1)(a), (b), 812(1)(a), 813(9)(k).
18. Real Prop. Tax Law § 336. *See also* Gen. Mun. Law § 812(1)(a).
19. *See* Gen. Mun. Law §§ 811(1)(c), (d), 812(6), 813(11)–(16); 1987 N.Y. Laws ch. 813, § 26, as amended by 1988 N.Y. Laws ch. 108, § 2 (providing that the powers of the Temporary State Commission, upon its expiration, devolve upon the municipality's board of ethics or, if the municipality has no board of ethics, upon the municipality's governing body).

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Model Annual Disclosure Form

[County, City, Town, Village, or Other Municipality] of _____

Annual Disclosure Statement

For Calendar Year 2007

_____

Last Name First Name Initial

_____

Title Department or Agency

_____

Work Address Work Phone No.

If the answer to any of the following questions is "none," please so state. Attach additional pages if necessary.

1. **Outside Employers and Businesses.** List the name of every employer or business, other than the [municipality], from which you received more than $1,000 for services performed or for goods sold or produced, or of which you were a paid member, officer, director, or employee during the year 2007. Do not list individual customers or clients of the business. Do not list businesses in which you were an investor only (they are listed in Question 2 below). Identify the nature of the business and the type of business, such as a partnership, corporation, or sole proprietorship, and list your relationship(s) to the employer or business (i.e., owner, partner, officer, director, member, employee, and/or shareholder). Provide the same information for your relatives. "Relative" means your spouse, registered domestic partner, child, stepchild, brother, sister, parent, stepparent, any person you claimed as a dependent on your latest income tax return, and their spouses or registered domestic partners.[1]

Name of Family Member	Relationship to You	Name of Employer or Business	Nature of Business	Type of Business	Relationship to Business
[E.g.: John Smith	*Self*	*TechIM*	*Computers*	*Corp.*	*Pres./Shareholder]*
[E.g.: Rose Smith	*Wife*	*Monument Realty*	*Real Estate*	*Partnership*	*Employee]*

_____

_____

2. **Investments.** List the name of any entity in which you have an investment of at least 5% of the stock or debt of the entity or $10,000,[2] whichever is less. Do not list any entity listed in response to Question 1 above. Identify the nature of the business and the type of business (e.g., corporation). Provide the same information for your spouse or registered domestic partner and any of your children who are under age 18.

Name of Family Member	Relationship to You	Name of Entity	Nature of Business	Type of Business
[E.g.: John Smith	*Self*	*Verizon*	*Communications*	*Corp.]*

_____

_____

_____

_____

_____

_____

3. **Real Estate**. List the address of each piece of real estate that you or your relatives, as defined in Question 1, own or rent, in whole or in part, or otherwise have a financial interest in. List only real estate that is located in the [municipality] and the [contiguous municipalities]. For residential property, list as the address only the city or village (or, if none, the town) in which the property is located.

Name of Family Member	Relationship to You	Address of Real Estate	Type of Interest
[E.g.: Robert Smith	*Father*	*2 Main St., Teatown*	*Hold mortgage]*

4. **Gifts.** List each gift that you or your spouse or registered domestic partner received worth $10[3] or more during the year 2007, except gifts from relatives, as defined in Question 1. A "gift" means anything of value for which you or your spouse or registered domestic partner paid nothing or paid less than the fair market value and may be in the form of money, services, reduced interest on a loan, travel, travel reimbursements, tickets, entertainment, hospitality, or in any other form. Separate gifts from the same or affiliated donors during the year must be added together for purposes of the $10 rule. You do not need to list a gift if you know that the donor has had no business dealings with the [municipality] during the previous 24 months and contemplates no business dealings with the [municipality] during the next 24 months.

Recipient of Gift	Donor of Gift	Relationship to Donor	Nature of Gift
[E.g.: John Smith	*Acme Corp.*	*Former employer*	*Free trip to Las Vegas]*

5. **Political Contributions.** List each person or firm that made to you or your campaign committee, within the previous 24 months, financial contributions, in money, goods, or services, totaling $1,000[4] or more to assist in your election to public office.

Name of Contributor_____

[E.g.: Alfred Jones]

6. **Relatives in [Municipality's] Service.** List each relative, as defined in Question 1, who is an officer or employee of the [municipality], whether paid or unpaid, including the relative's name, relationship to you, title, and department.

Name of Family Member	Relationship to You	Title	Department
[E.g.: Alex Jones	*Sister's husband*	*Code Enf. Officer*	*Building]*

7. **Volunteer Positions**. List each volunteer office or position that you hold with any not-for-profit organization. Do not list entities of which you were a member only or for which you volunteered only in a non-policymaking, non-administrative capacity, such as a Little League coach. Provide the same information for your spouse or registered domestic partner.

You or Spouse/RDP	Name of Entity	Position	Nature of Business
[E.g.: Spouse	*Shepherd's Food Pantry*	*Bd. of Directors member*	*Distributes free food]*

8. **Money You Owe** [Elected Officials and Compensated Policymakers Only]. List each person or firm to which you or your spouse or your registered domestic partner owes $10,000[5] or more. Do not list money owed to relatives, as defined in Question 1. Do not list credit card debts unless you have owed the money for at least 60 days.

Debtor	Creditor	Type of Obligation
[E.g.: John & Rose Smith	*Chase Bank*	*Mortgage loan]*

9. **Money Owed to You** [Elected Officials and Compensated Policymakers Only]. List each person or firm that owes you or your spouse or your registered domestic partner $10,000[6] or more. Do not list money owed by relatives, as defined in Question 1.

Creditor	Debtor	Type of Obligation
[E.g.: John Smith	*Alexis Doe*	*Personal loan]*

I certify that all of the above information is true to the best of my knowledge and that, within the past two weeks, I have read the two-page ethics guide attached to this form.[7]

Signed: _____

Date Signed: _____

Endnotes

1. "Relative" should be defined to include only those relatives whom, under the ethics code, an official may not take an action to benefit.
2. The amount should equal the threshold for a conflict of interest under the municipal ethics law. For example if an official does not violate the ethics law by acting to benefit a company in which he or she has an investment of less than $10,000 or 5%, then disclosure of that interest should not be required.
3. The amount should equal the threshold for prohibited gifts under the municipal ethics law but not more than $75 (see Gen. Mun. Law § 805-a(1)(a)).
4. The amount should equal the threshold for a conflict of interest under the municipal ethics law. For example, if an official does not violate the ethics law by acting to benefit a person who donated $500 to the official's campaign, then disclosure of that contribution should not be required on the annual disclosure statement.
5. The amount should be equal to the amount that would constitute a financial relationship between the official and the creditor, thus prohibiting the official from taking an official action that might benefit that creditor.
6. The amount should be equal to the amount that would constitute a financial relationship between the official and the debtor, thus prohibiting the official from taking an official action that might benefit that debtor.
7. A copy of the code of ethics (not the entire ethics law, just the code itself) should be attached to the disclosure form, if the code if sufficiently short. If it is not, then a summary, of no more than two pages, should be attached.

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

This quarter brings us a number of interesting and instructive cases relating to, among other things, the ever-popular topic of border wars among municipalities (love they neighbor, but not beyond the village line) and eminent domain (when is affordable housing not a public purpose), as well as cases which illuminate two balancing tests (one relating to the placement of wireless communications towers, and the other relating to the location of educational and religious uses in various non-residential districts), and which shed some light on the authority of zoning boards of appeal, in one case graphically illustrating that in some towns, at least, "love thy neighbor" does not even extend to the town line.

Village of Chestnut Ridge v. Town of Ramapo[1] is especially noteworthy because the decision, written for the court by Justice Spolzino, is particularly clear and well reasoned and elucidates the distinction between *capacity* to challenge municipal action and *standing* to do so, as respects both individual and municipal petitioners. The case appears to liberalize, to some extent, the standing standard for inter-municipal challenges, particularly in a SEQRA context.

I. Standing to Challenge the Adoption of a Local Law

In *Village of Chestnut Ridge v. Town of Ramapo*,[2] the Second Department held that Town Law Section 264, which prohibits a neighboring municipality from judicially challenging a zoning ordinance adopted by a town, does not prohibit a judicial challenge to zoning legislation adopted by local law pursuant to the Municipal Home Rule Law (as opposed to a zoning ordinance adopted pursuant to Section 264 of the Town Law) and does not bar a neighboring municipality from challenging a zoning law promulgated by a neighboring town on SEQRA grounds. The Court further held that town residents and neighboring municipalities may challenge the enactment of a zoning law on the grounds that the municipal government that adopted the zoning law failed to comply with the procedural requirements of General Municipal Law Section 239-m. Further, the Court, in a well-received opinion by Justice Spolzino, held that town residents have standing to challenge the adoption of zoning legislation by a town board on the grounds that the legislation is not in accordance with the town's comprehensive plan and on the grounds that the town board failed to comply with the procedural requirements of Municipal Home Rule Law Section 20; however, neighboring municipalities lack standing to assert such claims.

In *Village of Chestnut Ridge*, appellants, the Villages of Chestnut Ridge, Montebello, Pomona, and Wesley Hills, all Villages located in the Town of Ramapo, Rockland County (the "Villages"), and Milton B. and Sonya Shapiro, residents of the Town of Ramapo (collectively "Appellants"), brought a hybrid Article 78 proceeding/declaratory judgment action to nullify a local law adopted by the Town of Ramapo Town Board which added an "adult student housing facilities" use classification to the Town of Ramapo (the "Town") zoning code.[3] The adult student housing facility use was designed to permit the construction of housing for use by married students and their families while the student is enrolled full time in a postsecondary education program (the "Adult Student Housing Law"). The Town Board, acting as Lead Agency in the environmental review of the proposed legislation pursuant to the State Environmental Quality Review Action ("SEQRA"), classified the adoption of the Adult Student Housing Law as a Type I action, but issued a negative declaration, finding that it would not have a significant adverse environmental impact. The Town Board adopted the Adult Student Housing Law as a local law pursuant to the Municipal Home Rule Law on June 15, 2004.[4] At the time the Adult Student Housing Law was adopted, adult student living facilities could be accommodated on only four sites within the Town, each of which was immediately adjacent to or near one or more of the Villages.[5]

Pursuant to the Adult Student Housing Law, Yeshiva Chofetz Chaim of Radin, an Orthodox Jewish organization which planned to own and operate an adult student housing facility for its members, applied to the Planning Board for site plan approval to develop an adult student housing facility. The Planning Board

conducted a review of Chofetz Chaim's application under SEQRA and issued a negative declaration.[6]

Appellants brought this hybrid Article 78 proceeding/declaratory judgment action challenging, among other things, (a) the SEQRA review of the Adult Student Housing Law and Chofetz Chaim's application for site plan approval; (b) the procedural aspects of the referral of the Adult Student Housing Law to the Rockland County Department of Planning pursuant to General Municipal Law Section 239-m; and (c) the legality of the Adult Student Housing Law on the grounds that it did not conform to the Town's comprehensive plan and that the Town Board did not comply with the procedural requirements of Municipal Home Rule Law Section 20 when it adopted the Adult Student Housing Law. The Town cross-moved to dismiss on the grounds that the Villages did not have legal capacity to sue the Town and that Appellants did not have standing to assert their claims.[7]

A. Capacity to Sue

The Town argued that the Villages did not have the capacity to challenge the adoption of the Adult Student Housing Law on the grounds that villages are limited in their capacity to sue a town in the same manner in which they are limited to sue the state, or, alternatively, that Town Law Section 264 prohibits a village from bringing such a claim against a town. The court dismissed the Town's first argument reasoning that the rule that bars a village from suing the State (which is rooted in the State's sovereignty and the fact that the village exists as a "creature" of the State) does not similarly bar a village from suing another municipality. The Court also dismissed the Town's argument that the Villages lacked capacity to sue based on Town Law Section 264.[8] The Court examined the legislative history of Town Law Section 264, which establishes the procedural requirements associated with a town's adoption of zoning regulations pursuant to the Town Law and permits neighboring municipalities to participate in the public hearing process associated with the adoption of such zoning regulations, but which prohibits a village from suing a town based on the town's adoption of a zoning ordinance. However, the Court held that Town Law Section 264 does not preclude a challenge to the adoption of a local law adopted pursuant to the Municipal Home Rule Law when the local law pertains to zoning.[9]

Further, the Court held that even if Town Law Section 264 did prohibit such a claim when zoning legislation was adopted pursuant to the Municipal Home Rule Law, Section 264 would not bar a neighboring municipality from asserting statutory claims, such as SEQRA claims, that did not exist when Town Law Section 264 was adopted. The Court reasoned that under SEQRA, interested agencies, including neighboring municipalities, have the same right to participate in the SEQRA review of an action as a member of the public, which right includes the right to seek judicial review of a SEQRA determination.[10] Accordingly, the Villages, in their role as interested agencies under SEQRA, had capacity to bring their SEQRA claims.

B. Standing

Finding that the Villages had capacity to bring the asserted claims, the Court then looked to whether the Appellants had standing to bring the claims asserted. With regard to the Appellants' claims that the challenged zoning legislation was not in accordance with the Town's comprehensive plan and that the Town did not comply with the procedural requirements of Municipal Home Rule Law Section 20 when adopting the challenged legislation, the Court held that Town residents, but not neighboring municipalities, had standing. The Court reasoned that a town's comprehensive plan is meant to burden and benefit all properties in the Town; thus, residents of the town are intended beneficiaries of that plan and have an interest in seeing that it is complied with. Similarly, the procedural requirements of Municipal Home Rule Law Section 20 are in place to ensure that a town board, when it exercises its police power, does so after considering all relevant information and arguments on the topic of the proposed legislation so that those impacted by the legislation are ensured that it is not arbitrarily imposed. Because town residents are the intended beneficiary of a town's comprehensive plan, and have an interest in ensuring that the town board considers all relevant evidence before enacting legislation, the Shapiros, as town residents, had standing to assert the above-described claims.[11] However, a Village, which has its own authority to adopt zoning legislation, is not protected or burdened by the comprehensive plan or the zoning legislation of a neighboring town. Thus, the Villages lacked standing to bring their claims.[12]

With regard to the Appellants' claims under the General Municipal Law, the Court held that both the Villages and the Shapiros had standing, reasoning as follows:

> The causes of action alleging a violation of General Municipal Law §239-m, however, may be asserted by all of the appellants. The purpose of General Municipal Law §239-m is to "bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdic-

> tion" (General Municipal Law §239-l) and by so doing to facilitate regional review of land use proposals that may be of regional concern. . . . Individuals such as the Shapiros, who are affected by a land use determination that is subject to review under General Municipal Law §239-m, have standing to assert that the enacting municipality has failed to comply with the requirements of that statute. . . . Because adjoining municipalities necessarily have the same interest in the regional review that General Municipal Law §239-m requires, the Villages also have standing to assert such claims.[13]

Next the Court turned to the issue of whether the Appellants had standing to assert their SEQRA claims.[14] As applied to individuals, the Court held, SEQRA standing rests predominately on the petitioner's proximity to the subject site.[15] Thus, the Shapiros had standing to challenge the adoption of the Adult Student Housing Law because their home was across the street from a potential adult student housing site.[16] However, because they did not live in proximity to the Chofetz Chaim site, they did not have standing to challenge the Planning Board's SEQRA review thereof.[17]

The analysis of whether a neighboring municipality has standing to challenge a SEQRA determination, however, does not rest on proximity alone. Rather, for a municipality to have standing under SEQRA it must "have a demonstrated interest in the potential environmental impact of the project."[18] Here, the Second Department held that all of the Villages established a "demonstrated interest in the potential environmental impacts" of the rezoning and the Village of Wesley Hills made this showing with regard to the Chofetz Chaim site plan application as well. In so holding the Court recognized that community character is protected by SEQRA and an impact on a municipality's ability to control the character of its community due to the actions of another municipality could give rise to SEQRA standing. In this case, the potential impact to the character of the Villages was great. Under the Adult Student Housing Law a density of more than ten times the pre-rezoning density was permitted on the subject parcels, each of which was in close proximity to at least one of the Villages, thereby potentially changing the low to medium density character of the Villages along their border with the Town. Moreover, the Town and Villages share essential infrastructure such as roads, water, and sewer systems which, the evidence indicated, had the potential to be negatively impacted by the increased density permitted under the Adult Student Housing Law.[19]

II. Eminent Domain Procedure Law

In *49 WB, LLC v. Village of Haverstraw*,[20] the Second Department decided (a) when the 30-day statute of limitations within which to challenge a determination and findings pursuant to Section 204(A) of the Eminent Domain Procedure Law ("EDPL") begins to run; (b) whether the Village's finding that the taking of private property was for public use in this case was rational; and (c) whether attorneys' fees should be awarded to the petitioner if the condemnor's findings and determination are rejected by the reviewing court.[21]

The subject of this case was the Graziosi Building (the "Building") in the Village of Haverstraw, in Rockland County (the "Village"). The petitioners, 49 WB, LLC, purchased the Building on June 27, 2005. At that time, the building was occupied by a dental office, vacant office space, and the office of Housing Opportunity for Growth, Advancement and Revitalization, Inc. ("HOGAR"), the Village's designated affordable housing and neighborhood preservation not-for-profit corporation. Prior to petitioner's purchase of the Building, HOGAR was in negotiations with the prior owner to purchase the Building, but could not obtain the financing to complete the transaction.[22]

Eleven days after petitioners purchased the Building, the Village began to explore the possibility of taking the Building by condemnation. In accordance with the requirements of the EDPL, the Village Board of Trustees held a public hearing between July 25, 2005 and September 19, 2005 to determine whether the acquisition of the Building by the Village was necessary for a public purpose.[23] The Board of Trustees entertained general public comment and two specific proposals at the public hearing. The first proposal, put forth by HOGAR, included the construction of 16 units of affordable housing for sale to Village residents on the site. Petitioner proposed to develop six to eight affordable housing units on the property which would be offered for rent to municipal employees and volunteers. Petitioner also offered HOGAR a long term lease in the Building.[24] In the background, it should be noted that around the time of the condemnation, Ginsburg Development Company was engaged in the revitalization of the Haverstraw waterfront. In connection with its development of the Haverstraw waterfront, the Village required Ginsburg to provide 40 units of affordable housing within the Waterfront area and an additional 85 units of affordable housing scattered throughout the Village, a fact relevant in the Court's analysis of the taking in this case.[25]

On November 29, 2005 the Village passed a resolution in which it expressed its findings that the condemnation was appropriate to provide "a centrally located health care center, and affordable housing, as well as

suitable office space for HOGAR."[26] Legal notice of its determination and findings was published in *The Journal News* for five consecutive days, from December 15 through December 19, 2005. Petitioner commenced this proceeding by filing a petition on January 18, 2006.[27]

A. Statute of Limitations

The Court first addressed the issue of whether the petition was timely filed. The Village argued that, since the EDPL only requires that such notice be published for at least two successive days, the statute of limitations began to run on the second date of publication of its notice of findings and determination, even though the notice was actually published for five consecutive days. Petitioners argued that the petition was timely filed because it was filed within 30 days of the last day the notice was published, arguing that the minimum two day publishing requirement only set forth the minimum notice requirements and not the complete notice requirement.[28]

EDPL Section 207(A) provides that

> Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof . . . by the filing of a petition in such court within thirty days after the condemnor's *completion of its publication* of its determination and findings pursuant to section two hundred four herein.[29]

EDPL Section 204(A) provides that

> The condemnor, . . . , shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in *at least two* successive issues of an official newspaper. . . .[30]

Applying the above, the Court held that EDPL Section 207(A) requires a petition to be filed within 30 days of the condemnor's completion of publication, and that publication is complete on the last day the notice is published.[31] In so holding the Court reasoned that EDPL Section 204 requires publication for *at least* two days, not only two days; thus the publication is not complete after two days; rather it is complete on the last day of its publication.[32] Thus, the petition was timely filed.[33]

B. Public Purpose

The Court went on to discuss whether the Village had properly established that the Building was required for a public purpose. Describing its role in reviewing a condemnor's finding of public purpose, the Court stated that a condemnor's determination that property is necessary for a public purpose is "well-nigh conclusive" and that its finding of a public purpose should be reversed by a reviewing court only if the condemnor's decision is unsupported by the hearing record.[34] Notwithstanding this deferential standard, the Court held that in this case, the condemnor's finding that the Building was necessary for a public purpose lacked a rational basis.[35]

The Village supported its determination to take the Building on the grounds that the site was appropriate for a community healthcare facility, affordable housing, and an office for HOGAR.[36] The Court rejected each of the Village's three stated public purposes, reasoning that the owner of the property was already providing or proposed to provide these services, and the Village did not show that HOGAR would be better able to provide these services.[37] Moreover, the Court found the Village's claim that the taking would increase the availability of affordable housing in the Village to be illusory in that the affordable housing to be developed on the site by HOGAR would be funded by Ginsburg, and would partially satisfy Ginsburg's off-site affordable housing obligations. Thus, the affordable housing created by HOGAR would not result in a net increase of affordable housing; it would be fulfilling a preexisting affordable housing requirement. However, if petitioner were to provide affordable housing, it would be in addition to the number of affordable units Ginsburg was required to provide and thus would actually provide for more affordable housing in the Village. Accordingly, the Court found that the condemnation of the Building for use by HOGAR would produce less, not more, affordable housing in the Village, and thus the Village's reliance on affordable housing as a basis for the condemnation was improper.[38]

C. Attorneys' Fees

In light of the Court's determination that an adequate public purpose did not exist for the taking of the Building, petitioner argued that it was entitled to attorneys' fees. The EDPL provides that a condemnee can recover reasonable attorneys' fees "[i]n the event that the procedure to acquire . . . property is abandoned by the condemnor, or a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire the property."[39]

The Court denied petitioner's application for attorneys' fees on the grounds that the EDPL does not provide for attorneys' fees at this point in the condemnation process. The Court explained that under the EDPL, the condemnation process is divided into two parts. The first part provides for public notice and a public hearing to determine whether the subject prop-

erty is necessary for a public purpose.[40] The second part provides for the vesting of title and acquisition of the property by the condemnor, a determination of just compensation, and judicial proceedings pertaining thereto.[41] The court held that attorneys' fees are only awarded under the EDPL if the condemnation process is interrupted during the acquisition portion of the process, phase two. Here, the condemnation process was challenged during phase one; thus the provision in the EDPL which provides for attorneys' fees was not triggered, and therefore petitioners were not entitled to attorneys' fees in this case.[42]

III. Special Standards Applied

A. *Town of Hempstead v. State of New York*: Application of *In re County of Monroe* Balancing of Interests Test

In *Town of Hempstead v. State of New York*,[43] the Second Department was called upon to decide whether the construction of a wireless communication tower by the State's exclusive wireless communication licensee on State-owned property in the Town of Hempstead was immune from local zoning regulations. In 2003, the New York State Department of Transportation ("DOT") informed the Town of Hempstead that it was reviewing the feasibility of using state-owned property located in the Town near the intersection of the Seaford–Oyster Bay Expressway and the Sunrise Highway for the purposes of permitting Crown Communication New York, Inc. ("Crown"), the State's exclusive licensee, to construct a wireless communication tower, which would be located within 250 feet of neighboring residences. In connection with its notice, the DOT provided the Town with a site plan for the proposed wireless communication tower and a copy of the environmental assessment form for the project, and invited the Town to comment on the project, which the Town failed to do.[44] In March 2003, the DOT completed the SEQRA process for the proposed wireless communication tower by adopting a negative declaration and finding that the construction of the proposed wireless communication tower in the location selected would not impair the aesthetics or the character of the neighborhood.[45]

In November 2004, Crown constructed a wireless communication tower on the southwest quadrant of the site. In December, the Town commenced an action against the State of New York and the DOT to permanently enjoin the construction, maintenance, and use of the wireless communication tower on the grounds that the tower violated the Town's zoning ordinance. The State cross-moved to dismiss the action on the grounds that the Town did not state a cause of action, arguing that "the application of the balancing test enunciated in the case of the *Matter of County of Monroe* clearly required that the project be afforded immunity from local regulation[.]"[46]

The Supreme Court, applying the *In re County of Monroe* balancing test, held that in this case the State was immune from the Town of Hempstead's zoning regulations, and the Second Department affirmed. The Second Department reasoned that the neighboring property owners' aesthetic interests did not outweigh the general community benefit of increased wireless communication service, and dismissed alternative locations suggested by the Town as unworkable.[47] In support of its holding, the Court specifically noted that the interests in this case did in fact balance in favor of the State and noted that immunity from local regulation is not a foregone conclusion in every similar case.[48]

B. *Western New York District Inc. of the Wesleyan Church v. Village of Lancaster*: Application of the *Cornell University v. Bagnardi* Balancing Test

In *Western New York District Inc. of the Wesleyan Church v. Village of Lancaster* ("*Western New York District Inc.*")[49] the Court held that a Village is required to apply the *Cornell University v. Bagnardi*[50] balancing test when reviewing an application of a church that wishes to establish in an industrial district. The *Cornell University* balancing test provides that municipal governments must make an individual decision about each religious or educational use that wishes to establish within the municipality and must consider whether the benefits to the public welfare in permitting the religious use outweigh the detriment to the public welfare by permitting such use. Additionally, the Court decided the scope of the public welfare standard under this test.

In *Western New York District Inc.*, the petitioners-plaintiffs, Western New York District Inc., a New York Religious corporation (the "District") and Vine Wesleyan Church, an unincorporated association of persons operating under the authority of the District (collectively "Petitioners"), claimed that respondent-defendant Village of Lancaster (the "Village") and its various Boards improperly denied its special use permit application requesting permission to establish a church in the Village's industrial zoning district.[51]

On February 27, 2007, Petitioners entered into an agreement with Sherex Industries, Inc. to purchase a building located in the Village's Industrial Park Zone. This agreement was conditioned upon the Petitioners' ability to obtain a special use permit to use the subject property as a church. In March 2007, the Village's code enforcement officer advised Petitioners that churches were prohibited in the Industrial Park Zone and that it would be required to obtain a use variance from the Village's Zoning Board of Appeals to establish a church in that district. Pursuant to the Village's Code, churches are a permitted use in the residential, commercial, and manufacturing districts in the Village, but are not permitted in the industrial district.[52]

Petitioners initially applied to the Village's Zoning Board of Appeals, but terminated their application and commenced a hybrid Article 78 proceeding/declaratory judgment action challenging the exclusion of churches from the Village's Industrial Park Zone. On June 8, 2007, the Court issued a bench decision directing Petitioners to seek a special use permit from the Village Board of Trustees in accordance with the Village Code, and required the Village Board to process Petitioners' application in accordance with the balancing test articulated by the Court of Appeals in *Cornell University* and its progeny.[53] In its bench decision, the Court was careful to note that "New York case law is not fully developed on the question of a church being able to be located in either a commercial or an industrial park."[54] However, in the instant decision, the Court held a municipality must apply the *Cornell University* balancing test when reviewing an application regarding the establishment of a religious use in an industrial district.[55]

On July 2, 2007, Petitioners submitted a special use permit application to the Village's Planning Commission. The Planning Commission considered comments in support of and in opposition to Petitioners' application and recommended the denial of the application. On July 23, 2007, the Village Board of Trustees held a public hearing on the Petitioners' application at which it considered documentary evidence and testimony in support of and in opposition to Petitioners' application. At a special meeting held on July 30, 2007, the Village Board of Trustees unanimously denied Petitioners' special use permit application.[56] In support of its denial, the Village Board of Trustees reasoned that although churches by their nature serve the public welfare, and that the development of the church somewhere in the Village would serve the public welfare, a church in the Village's Industrial Park District would not be appropriate in light of the fact that the purpose of the Industrial Park District is to support the economy of the Village by encouraging industry and job growth, and that the Village has invested a substantial amount of resources in creating an industrial park to attract jobs and business to the Village, and that churches are permitted in every other district in the Village.[57]

On August 7, 2007, Petitioners commenced their hybrid Article 78 proceeding/declaratory judgment action challenging the Board's denial of its special use permit application.[58] Petitioners argued that the Village Board of Trustees, when it considered their special permit application, failed to properly apply the *Cornell University* public welfare standard because it did not balance the benefits and burdens of the establishment of a church in according with traditional notions of public health, safety, welfare, and morals (i.e., the proposed uses' impact on traffic congestion, property values, municipal services, etc. . . .).[59] The Village argued that public welfare carries a broad meaning and permits the consideration of such factors as economic development and the Village's comprehensive plan in addition to the above-listed traditional notions of public welfare.[60]

The Court agreed with the Village and held that the Board of Trustees was not confined to traditional notions of public welfare, as argued by the Petitioners, but could consider the traditional notions of public welfare and any other legitimate public interest.[61] In support of its holding the Court relied on *Trustees of Union College in the Town of Schenectady in the State of New York v. Members of the Schenectady City Council*,[62] in which the Court of Appeals held, in extending the *Cornell University* balancing standard to the establishment of an educational use in a historic district, that the application of the balancing test permitted the consideration of the interests of the zoning district (in that case a historic preservation district) and "other legitimate competing interest" in the public welfare analysis.[63] Here, the Village based its decision not to permit the church to establish in the Industrial Park District on economic development considerations and a consideration of the municipality's comprehensive plan, both well established as a legitimate exercise of public purpose over land use matters under New York case law, and accordingly permissible considerations in the application of the *Cornell University* balancing test.[64] Because the Board properly applied the *Cornell University* balancing test, and its decision to deny Petitioners' application based on its application of that standard was reasonable, the Court denied the petition.[65]

IV. Zoning Boards of Appeals

A. Authority to Extend Approvals

In *420 Tenants Corp v. EBM Long Beach LLC*,[66] the Second Department held that an application to extend a previously granted variance may be granted by a zoning board of appeals after the subject variance has expired provided that the application to extend the variance was submitted prior to the variance's expiration. Therein, the Zoning Board of Appeals of the City of Long Beach (the "ZBA") granted EBM Long Beach LLC's ("EBM") area variance application on May 3, 2005. The initial variance was granted subject to the condition that it would expire if construction did not commence within nine months. On February 2, 2006, one day before the May 3 variance was due to expire, EBM applied to the ZBA for an extension of that approval. On March 2, 2006, more than nine months after the variance was granted, the ZBA approved the requested extension.[67] Petitioners commenced a proceeding to nullify the extension on the grounds that the ZBA lacked the authority to grant the requested extension after the variance had expired. The Court held that a ZBA's authority to issue a variance includes the authority to extend such variance without the

required notice and public hearing associated with the initial variance application if an application for such extension is made prior to the expiration of the variance.[68] In this case, because the extension application was made before the variance expired, the fact that it was actually granted after the expiration date did not impact the validity of the extension.[69]

B. Limitations on Authority

In *Board of Trustees, Village of Thomaston v. Zoning Board of Appeals, Village of Thomaston*,[70] the Supreme Court, Nassau County held that absent specific authorizing legislation, a zoning board of appeals is not permitted to modify or waive conditions imposed by the Village Board of Trustees as a part of a prior land use approval.

By way of background, in 1996 Scottvic Realty Corp, Inc. ("Scottvic") applied to the Thomaston Board of Trustees for a permit to enlarge its gasoline and motor vehicle repair station. The Board of Trustees granted Scottvic's application with several conditions, including one which prohibited Scottvic from changing, expanding or altering the property without permission from the Board of Trustees. The Board of Trustees required that Scottvic record a declaration of covenants and restrictions confirming that there would be no change, expansion of, or alteration of the site without the Board of Trustees' approval, and Scottvic complied.[71]

In 2005, Scottvic submitted an application to the Village's Building Inspector to enlarge the facility without seeking permission to expand from the Board of Trustees. The Building Inspector denied the application on the grounds that, among other things, it did not comply with the conditions of the 1996 approval and the recorded declaration. Scottvic applied to the Village's ZBA for relief from the Building Inspector's determination and for certain area variances required in connection with its expansion plan. The ZBA reversed the determination of the Building Inspector and granted the requested variances.[72]

The Village of Thomaston Board of Trustees brought this Article 78 proceeding to annul the ZBA's determination on the grounds that it exceeded its authority when it permitted Scottvic to act in a manner contrary to conditions imposed by the Board of Trustees as a part of its 1996 approval.[73] The Supreme Court, Nassau County, granted the Board of Trustees' petition and reversed the determination of the ZBA on the grounds that it exceeded its authority when it waived a condition imposed by another municipal board as a part of a prior land use approval. In so holding, the Court stated that the authority to waive conditions imposed by other municipal boards is not inherent in a zoning board of appeals' authority, and the Thomaston Code does not grant the ZBA that authority.[74]

C. Variances

In *Gjerlow v. Graap*,[75] the Second Department reminded zoning boards of appeal that they may grant exemptions from zoning requirements based on only the *use* of a parcel of property, not the *user*. In 1982, the Gjerlows, the owners of an approximately 17.8-acre parcel of property in the Town of Bedford, Westchester County, applied for and were granted a variance "to permit construction of a 1711 square foot caretaker's cottage [an accessory use under the Bedford Code] prior to construction of the main building."[76] The variance did not specify a time within which the main house was to be built. The Gjerlows constructed and occupied the cottage, but never constructed a main house on the property.[77]

In 2003, the LeBrauns acquired an approximately 20-acre property adjacent to the Gjerlow's property and embraced their new neighbors by complaining to the Town's Code Enforcement Officer that the Gjerlows were in violation of the 1982 approval because they never constructed a main house on their property. The Code Enforcement Officer agreed that the Gjerlows were in violation of the 1982 approval and required the Gjerlows to apply for a building permit to construct a main house on the property within 90 days. The Gjerlows appealed the Code Enforcement Officer's determination to the Town's ZBA. The ZBA affirmed the Code Enforcement Officer's determination to the extent that it found that the 1982 approval required the construction of a main house on the property. However, the ZBA found that the 90-day time limitation within which to the Gjerlows were required to apply for a building permit was not reasonable and held that the Gjerlows could continue to reside in the cottage without constructing a main dwelling, but if they sold the property their successor would be required to obtain a building permit to construct a main residence on the property within two years after acquiring the property.[78]

The Gjerlows and the LeBrauns both appealed and the Supreme Court dismissed the proceedings and again both parties appealed.[79] The Second Department upheld the determination of the Code Enforcement Officer and of the ZBA that the 1982 variance required the construction of a main residence within a reasonable time. The Court also affirmed the ZBA's determination that the 90-day time limit within which to obtain a building permit was unreasonable. However, the Court invalidated that portion of the ZBA's determination which did not require the Gjerlows to construct a main residence on the property but required their successors in title to construct a main residence. In so holding, the Court stated as follows:

> the ZBA acted arbitrarily and capriciously in permitting the Gjerlows to have an open-ended exemption from constructing a main dwelling while directing that any successor owner comply with such condition within two years of the property's transfer. Such a determination violates the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it" [citing cases]. Regardless of who owns the subject property, enforcement of the 1982 variance requires that an application for a building permit and construction of a main dwelling take place within a reasonable period of time.[80]

Accordingly, the case was remanded to the ZBA so that it could determine a reasonable time within which the Gjerlows must apply for a building permit to construct the main residence.[81]

V. SEQRA

In *AC I Shore Road, LLC v. Incorporated Village of Great Neck*,[82] the Second Department held that the Village of Great Neck improperly segmented the SEQRA review of the Village's plan to decommission two sewage treatment facilities and divert its sewage to another municipality from the rezoning of the property around and on which the sewage treatment facilities were located.

In 2001 the Village of Great Neck began to study the possibility of development along its Manhasset Bay waterfront. The redevelopment plan studied by the Village included the rezoning of certain properties in the waterfront area, including, among other properties, two sewage treatment facilities. Concurrent with its study of the waterfront rezoning, the Village was considering decommissioning the sewage treatment facilities and diverting its sewage to a treatment facility in another municipality.[83]

The Village Board of Trustees released a Draft Generic Environmental Impact Statement ("DGEIS") for the proposed waterfront rezoning in 2003. The DGEIS provided that the action was "intended to lead to the development or redevelopment of the rezoned properties as shown on a conceptual site plan."[84] The conceptual site plan depicted residential and retail development on the site of the then-operating sewage treatment plants; however, the DEIS did not provide any meaningful analysis of the environmental impact of the sewage diversion plan. Similarly, the Final Generic Environmental Impact Statement ("FGEIS") accepted by the Village Board of Trustees did not include a meaningful analysis of the sewage diversion plan, rather, in response to comments requesting an analysis of that plan, the Village replied that the sewage diversion plan is a project independent of the rezoning.[85]

The Board of Trustees adopted SEQRA Findings and adopted two local laws creating a Waterfront district and a Mixed-Use district. Petitioner, the owner of property in the newly created Waterfront district, commenced an Article 78 proceeding to annul the local law creating the Waterfront District, arguing that the SEQRA review thereof was deficient.[86]

Annulling the challenged legislation, the Court held that the SEQRA review of the proposed waterfront rezoning was improperly segmented from the environmental review of the proposed sewage diversion plan. The Court held that the record did not support the Village's contention that the sewage diversion plan was speculative and not a part of the overall waterfront redevelopment plan.[87] Further, the Court held that the Village failed to take a hard look at the relevant area of environmental concern because it did not provide an adequate environmental review of proposed remediation and dredging that was required to take place on the site in order for the waterfront redevelopment plan to be implemented. Accordingly, the Second Department affirmed the Supreme Court's decision to grant the petition and annul the rezoning challenged.[88]

Endnotes

1. *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 841 N.Y.S.2d 321 (2d Dep't 2007).
2. *Id.*
3. *Village of Chestnut Ridge*, 45 A.D.3d at 76–77, 841 N.Y.S.2d at 327.
4. *Village of Chestnut Ridge*, 45 A.D.3d at 77–78, 841 N.Y.S.2d at 326–327. In November 2004, after conducting an environmental review, the Town Board adopted the new comprehensive zoning law which included the adult student housing provision.
5. *Village of Chestnut Ridge*, 45 A.D.3d at 77, 841 N.Y.S.2d at 326.
6. *Village of Chestnut Ridge*, 45 A.D.3d at 78–79, 841 N.Y.S.2d at 327.
7. *Village of Chestnut Ridge*, 45 A.D.3d at 79–80, 841 N.Y.S.2d at 327–328.
8. *Village of Chestnut Ridge*, 45 A.D.3d at 80–82, 841 N.Y.S.2d at 329–332.
9. *Village of Chestnut Ridge*, 45 A.D.3d at 82–85, 841 N.Y.S.2d at 330–332. In support of its holding, the Court reasoned that the Municipal Home Rule Law, which was adopted eight years after Town Law Section 264(4), does not limit a neighboring municipality's ability to bring a lawsuit against another municipality with regard to a local law adopted by the latter, and that the absence of the express exclusion of this bar indicates that the Legislature did not intend to prohibit such suits. *Id.* Moreover, the Court indicated that even if Town Law Section 264(4) applied here, it would go to the issue of standing, not capacity, to sue.
10. *Village of Chestnut Ridge*, 45 A.D.3d at 85–86, 841 N.Y.S.2d at 332–333.

11. *Village of Chestnut Ridge*, 45 A.D.3d at 87–88, 841 N.Y.S.2d at 333–334.
12. *Village of Chestnut Ridge*, 45 A.D.3d at 87–88, 841 N.Y.S.2d at 334.
13. *Village of Chestnut Ridge*, 45 A.D.3d at 88–89, 841 N.Y.S.2d at 334–335 (internal citations omitted).
14. *Village of Chestnut Ridge*, 45 A.D.3d at 89–90, 841 N.Y.S.2d at 335 ("To establish standing under SEQRA, the petitioners must show (1) that they will suffer an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by SEQRA.").
15. *Village of Chestnut Ridge*, 45 A.D.3d at 90, 841 N.Y.S.2d at 335–336.
16. *See also In re Trude*, 17 Misc. 3d 1104(A) (Sup. Ct., Steuben Co. 2007) ("'A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity. . . . The proximity alone permits an inference that the challenger possesses an interest different from other members of the community. . . . However, the status of neighbor does not automatically entitle a party to judicial review. . . . The Court must still determine whether the nearby landowners are close enough to the property affected by the law that they suffer some harm other than that suffered by the public generally") (citations omitted).
17. *Village of Chestnut Ridge*, 45 A.D.3d at 90, 841 N.Y.S.2d at 336.
18. *Village of Chestnut Ridge*, 45 A.D.3d at 91, 841 N.Y.S.2d at 337 (internal quotations omitted, citations omitted).
19. *Village of Chestnut Ridge*, 45 A.D.3d at 93, 841 N.Y.S.2d at 337–338 ("It further alleges that the Villages share much of their infrastructure with the Town, and that development under the adult student housing law will generate substantial increases in water and sewage system usage and traffic. In this regard, Jeffrey Osterman, the appellants' expert planner, opined in his affidavit, submitted in opposition to the defendants' cross motions, that development to the maximum potential permitted by the adult student housing law would increase water usage by 12 times over the usage generated by the current zoning. The Rockland County Sewer District, in commenting on Chaim Chofetz's proposed site plan for the Nike site, noted that the increased development, while within the existing capacity of the sewage system, "may lead to an overflow of the Sewer District's facilities in the future.").
20. *49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226, 839 N.Y.S.2d 127 (2d Dep't 2007).
21. *49 WB, LLC*, 44 A.D.3d at 228–229, 839 N.Y.S.2d at 130.
22. *49 WB, LLC*, 44 A.D.3d at 229, 839 N.Y.S.2d at 130–131.
23. *49 WB, LLC*, 44 A.D.3d at 230, 839 N.Y.S.2d at 131.
24. *Id.*
25. *49 WB, LLC*, 44 A.D.3d at 229, 839 N.Y.S.2d at 130.
26. *49 WB, LLC*, 44 A.D.3d at 230, 839 N.Y.S.2d at 131.
27. *Id.*
28. *49 WB, LLC*, 44 A.D.3d at 232, 839 N.Y.S.2d at 132–33.
29. EDPL § 207 (emphasis added).
30. EDPL § 204 (emphasis added).
31. *49 WB, LLC*, 44 A.D.3d at 232–234, 839 N.Y.S.2d at 133–134.
32. *49 WB, LLC*, 44 A.D.3d at 232–234, 839 N.Y.S.2d at 133.
33. *49 WB, LLC*, 44 A.D.3d at 235, 839 N.Y.S.2d at 133.
34. *49 WB, LLC*, 44 A.D.3d at 235–236, 839 N.Y.S.2d at 135.
35. *49 WB, LLC*, 44 A.D.3d at 244, 839 N.Y.S.2d at 142.
36. *49 WB, LLC*, 44 A.D.3d at 240, 839 N.Y.S.2d at 139.
37. *49 WB, LLC*, 44 A.D.3d at 240–244, 839 N.Y.S.2d at 141–142.
38. *49 WB, LLC*, 44 A.D.3d at 241–243, 839 N.Y.S.2d at 139–141.
39. EDPL § 702(B).
40. *49 WB, LLC*, 44 A.D.3d at 244–245, 839 N.Y.S.2d at 142 (citing EDPL Article 2).
41. *49 WB, LLC*, 44 A.D.3d at 245, 839 N.Y.S.2d at 142 (citing EDPL Articles 4 through 6).
42. *49 WB, LLC*, 44 A.D.3d at 246, 839 N.Y.S.2d at 142–143.
43. *Town of Hempstead v. State of New York*, 42 A.D.3d 527, 840 N.Y.S.2d 123 (2d Dep't 2007).
44. *Town of Hempstead*, 42 A.D.3d at 528, 840 N.Y.S.2d at 125.
45. *Id.*
46. *Id.* In *In re County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (1988), the Court of Appeals articulated a balancing test to be applied when a conflict exists between two governmental entities with regard to the application of local zoning regulations. Pursuant to that test, a governmental entity is exempt from local zoning regulations if it can show that the public interest served by the proposed project outweighs the public interest protected by local zoning regulations. In order to apply the balancing test, the Court of Appeals cited the following factors: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulations would have upon the enterprise concerned and the impact upon legitimate local interest." *Town of Hempstead*, 42 A.D.3d at 529, 840 N.Y.S.2d at 125 (quoting *County of Monroe*, *supra*).
47. *Town of Hempstead*, 42 A.D.3d at 530, 840 N.Y.S.2d at 126.
48. *Town of Hempstead*, 42 A.D.3d at 529, 840 N.Y.S.2d at 125.
49. *Western New York District Inc. of the Wesleyan Church v. Village of Lancaster*, 841 N.Y.S.2d 740 (Sup. Ct., Erie Co. 2007).
50. *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861 (1986). In *Cornell University* the Court of Appeals held that religious and educational uses are inherently beneficial in nature and thus the total exclusion of such uses from residence districts could not be reasonably related to the protection of the health, safety, welfare, or morals of the community. Thus, in accordance with that decision, municipalities must make an individual decision about each religious or educational use that wishes to establish and must consider whether the benefits to the public welfare in permitting the religious use outweigh the detriment to the public welfare by permitting such use. In future decisions, New York Courts have extended the *Cornell University* analysis to applications of religious and educational institutions in historic districts and commercial districts. *See Trustees of Union College in the Town of Schenectady in the State of New York v. Members of the Schenectady City Council*, 91 N.Y.2d 161, 667 N.Y.S.2d 978 (1997) (historic districts); *Albany Preparatory Charter School v. City of Albany*, 31 A.D.3d 870, 818 N.Y.S.2d 651 (3d Dep't 2006) (commercial districts).
51. *Western New York District Inc.*, 841 N.Y.S.2d at 742–743.
52. *Id*.
53. *Id.*
54. *Western New York District Inc.*, 841 N.Y.S.2d at 743.
55. *Western New York District Inc.*, 841 N.Y.S.2d at 749–750.
56. *Western New York District Inc.*, 841 N.Y.S.2d at 743.
57. *Western New York District Inc.*, 841 N.Y.S.2d at 746.
58. *Id*.
59. *Western New York District Inc.*, 841 N.Y.S.2d at 752.

60. *Id.*
61. *Western New York District Inc.*, 841 N.Y.S.2d at 759.
62. 91 N.Y.2d 161, 667 N.Y.S.2d 978 (1997).
63. *Western New York District Inc.*, 841 N.Y.S.2d at 753.
64. *Western New York District Inc.*, 841 N.Y.S.2d at 754.
65. *Western New York District Inc.*, 841 N.Y.S.2d at 760.
66. *420 Tenants Corp. v. EMB Long Beach, LLC*, 41 A.D.3d 641, 838 N.Y.S.2d 649 (2d Dep't 2007).
67. *420 Tenants Corp.*, 41 A.D.3d at 642, 838 N.Y.S.2d at 650.
68. *420 Tenants Corp.*, 41 A.D.3d at 642–643, 838 N.Y.S.2d at 650–651.
69. *420 Tenants Corp.*, 41 A.D.3d at 643, 838 N.Y.S.2d at 651.
70. N.Y.L.J. 28, Aug. 15, 2007, col. 1.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Gjerlow v. Graap*, 43 A.D.3d 1165, 842 N.Y.S.2d 580 (2 Dep't 2007).
76. *Gjerlow*, 43 A.D.3d at 1166, 842 N.Y.S.2d at 582.
77. *Gjerlow*, 43 A.D.3d at 1166, 842 N.Y.S.2d at 581.
78. *Gjerlow*, 43 A.D.3d at 1166–1167, 842 N.Y.S.2d at 581–582.
79. *Gjerlow*, 43 A.D.3d at 1167, 842 N.Y.S.2d at 583.
80. *Gjerlow*, 43 A.D.3d at 1168, 842 N.Y.S.2d at 584.
81. *Id.*
82. *AC I Shore Road, LLC v. Incorporated Village of Great Neck*, 43 A.D.3d 439, 841 N.Y.S.2d 344 (2d Dep't 2007).
83. *AC I Shore Road, LLC*, 43 A.D.3d at 440, 841 N.Y.S.2d at 344.
84. *AC I Shore Road, LLC*, 43 A.D.3d at 440, 841 N.Y.S.2d at 346 (internal quotation omitted).
85. *AC I Shore Road, LLC*, 43 A.D.3d at 440–442, 841 N.Y.S.2d at 346.
86. *Id.*
87. *AC I Shore Road, LLC*, 43 A.D.3d at 442, 841 N.Y.S.2d at 346–347.
88. *Id.*

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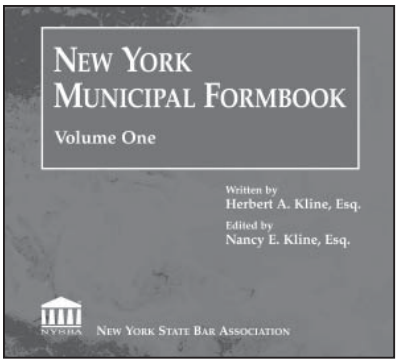

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