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Municipal Lawyer

A joint publication of the Municipal Law Section of the New York State Bar Association and the Edwin G. Michaelian Municipal Law Resource Center of Pace University

A Message from the Chair

Why bother with a bar association, let alone a Section of one?

Don't you spend enough time with lawyers? Do you really want to socialize with them? Don't you have better things to do? And now that you can spend a few bucks and breeze through the CLE tapes for mandatory credits, why endure the bar-sponsored programs that fill up a productive work day or a relaxing weekend? After all, what good does a bar association really do?

Of course, if you're reading this, you're probably already a member of the New York State Bar Association and our Municipal Law Section. But that doesn't mean you're participating as you could, and should.

By its nature, the practice of law is solitary and antagonistic. We read, we think, we write, we argue. Few lawyers, particularly municipal lawyers with some exceptions, get to collaborate with their peers in a helpful manner. We get tired of contesting each other. We often underestimate how much we can help each other, how much we need each other's counsel for a healthy balance.

Municipal lawyers are generally decent people and thoughtful practitioners.

Our practice makes us civic-minded. That spirit leads us to cooperate with one another, assist one another, when we ask questions of one another. If you haven't learned this already, I have a few easy suggestions to make it manifest.

Make sure you're on the Section listserve (www.nysba.org/municipal). Check with Albany headquarters if you have any problems; staff will quickly address them. Every so often, while you're reading or writing at your desk alone, an email inquiry will pop up on your computer screen from one of your fellow Section members. Return to your reading or writing. Before you can finish what you were doing, a half dozen or more people will be volunteering worthwhile advice. It's great, but not surprising.

Join a committee or Section that fits your practice area. Take a look at the committees listed in the back of this publication. If you like one, great; if you don't and can suggest a new one, contact me or send the Section an email about it. Committees meet at least once a year at the New York State Bar Annual Meeting in New York, and committee chairs are invited to Executive Committee meetings in the fall and spring. Committee work is an effective means to meet and get to know active members of your Section.

Inside

If you're a little more ambitious, write an article for this publication.

Our longstanding editor, Les Steinman, will receive it gleefully. Your writing on a subject will make you know it better and help us all out.

That's what our Section is about.

On a regular basis, come to the Annual Meeting in New York and the annual Section meeting at rotating locations. Attendance at the programs given during those meetings will satisfy your CLE credits, so you don't have to worry about that anymore. More importantly, you can meet, talk to, laugh with, and get to know your peers. All meetings are a mix of work and play to keep it interesting. It is always a challenge to choose presentation topics and speakers that satisfy your interests. If you're not there to let us know how we're doing, we can't improve.

Would you like to influence lawmaking? Our Section does that, in a good way, we hope. There are many state bills pending at any given time that affect municipal interests. Our Executive Committee reviews those of special interest and comments on them. We are heard and often make a difference. If you're interested in this, volunteer.

This is obviously just an entree to our Section. You will make it vibrant or not. Get involved, learn something, teach something, improve the law, and have some fun with your colleagues along the way. That's not so bad, is it?

Robert B. Koegel

From the Editor

With this issue of the *Municipal Lawyer,* I am pleased to introduce the new Chair of the Municipal Law Section, Robert B. Koegel. An attorney in the Rochester law firm of Remington, Gifford, Williams and Colicchio, LLP, Bob concentrates his practice in municipal and environmental law and general litigation. He previously served as attorney for the Town of Greece, New York.

Active in the Section for many years, Bob serves as a member of the State Bar Association's Task Force on Eminent Domain and is a frequent author for the *New York Law Journal*. He is a former Chair of the Environmental Law Committee of the Monroe County Bar Association and participates in Lawyers for Learning and mentors School 29 in Monroe County. Bob received his undergraduate degree from Williams College in 1973, where he currently chairs the Planned Giving program and formerly chaired the Alumni Association. He received his law degree from Fordham Law School in 1976.

In his first Message from the Chair, Bob asks whether we are taking full advantage of the benefits of Section membership. He reminds us that opportunities abound to exchange ideas and information with other Section members through the Section's listserve, to collaborate with our peers by joining a Section committee in our area of practice, to review and comment on pending legislation relevant to your practice, to share your experience by writing for this publication and to satisfy CLE obligations and network at Section meetings.

Also, in this issue of the *Municipal Lawyer*, Mark Davies, Executive Director of the New York City Conflicts of Interest Board, begins a three-part series outlining the essential components of an effective local ethics law. In Part I of the series, Mark focuses on a comprehensive and comprehensible code of ethics. Future installments will examine common sense disclosure and effective administration provisions.

Kenneth W. Bond, of Squire, Sanders & Dempsey, LLP, New York City, Chair of the Section's Municipal Finance and Economic Development Committee, writes about the "Perplexing Case of GASB 45" and the burden compliance places on state and local governments to disclose unfunded health benefit costs for retired employees. Henry Hocherman and Noelle Crisalli of Hocherman Tortorella and Wekstein, LLP, White Plains, provide a comprehensive update of recent land use and environmental law decisions addressing SEQRA, accrual of a claim for consulting fees, New York City Department of Environmental Protection variance procedures from its storm water regulations, special permit conditions, and other subjects.

Finally, this year's Fall Meeting will take place on the weekend of October 19-21 at the Thayer Hotel in West Point, New York. Among the topics to be covered are Religious Land Uses and Community Development; Siting of Wind Farms; Ethics for Municipal Attorneys; Global Warming, Climate Change and the Municipal Lawyer; and Hot Topics in Public Sector Labor Law. On Saturday, John Clarkson, Executive Director of the New York State Commission on Local Government Efficiency and Competitiveness will be the luncheon speaker. At Saturday evening's dinner at the West Point Officers' Club, the Honorable Eugene F. Pigott, Jr., Associate Judge of the Court of Appeals, will be the featured speaker.

Be sure to save the dates and join your colleagues for an enriching and enjoyable weekend.

Lester D. Steinman

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Enacting a Local Ethics Law—Part I: Code of Ethics

By Mark Davies

The State law governing municipal conflicts of interest, set forth in Article 18 of the General Municipal Law, is, in the words of the former Temporary State Commission on Local Government Ethics, "disgracefully inadequate." Article 18 contains huge gaps, makes no sense, provides little guidance to municipal officials or their attorneys, imposes a financial disclosure system that is charitably described as asinine, and, in the one area it does regulate—namely, the prohibition on a municipal official having an interest in certain contracts with his or her municipality—overregulates to such an extent that it turns honest officials into crooks. Widely supported proposals by the Commission, the State Bar, and many others to remedy this situation have fallen on deaf legislative ears for over 15 years.[1] Accordingly, municipalities are well-advised to enact an effective local ethics law. Indeed, Article 18 expressly permits a municipality to adopt a code of ethics that prohibits conduct permitted by Article 18, provided that the code does not permit any conduct prohibited by Article 18.[2] That is, a municipal ethics law must be more stringent, never less stringent, than Article 18—hardly a difficult task.

"Since the vast majority of municipal officials are honest and want to do the right thing, the code of ethics must seek to guide and protect honest public officials."

Purpose, Principles, and Precepts

It has often been said that an effective ethics law rests upon three pillars: a sensible, comprehensive, and comprehensible code of ethics; common sense disclosure; and effective administration, consisting of an independent local ethics board that provides quick answers to ethics questions, regulates disclosure, trains municipal officials in the requirements of the ethics law, and imposes fair and appropriate penalties for violations. All three pillars are essential; the removal of any one of them, such as the enforcement power of the ethics board, will topple the entire system.[3] This article will discuss the code of ethics. Part II, in the next issue of the *Municipal Lawyer*, will address disclosure. Part III will review the requirements for effective administration.[4]

The purpose of the code of ethics, indeed of the entire ethics law, lies in promoting both the reality and the perception of integrity in municipal government by preventing unethical conduct before it occurs. Thus, the code of ethics must focus on prevention, not punishment, and must address not only the reality of conflicts of interest but also the appearance of such conflicts. Although called "ethics" codes, these codes in fact do not regulate ethics at all—in the sense of right and wrong or good and evil—but rather conflicts, usually financial conflicts, between the official's public duties and private interests, that is, divided loyalty.

Since the vast majority of municipal officials are honest and want to do the right thing, the code of ethics must seek to guide and protect honest public officials. An ethics law does not, will not, and cannot catch crooks. That is not its purpose.

The code of ethics must be understandable, comprehensive, and sensible and must be tailored to the particular municipality. A code is useless if it requires the official to routinely consult a lawyer in order to understand it. Therefore, rules should be bright line whenever possible, and definitions and exceptions to the ethics code should be set forth not in the code itself but in separate sections that limit but never expand the official's obligations under the code.

Some issues, such as gifts, moonlighting, and post-employment, must be addressed in every municipality's ethics code while other issues, such as prohibited ownership interests or the simultaneous holding of partisan and public offices, will be addressed in the ethics code only of those municipalities for which such issues have presented problems. Furthermore, the details of the provisions of the ethics code may differ somewhat from municipality to municipality. For example, a large municipality may bar former employees from appearing only before their agency for one year after leaving municipal service while a small municipality may impose a bar on appearances before any agency of the municipality during the first post-employment year.

Finally, the burden of complying with the code of ethics must not rest solely upon municipal officials. Private citizens, developers, contractors, applicants, and firms must have a stake in the municipal ethics law. If, for example, the code of ethics would prohibit the village treasurer from accepting a low-interest loan from a

bank seeking to do business with the village, then the bank should not with impunity be able to offer that loan. Inducement of an ethics violation must itself be a violation, even if the inducer is not a municipal official.

Required Provisions of the Code of Ethics

With these principles and precepts in mind, one may consider the contents of the code of ethics.[5] Every ethics code should contain certain provisions, including:

- A general prohibition on the use of municipal office for private gain (misuse of office)

  (1) A municipal officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a personal financial benefit for any of the following persons:

  (a) the municipal officer or employee;

  (b) his or her outside employer or business;

  (c) a member of his or her household;

  (d) a customer or client;

  (e) a relative;

  (f) a person or entity with which the municipal officer or employee has had a financial relationship within the previous twelve months;

  (g) any person or entity from which the municipal officer or employee has received a gift, or any goods or services for less than fair market value, during the previous twelve months; or

  (h) a person from whom the municipal officer or employee has received election campaign contributions of more than one thousand dollars in the aggregate during the previous twenty-four months.

- Recusal

  (2) A municipal officer or employee shall promptly recuse himself or herself from acting on a matter before the municipality when acting on the matter, or failing to act on the matter, may financially benefit any of the persons listed in subdivision one of this section.[6]

- Misuse of municipal resources

  (3) A municipal officer or employee shall not use municipal letterhead, personnel, equipment, supplies, or resources for a non-governmental purpose nor engage in personal or private activities during times when he or she is required to work for the municipality.

- Gifts

  (4) A municipal officer or employee shall not solicit a gift from any person who has received or sought a financial benefit from the municipality, nor accept a gift from any person who the municipal officer or employee knows or has reason to know has received or sought a financial benefit from the municipality within the previous twenty-four months.

- Gratuities (tips)

  (5) A municipal officer or employee shall not request or accept anything from any person or entity other than the municipality for doing his or her municipal job.

- Representation

  (6) A municipal officer or employee shall not represent any person or entity in any matter that person or entity has that is before the municipality nor represent any person or entity in any matter that involves the municipality.

- Appearances

  (7) A municipal officer or employee shall not appear before any agency of the municipality, except on his or her own behalf or on behalf of the municipality.

- Confidential information

  (8) A municipal officer or employee shall not disclose confidential information or use it for any non-municipal purpose, even after leaving municipal service.

- Political solicitation of subordinates

  (9) A municipal officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to participate in an election campaign or contribute to a political committee.

- Future employment

  (10) A municipal officer or employee shall not seek or obtain any non-municipal employment with any person or entity her or she is dealing with in his or her municipal job.

- Revolving door

  (11) For one year after leaving municipal service, a former municipal officer or employee shall not communicate with his or her former municipal

agency, except on his or her own behalf, and shall never accept anything of value to work on any particular matter that he or she personally and substantially worked on while in municipal service.

- Inducement of others

  (12) A municipal officer or employee shall not induce or aid another officer or employee of the municipality to violate any of the provisions of this code of ethics.

Note that the foregoing provisions completely subsume the provisions of Gen. Mun. Law § 805-a, which, unlike sections 800-803 (discussed below), may thus safely be ignored; in any event, a violation of section 805-a carries no penalty, other than disciplinary action.

Optional Provisions of the Code of Ethics

Whether the code of ethics should contain additional provisions—and, if so, which ones—will depend on the needs and ethical history of the particular municipality. Such additional provisions might address:

- Prohibited outside positions

  (13) A municipal officer or employee shall not be a paid attorney, agent, broker, employee, officer, director, trustee, or consultant for any person or entity that is doing business or seeking to do business with the municipality or that is seeking a license, permit, grant, or benefit from the municipality.

- Prohibited ownership interests

  (14) A municipal officer or employee shall not own any part of a business or entity that is doing business or seeking to do business with the municipality or that is seeking a license, permit, grant, or benefit from the municipality nor shall the municipal officer's or employee's spouse nor shall any of his or her children who are less than 18 years old.

- Lawyers and experts

  (15) A municipal officer or employee shall not be a lawyer or expert against the municipality's interests in any lawsuit.

- Purchase of office

  (16) A municipal officer or employee shall not give or promise to give anything of value to any person or entity for being elected or appointed to municipal service or for receiving a promotion or raise.

- Coercive political solicitation

  (17) A municipal office or employee shall not use his or her municipal position to make threats or promises for the purpose of trying to get anyone to do any political activity or make a political contribution.

- Political solicitation of vendors, contractors, and licensees

  (18) A municipal officer or employee shall not ask any person or entity that does or intends to do business with the municipality or that has or is seeking a license, permit, grant, or benefit from the municipality or that has done business with the municipality during the previous twelve months to make any political contribution or engage in any political activity.

- Political party positions

  (19) A municipal officer or employee holding any of the following positions shall not hold a political party office: [specify positions].

- Political activity by high-level appointed officials

  (20) A municipal officer or employee holding any of the following positions shall not directly or indirectly ask anyone to contribute to the political campaign of a municipal officer or employee running for any elective office or to the political campaign of anyone running for elective municipal office: [specify positions].

- Superior-subordinate relationships

  (21) A municipal officer or employee shall not have any business or financial dealings with a subordinate or superior.

- Solicitation of subordinates

  (22) A municipal officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to purchase anything from, or give or contribute anything to, any person or organization, including any not-for-profit organization.

- Revolving door for high-level officials

  (23) For one year after leaving municipal service, a municipal officer or employee holding any of the following positions shall not communicate with any agency of the municipality, except on his or her own behalf: [specify positions].

- Avoidance of conflicts

  (24) A municipal officer or employee shall not knowingly acquire, solicit, negotiate for, or accept any interest, employment, or thing that would result in a violation of this code of ethics.

- Improper conduct (appearance of impropriety)

  (25) A municipal officer or employee shall not take any action or have any position or interest that, as defined by rule of the ethics board, conflicts with his or her municipal duties.

Prohibited Interests, Definitions, Exclusions

The ethics law must also specify, in a separate section, the requirements of General Municipal Law §§ 800-802, which prohibit interests in certain contracts with the municipality. Failure to include the requirements of those sections in the ethics law will require municipal officials to consult two separate bodies of law for their ethical obligations and will set them up for inadvertent violations. Also, as noted, definitions and exclusions from the code of ethics should be set forth in separate sections, not in the code of ethics itself, and should narrow, but never expand, the obligations of the code. Thus, if an official consults only the ethics code but fails to examine the definitions or exclusions, the official may believe that conduct is impermissible when in fact it is allowed but will never believe that conduct is permitted when it is in fact prohibited. Model provisions for the prohibited interests in contracts, definitions, and exclusions may be found in the Model Law article by this author.[7]

Regulation of Private Citizens and Entities

Finally, as discussed above, private citizens, developers, contractors, applicants, and firms must have a stake in the municipal ethics law. For that reason, two additional sections should be added after the code of ethics, one prohibiting anyone from inducing a municipal official to violate the code and one prohibiting appearances, in a representational capacity, by the outside employer or business of a municipal official before his or her own agency. For example, the law firm of which a zoning board member is an associate should not be permitted to appear on behalf of a private client before the zoning board, although it could, of course, appear on its own behalf. Thus,

- Inducement of a violation of the code of ethics

  No person, whether or not a municipal officer or employee, shall induce or attempt to induce a municipal officer or employee to violate any provision of the code of ethics.

- Appearances of outside employers and businesses of municipal officers and employees

  (1) Except as provided in subdivision 3 of this section, the outside employer or business of a municipal officer or employee shall not appear before the particular agency in which the municipal officer or employee serves or by which he or she is employed.

  (2) Except as provided in subdivision 3 of this section, the outside employer or business of a municipal officer or employee shall not appear before any other agency of the municipality if the officer or employee has the authority to appoint any officer, employee, or member of the agency or to review, approve, audit, or authorize any budget, bill, payment, or claim of the agency.

  (3) Nothing in this section shall be construed to prohibit the outside employer or business of a municipal officer or employee from

  (a) Appearing on its own behalf, or on behalf of the municipality, before a municipal agency; or

  (b) Seeking or obtaining a ministerial act; or

  (c) Receiving a municipal service or benefit, or using a municipal facility, which is generally available to the public.

Conclusion

The code of ethics provides the heart and soul of a local ethics law. Carefully crafting an ethics code tailored to the particular municipality will, in the long run, more than prove worth the effort.

"[P]rivate citizens, developers, contractors, applicants, and firms must have a stake in the municipal ethics law."

Endnotes

1. See Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991); Mark Davies, *New Municipal Ethics Law Proposed*, 5 MUNICIPAL LAWYER, March/April 1991, at 1; Mark Davies, *Final Report of the Temporary State Commission on Local Government Ethics*, 21 FORDHAM URBAN LAW JOURNAL 1-60 (1993); Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTE 5, County Attorneys' Association of the State of New York (Winter 1996). See also Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALBANY LAW REVIEW 1321-1351 (1996); Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, MUNICIPAL LAWYER, Summer 2005, at 10. All of the foregoing publications are available at http://www.nyc.gov/ethics, then "Publications," and then "Directory of Materials for Municipal Ethics Boards in New York State."
2. Gen. Mun. Law § 806(1).
3. See Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES 97-122 (Praeger 2000); Mark Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in ETHICAL STANDARDS IN THE PUBLIC SECTOR 127-155 (American Bar Association 1999).

4. A comprehensive discussion of the process of adopting a local ethics law in New York State may be found in Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 in ETHICS IN GOVERNMENT—THE PUBLIC TRUST: A TWO-WAY STREET (NYSBA 2002), available from the New York State Bar Association. See also Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URBAN LAW JOURNAL 61-126 (1993) ("Model Law"); Mark Davies, *Empowering County Ethics Boards*, FOOTNOTE 11, County Attorneys' Association of the State of New York (Spring 1999), both articles available online at the link set forth in note 1, *supra*.

5. A commentary on each of these provisions may be found in the materials set forth in notes 1 and 3, *supra*, as well as in Mark Davies, *A Practical Approach to Establishing and Maintaining a Values-Based Conflicts of Interest Compliance System* (presented to the IV Global Forum on Fighting Corruption, Brasilia, June 2005), *available at* http://www.nyc.gov/ethics, then "International."

6. Transactional disclosure should be addressed in a separate section and will be discussed in Part II of this article. *See also* Model Law, *supra*, note 4, at 77-78 (§ 101).

7. *See* Model Law, *supra*, note 4, at 78-88 (§§ 102, 104, 105). In view of the applicability of the lobbying law to local governments (*see, e.g.*, Leg. Law §§ 1-c(c), (k), (l)(v), (m), (n), (q)-(u), 1-m), consideration should be given to defining gifts by reference to Leg. Law § 1-c(j) and excluding gifts that are excluded in that section. In addition, "electronic correspondence" (fax and emails) should be added to the definition of "appear." If a definition of "particular matter" is desired, the definition set forth in New York City Charter § 2601(17) should suffice.

Mark Davies is the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York, the Chair of the Section's Government Ethics and Professional Responsibility Committee, and a member of the Section's Executive Committee. He is also the former Executive Director of the Temporary State Commission on Local Government Ethics. The views expressed in this article do not necessarily represent those of the Board or of the City of New York.

The Perplexing Case of GASB 45

By Kenneth W. Bond

One of the most complex and difficult to understand financial issues facing states and local governments now and in the near future is compliance with Statement 45 issued by the Governmental Standards Accounting Board in 2004 ("GASB 45").[1] Municipal attorneys, who often would rather leave budget and financial issues to the accountants, need to become familiar with GASB 45 if for no other reason than that it is, in effect, in the nature of a substantial "unfunded mandate"[2] established by a national non-governmental or regulatory entity whose standards of financial accounting are followed by the accounting profession in preparing audited financial statements.[3] Resort to the Legislature for "mandate relief" is probably unavailable, practically speaking, while resort to the Legislature for mandate compliance is probably a necessity.

Much has been written about the mechanics of GASB 45.[4] In a nutshell, by the end of 2008, every state and local government entity that prepares financial statements must disclose therein its estimate of unfunded health benefit costs for retired employees.[5] The resulting number, by any measure, is staggering and must be reported as an unfunded actuarial accrued liability.[6] There are no safe harbors from compliance. Failure to comply may be a "scarlet letter" with the national credit rating agencies so that access to capital markets may be more expensive.[7] Accountants, actuaries, bond attorneys, financial advisors, underwriters and bond insurers are now jockeying for position to present bond financing solutions to meet GASB 45 requirements.

How GASB 45 was born is a product of three (if not more) trends in government financial accounting. The first trend is the movement in the private sector in the 1990s to require financial reporting of accrued health benefits for private corporations. This was a period when mounting pension and health benefits were identified as raising the cost of manufacturing in the United States, making U.S.-based production uncompetitive to the rest of the world rising from the fall of the Iron Curtain, the advent of the Internet, and the opening of markets in China and India. If an American manufacturer was going to close shop or move it to Shanghai, for example, shareholders needed to know the accrued pension and health benefits owing to former employees. The response from the Financial Accounting Standards Board ("FASB"), GASB's sibling, was Statement 106 which requires the reporting of accrued health benefits as a balance sheet liability. GASB largely borrowed from FASB Statement 106[8] in producing GASB 45. Second, in 1999 GASB issued Statement No. 34[9] which requires the valuing of major capital assets (roads, water and sewer facilities, etc.) imposing a balance sheet approach to governmental financial reporting. GASB 45 advances the balance sheet approach by requiring accounting for retirees health benefits as an actuarial accrued liability. Finally, GASB 45 is justified as another step in the direction of full disclosure and transparency in financial reporting. GASB 45 is not so much a reaction to Sarbanes-Oxley disclosure requirements, as a prophylactic against potential securities fraud highlighted recently by Securities and Exchange Commission no action enforcement.[10]

"[B]y the end of 2008 every state and local government entity which prepares financial statements must disclose therein its estimate of unfunded health benefit costs for retired employees."

The municipal securities market's reaction to GASB 45 has until recently been muted. Since GASB 45's effectiveness is phased in over three years, only the states and largest, and presumably most sophisticated, local governments have been required to comply with it beginning in 2007. However, as the effective date for intermediate and small local governments draws nigh, a somewhat radical response from the bond issuer community has emerged. In Texas, the legislature adopted legislation which would require municipalities to account for retiree health benefits on a pay-as-you go basis, in an attempt to remove the concept of an actuarial accrued liability from state law and thereby side step the application of GASB 45.[11] This maneuver has been criticized as disrupting the uniformity of accounting rules on a national basis, making it more difficult for underwriters and rating agencies to price and evaluate the debt of bond issuers from state to state. Likewise, the Connecticut legislature has adopted a bill which would permit the State Comptroller to "select" which GASB standards (i.e., elect to not follow GASB 45) the state should follow to comply with GAAP for financial accounting purposes.[12] A more aggressive, and somewhat surprising, negative reac-

tion to GASB 45 has emanated from the Government Finance Officers Association ("GFOA"), the premier trade association for state and local government bond issuers. In December 2006, GFOA blasted GASB as unfit to continue in its role as the authoritative accounting standard-setting body for states and local governments, and called for GASB to be dismantled and its functions transferred to FASB.[13] GFOA asserted that after 20 years of standard setting, GASB's mission is complete with nothing to do but find an accounting solution to every perceived financial problem, seeking new outlets for its standard-setting energies, taking on non-financial "accountability" issues (a role traditionally assigned to the SEC and the MSRB[14]), and generally frustrating GFOA members with seemingly endless projects which complicate financial reporting without adding information of real value for decision makers.[15]

"New York, a strong municipal union state with a plethora of local governments, many in a state of economic decline, is disadvantaged by GASB 45 compared to states with growing economies, weak or no municipal unions and fewer units of local government."

Texas, Connecticut and GFOA have a point; in fact several points. GASB 45 is the stepchild of FASB 106 applicable to corporate financial accounting. The asset/accrued liability balance sheet approach of recent GASB statements for governments suggests corporate financial accounting standards are being imposed on governments without taking into consideration the uniqueness of municipal finance. Hence, everyone's frustration. For example, requiring disclosure of accrued retiree health benefits for a major corporation on the brink of bankruptcy (as was the case of General Motors reported in 2006) makes sense. Shareholders and employees (active and retired) want to know that there is a funded trust sufficient to pay benefits if business operations cease—"pay-as-you go" would not necessarily provide future benefits since there may be no future revenues. But municipal finance is different (even the rules of Chapter IX of the Bankruptcy Code[16]). Governments possess the sovereign police power which includes the power to tax and assess. It doesn't matter if the government makes a profit to "stay in business" (including several in New York which operate with an annual deficit). The government may expand and merge but absent a hurricane or nuclear war, it's not going anywhere: it will always be taxing and assessing its residents. Here, pay-as-you-go works well. Yet while GASB 45 requires disclosing the actuarial accrued health benefit liability, it does not recognize the obvious: an actuarial accrued asset of government tax or other revenues to be raised in the future. If the actuarial accrued asset were recognized in the GASB standard-setting process, the financial accounting problem would not exist: an actuarial accruing asset would correspond to an actuarial accrued liability.

Likewise, GASB appears to have largely ignored state law issues in drafting Statement 45. For example, GASB 45 requires annual payments beyond pay-as-you go to be placed in a trust, just like FASB 106 for corporations.[17] However, GASB 45 ignores that local governments generally do not have the power to create "trust funds" absent special state enabling authority or exercise of home rule power (not available to school districts). Governments can create reserve funds, and the Legislature has made an effort to address GASB 45 by authorizing a reserve fund for retiree benefits,[18] but moneys in a reserve are restricted to low-yielding "secure" investments applicable to public funds which would make the rate of return inadequate to liquidate the UAAL GASB 45 requires governments to recognize.[19] Further, it is unclear whether government trust funds for which federal tax law treats income as exempt from income taxation apply to the purpose which GASB 45 requires.[20]

Unlike provisions in the Internal Revenue Code dealing with the exclusion of interest on municipal bonds from income taxation,[21] and Rule 15c2-12 dealing with disclosure requirement for municipal bonds sold to the public,[22] GASB 45 applies to all governments regardless of size—there are no safe harbors from its application. This will be particularly frustrating for small or infrequent bond issuers which require certified financial statements in their disclosure documents to enter the capital markets. Both the federal tax laws and federal securities laws contain "safe harbors" for small issues so as to not overburden local government.[23] Thus, a small upstate village with a once-in-a-decade financing may find exemptions from arbitrage and rebate tax rules and continuing disclosure requirements, yet would need to perform the actuarial valuation of its accrued health benefits owing to retired employees in order to sell bonds. If the village is one which has declined in population and economic productivity in the past several years (there may be hundreds of them), disclosing the UAAL may appear to distort the village's future fiscal viability.

Indeed, New York, a strong municipal union state with a plethora of local governments, many in a state of economic decline, is disadvantaged by GASB 45 compared to states with growing economies, weak or no municipal unions and fewer units of local gov-

ernment.[24] Although retiree health benefits are not guaranteed under the State Constitution like pension benefits,[25] and indeed must be provided through collective bargaining,[26] the Legislature is under pressure to sustain retiree benefits equal to those of active employees.[27] FASB 106 may have had the effect on corporations to convert retiree benefit plans from "defined benefit" to "defined contribution" types in the aspiration to reduce employer health benefits costs. But it would be a long and hard struggle with the municipal unions to effect the same result in New York. [28]

The plenary application of GASB 45 calls for smaller local governments to band together in compliance. Efforts in this direction are already underway from government trade associations.[29] Indeed, the issue of "shared municipal services" and consolidation of local governments is an active pursuit by the Legislature and the Governor.[30] But none of the current activity in this area specifically addresses GASB 45 compliance. As to fiscal inability of some local governments to fund the actuarial accrued liability imposed by GASB 45, state aid in some form would appear necessary. Indeed, the state is in a better position to take over GASB 45 compliance responsibility than most upstate local governments.

Stronger local governments may have the fiscal ability and the will to fund additional payments beyond pay-as-you go to account for the actuarial accrued liability GASB 45 requires to be recognized. But for most, should GASB 45 be fully implemented, resort to borrowing to fund the liability may be inevitable. Even those governments making the extra ARC payments may be scrutinized by rating agencies should their future administrations decide to discontinue ARC payments and resort to financing. At some point in the business cycle interest rates for borrowing become lower than the rate of return on invested bond proceeds. That is when governments issue bonds to finance actuarial accrued pension liabilities and will issue bonds to finance actuarial accrued retiree health benefits. But New York law is deficient in providing a statutory regime for this purpose. The *Hurd* case and its progeny[31] discourage attempts to finance the UAAL under any provision of the Local Finance Law. Bond proceeds as "public funds" have nowhere to go to be invested in high-yielding securities necessary to liquidate the UAAL.[32] Constitutional debt limits make it impossible for almost any local government to issue tax-supported bonds in a principal amount sufficient to fund the UAAL (it's not just another "settled claim" that can be funded with non-voted debt).[33] The Comptroller has developed a working group to look into statutory changes. However, a set of comprehensive statutory amendments is required in New York to make GASB 45 financing clearly "legal and valid."

As for a state attempting to opt out of GSB 45 compliance through a change in state accounting rules, Texas and Connecticut are likely to encounter the same result as South Carolina 25 years ago when it asserted its constitutional right ("intergovernmental tax immunity") to issue long-term municipal bonds in bearer form in the face of Internal Revenue Code amendments requiring tax-exempt bonds to be issued in registered form.[34] In an increasingly "flat world"[35] it is unrealistic for states and local governments which require access to public markets to consider excluding themselves from accepted rules applicable to the market—whether federal tax law or GAAP financial accounting standards. This principle may be illustrated by the U.S. Supreme Court's action in the near future in *Kentucky v. Davis*[36] in the context of permissible state economic protection where a state appeals court upheld taxpayers' allegation under a "dormant Commerce Clause"[37] theory that a municipal bond exempt from state income taxation in the state of issue should also be exempt from state income taxation in the state of the taxpayer/bondholder. Only if the Supreme Court should reverse and remand (no Commerce Clause violation)[38] or should GFOA muster safe harbor protections, might the application of GASB 45 be limited.

But where does GASB's standard setting end and at what point are state lawmakers compelled to modernize 19th century laws prescribing local government finance powers to address 21st century market standards? As to GASB, the trend toward recognizing actuarial accrued financial liabilities is at odds with the traditional income statement approach to municipal accounting. What's to stop a standard setter from requiring, for example, an accrued liability of recurring highway expenses to maintain transportation infrastructure? Because states and local governments are ongoing entities irrespective of business conditions, any accrued expense necessarily has a companion accrued revenue.[39] Yet at least one state court has renounced treating accrued revenues under its laws as an "asset" which can be financed.[40]

Modifying New York's debt financing laws around state constitutional constraints on incurring state debt has not been a serious policy concern in recent years. For any project which the New York Constitution may prohibit the state to finance directly, there has been a legislatively created public benefit corporation to finance the project indirectly—all upheld by the Court of Appeals on various challenges.[41] Thus, financing GASB 45 requirements through a state-sponsored entity may be the most practical solution. But state agency financing of local government projects tends to diminish local government control and undermine the vitality of local government finance laws. Addressing the funding of GASB 45 requirements at the local level may require changes to the New York Constitution so that a discreet

stream of revenues can be pledged to special non-tax-supported bonds similar to "tax increment bonds" which may be issued for municipal redevelopment purposes.[42] Encouraging, or compelling, local governments to act jointly or through regional agencies would minimize the costs of borrowing and maximize investment returns. However, a comprehensive plan to address financing GASB 45 obligations has yet to be considered seriously by New York's legislative leaders—and the GASB 45 compliance clock is ticking.

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Endnotes

1. GASB was organized in 1984 by the Financial Accounting Foundation to establish financial accounting and reporting standards for state and local governments, including school districts.
2. The term is used in the context of the State requiring local government expenditures to be funded with locally derived revenues. Its meaning applies aptly to GASB 45 compliance.
3. The American Institute of Certified Public Accountants requires audited financial statements to note departures from GASB standards, sometimes with adverse credit rating implications.
4. *See* "Testimony from First Deputy Comptroller Regarding GASB 45 Accounting Change," www.nysocs3.osc.state.ny.us/press/releases/jan07/013007.htm, January 30, 2007; Fingar, "GASB 43 and GASB 45: The End of Public Sector Retirement Benefits as We Know Them?" Journal of Compensation & Benefits, November/December 2006; Wiener, "State and Local Government's Options for Complying with GASB 45's OPEB Reporting Requirement," Section on State and Local Government Law, American Bar Association, www.abanet.org/statelocal/lawnews/winter06/Stateand Local.htm.
5. GASB 45 refers to the accrued liability of retiree health benefits (and other retiree benefits, such as life insurance) as "other post employment benefits" or OPEB. GASB 45 compliance phases in over three years: public sector entities with annual revenues in excess of $100 million are required to comply as of December 15, 2006; those with annuals between $100 million and $10 million as of December 15, 2007; and those with annual revenues less than $10 million as of December 15, 2008.
6. This is the "unfunded actuarial accrued liability" or UAAL which GASB 45 requires be disclosed in financial statements and its payment addressed by the issuer. GASB 45 requires that the UAAL be paid at least in the amount of the ARC (*see* note 17).
7. Moody's, Standard & Poor's and Fitch, the national municipal bond rating services, have each written reports to the effect that a failure to fund OPEB liabilities or otherwise manage them will be viewed as a negative rating factor.
8. Statement 106 of the Financial Accounting Standards Board (December 1990) addresses financial accounting of post-retirement benefits other than pensions of private sector employers.
9. GASB Statement 34 (June 1999) requires public sector entities to report the value of major infrastructure capital assets like roads, water and sewer facilities.
10. *See In re City of San Diego*, SEC el Nos. 33-8751, 34-54745 (November 14, 2006), affirmed on appeal to the D.C. Circuit Court of Appeals. The SEC was concerned that San Diego did not disclose in its prior bond offering statements that its fiscal condition might require an election by the city in the future to pay bondholders or pension obligations, but not both.
11. New Chapter 2264 of Subtitle F, Title 10 of the Texas Government Code establishes an alternative basis of accounting for Texas governments since "GASB 45 could lead to inaccurate and inappropriate reporting of OPEB obligations in Texas."
12. Not surprisingly, GASB has urged the governor to veto the bill: Leone, "FAF to Governor: Veto the Bill," www.cfo.com, June 20, 2007.
13. *See* www.gfoa.org/gsb.shtml.
14. U.S. Securities and Exchange Commission or SEC; Municipal Securities Rulemaking Board, or MSRB, under the supervision of the SEC which sets standard for underwriters and financial institutions participating in the municipal securities industry.
15. GFOA's and certain states' frustration with GASB can be illustrated and perhaps measured by standards for disclosure established by Robert Amdursky and Clayton Gillette over 15 years ago. They measured the cost of disclosing, the amount of loss if the risk materialized, and identified the party in the best position to disclose to determine whether a fact was "material" (should be disclosed) and who should be responsible for the disclosure. *See*: "Municipal Debt Finance Law—Theory and Practice," § 6.1.1, R. Amdursky and C. Gillette, Little, Brown and Company, 1992, Boston. Using the Amdursky/Gillette analysis, given that (i) calculating the UAAL and ARC is very costly, (ii) the risk of default on account of the UAAL is minimal (governments keep assessing and collecting taxes), and (iii) financial institutions are in a better position to determine the information GASB 45 requires than most governments, it is arguable that the UAAL is not a material fact and that, far from being a government financial accounting mandate, the bond underwriter should provide it in its discretion and at its expense.
16. Municipal bankruptcy contemplates only the financial reorganization of an ongoing entity (e.g., Chapter II) not liquidation and winding up business in bankruptcy proceedings (*i.e.*, Chapter X).
17. This is the ARC (annual required contribution) payment consisting of the "normal cost" per annum of retiree health benefits plus the per annum portion of the UAAL (unfunded actuarial accrued liability) for future retiree health benefits amortized (over 30 years).
18. See A.71221 (New York Legislature, 2007).
19. Like all public funds, moneys in a reserve fund are limited largely to investments in bank certificates of deposit and U.S. government direct and guaranteed obligations (NYS General Municipal Law, § 11).
20. Government created trusts, the income from which the federal tax laws recognize as tax-exempt, are available under §§ 115, 401(b) and 501(c)(9) of the Internal Revenue Code of 1986, as amended (the "Code") but none of these provisions neatly apply to the trust prescribed in GASB 45.
21. Sections 103 and 141-151 of the Code and applicable U.S. Treasury Regulations.
22. Rule 15c2-12 promulgated under the Securities Exchange Act of 1934 regulates underwriters and broker/dealers in the underwriting and subsequent sale of municipal securities as to the disclosure of information available to the investing public.

23. For example, bond issues under $5 million principal amount are exempt from rebate of arbitrage profits on investment of bond proceeds; a bank may purchase municipal bonds of an issuer selling not more than $10 million per annum and exclude the interest income if so designated by the issuer; a bond issue under $1 million or maturing in not more than 9 months issued in minimum denominations of $100,000 is exempt from the disclosure and continuing disclosure provisions of Rule 15c2-12.

24. *See* "The Palisades Principals: Fixing New York's Fiscal Practices," Citizens Budget Commission, February 2004, which compares New York fiscal conditions to other Northeastern states and large urban states.

25. *See Lippman v. Sewanaka Central High School District*, 66 N.Y.2d 313, 496 N.Y.S.2d 987 (1985).

26. *See Handy v. County of Schoharie*, 244 A.D.2d 842, 665 N.Y.S.2d 708 (3d Dep't 1997); 1988 Opns. St. Comp. No. 88-5, p.1.

27. Ch 22, Laws of 2007 (New York) protects school district retirees from diminution of health benefits without diminution for active employees through May 2008.

28. *See* "Defusing New York's Pension Bomb," E.J. McMahon, Director, Empire Center for New York State Policy, June 2006.

29. S*ee* www.roberthjackson.org/documents/bond_newyork_102506.pdf. The Commission on Local Government Efficiency & Competitiveness ("CLGEC"), created by executive order in April 2007, is charged with finding ways to "streamline government at every level . . ." taking into account "the multiplicity of local governments that has evolved over centuries . . . ;" www.nyslocalgov.org.

30. *See* "Shared Services" on the CLGEC website: www.nyslocalgov.org/pdf/shared_service_brief.pdf.

31. S*ee Hurd v. Buffalo*, 41 A.D.2d 402, *aff'd*, 34 N.Y.2d 628 (1974) (an expense [pension contribution] that exceeds the constitutional tax limit may not be financed under the Local Finance Law).

32. *Id.*, note 19.

33. Financing of settled claims recognized in § 11.00(a), subd. 33 of the Local Finance Law are subject to debt limits in Article VIII, § 2 of the New York Constitution.

34. *See South Carolina v. Baker*, 485 U.S. 505 (1988), where the Supreme Court held that the Tenth Amendment did not prohibit Congress from requiring all state and local bonds in excess of $1 million be issued in registered form for the interest thereon to be tax-exempt holding that "states must find their protection from congressional regulation through the national political process . . ." Similarly, a state's legislative attempt to opt out of GASB 45 may encounter resistance from the "national market process" of the municipal securities industry which abhors diversions from nationally accepted and recognized norms.

35. *See* "The World Is Flat—A Brief History of the Twenty-First Century," T. Friedman, Farrar, Straus and Giroux, New York, 2005.

36. *See Kentucky v. Davis*, 197 S.W.3d 557 (2007), *cert. granted*, 127 S. Ct. 245 (May 21, 2007).

37. U.S. Const. art. 1, § 8, cl. 3.

38. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority et. al*, __ U.S. __ (April 30, 2007), the Supreme Court found no Commerce Clause violation where the economic protection benefited a public enterprise rather than a private one in the context of a "flow control" ordinance.

39. *Id.*, note 15.

40. *See Lance v. McGreevey*, 180 N.J. 590 (2004), where the New Jersey Supreme Court did not recognize the proceeds of a securitization of future taxes as a "revenue" under the state constitution requiring a balanced budget.

41. *See LGAC v. STARC*, 2 N.Y.3d 524 (2004), where the Court of Appeals sanctioned numerous legislatively crafted assignments of public funds among various conduit entities sufficient to slip by state constitutional prohibitions on issuing debt, *citing* the *Wein* cases from the 1970s and the *Schulz* cases from the 1990s. *But see California et al. v. All Persons Interested in the Matter of the Validity of the California Pension Obligation Bonds to be Issued, etc.*, Court of Appeals, 3d App Dist., filed July 2, 2007, where the court struck down the legislative authority for pension obligation bonds as violating the state constitutional restraint on issuing non-voted direct state debt because such authority was not within exceptions for (i) "special fund doctrine" bonds, *Rider v. City of San Diego*, 18 Cal. 4th 1035 (1998), (ii) bonds to finance contingent liabilities (*i.e.*, leases), *City of Los Angeles v. Offner*, 19 Cal. 2d 483 (1942), or (iii) bonds to finance obligations imposed by law, *County of Los Angeles v. Byram*, 36 Cal. 2d 694 (1951).

42. *See* NYS General Municipal Law, Art. 18-D (Municipal Redevelopment Law).

Mr. Bond is a partner in the firm of Squire, Sanders & Dempsey, LLP in New York City and Chair of the Municipal Law Section's Municipal Finance and Economic Development Committee.

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

The later portion of 2006 and the first half of 2007 have provided New York Courts with the opportunity to hear and decide cases on a variety of land use issues. In *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam*,[1] the Third Department addressed the ever popular issue of when the statute of limitations to challenge a defective State Environmental Quality Review Act ("SEQRA") review accrues in the context of a challenge to the SEQRA review of an application for site plan approval. Deciding a similar issue, the Third Department considered when the statute of limitations within which to challenge the imposition of consultant review fees accrues.[2]

The Court of Appeals has provided the New York City Department of Environmental Protection with various guidelines in the application of its watershed regulation variance provision.[3] And, the Court of Appeals has held that the decision of an administrative official to grant a certificate of occupancy is appealable by those aggrieved by that decision within sixty days of the date that the decision is initially made and filed, and within that time frame only.[4]

The Second Department has reaffirmed that municipal boards may not regulate the internal operations of a business through the imposition of conditions on the issuance of a special use permit, and, moreover, may not impose conditions that interfere with an area of law preempted by a comprehensive state scheme.[5] New York Courts have also continued to require zoning boards of appeal to strictly apply the five-factor area variance standard.[6] Finally, the United States Court of Appeals for the Second Circuit has asked the New York Court of Appeals to decide whether an open space restriction imposed during the subdivision approval process and indicated on a filed plat is enforceable against a subsequent purchaser.[7]

I. Accrual of a SEQRA Claim

Addressing one of the most vexing issues facing land use practitioners today, the Third Department, in *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*,[8] continued the discussion of when the statute of limitations within which to challenge the SEQRA review of an action accrues; a discussion the Court of Appeals began in *Save the Pine Bush v. City of Albany*[9] and revisited in *Stop-the-Barge v. Cahill*[10] and, most recently, in *Eadie v. Town Board of the Town of North Greenbush*.[11]

In *North Country Citizens for Responsible Growth*, the Third Department held that in the context of development approvals the statute of limitations within which to challenge the SEQRA review of an action commences when the petitioner suffers "a concrete injury not amenable to further administrative review and corrective action."[12] In the context of the facts of the case, the court held that where the lead agency and the approving agency are the same body, and the SEQRA review ends with a findings statement issued by the lead agency, and the requested approval is granted, an opponent of the approval suffers a "concrete injury" when the approval is granted, rather than when the SEQRA findings are adopted, and thus the statute of limitations within which the opponent must challenge the SEQRA review accrues on the date on which the approval was granted, not the date on which the SEQRA findings were issued.

The facts of *North Country Citizens for Responsible Growth* are as follows: Wal-Mart submitted a building permit application (which in Potsdam commenced the site plan approval process), along with a draft environmental impact statement, to the Town of Potsdam Planning Board to build a Wal-Mart "supercenter" in the Town. The Planning Board resolved to be lead agency in the SEQRA review of Wal-Mart's project. In February 2005, Wal-Mart submitted an application for an area variance to the Potsdam Zoning Board of Appeals because the tire and lube center proposed as part of the supercenter was to be located within 146 feet of the property line and the Potsdam Code required a 200 foot setback. In September 2005, the Planning Board accepted a final environmental impact statement, and on October 5, 2005, SEQRA findings were filed with the Town Clerk. On October 25, 2005, after a two-session public hearing, the Zoning Board of Appeals granted the requested area variance. On October 26, 2005, the Planning Board determined that the site plan was consistent with the Potsdam Zoning Code and approved the site plan with conditions. In November 2005, the petitioner, a not-for-profit corporation opposed to

the construction of the new Wal-Mart, commenced a combined article 78 proceeding and declaratory judgment action claiming that the decisions of the Planning Board and the Zoning Board of Appeals were arbitrary and capricious, and that the Planning Board had failed to comply with SEQRA. Supreme Court dismissed the petition and the petitioner appealed.

Addressing the issue of whether the petitioner's challenge to the Planning Board's SEQRA determination was timely, the Appellate Division, Third Department stated that:

> As a threshold matter, the individual petitioners contest Supreme Court's conclusion that the 30-day statute of limitations to challenge a planning board decision was triggered on October 5, 2005 [the date the Planning Board's SEQRA findings were filed with the Town Clerk], and argue that the statute of limitations period should not have commenced until October 26, 2005, when the Planning Board approved Wal-Mart's overall site plan. With respect to this argument, the first inquiry must be when did the individual petitioners suffer "a concrete injury not amenable to further administrative review and corrective action" (*Matter of Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 316 [2006]. . .) because the 30-day statute of limitations . . . commences on the day that a planning board decision inflicting such injury is filed in a town clerk's office. Here, insofar as it was the same agency that made the SEQRA determination and the site plan approval—both steps in an integrated process, we agree with the individual petitioners that they did not suffer the concrete injury until the site plan was approved. (*See Matter of Eadie v. Town Bd. of N. Greenbush, supra* at 317; *see also Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 200 [1987]) Those cases in which the SEQRA determination was made by one agency, and review of the action of a second agency or legislative body is thereafter sought, are distinguishable.[13]

Finding petitioner's challenge to the SEQRA review of the Planning Board's actions timely, the court held that the petitioner's SEQRA claim was without merit because the Planning Board, during its 17-month review of the proposed project, took the requisite "hard look" at the environmental impacts of the proposed project and made "a reasoned elaboration of the basis of its findings."[14]

With regard to the accrual of the SEQRA statute of limitations, *North Country Citizens for Responsible Growth* is instructive on two points, but leaves open several questions. The case reinforces the Court of Appeals' holding in *Eadie* that the statute of limitations within which an aggrieved party must challenge the SEQRA review of an action will be based on the facts and circumstances of each case and will accrue when the petitioner suffers "a concrete injury not amenable to further administrative review and corrective action."[15] Additionally, when faced with a fact pattern analogous to that of *North Country Citizens for Responsible Growth*, a concrete injury will likely be sustained when the development approval is granted, rather than when the SEQRA findings are issued.

However, the court clearly stated that cases in which the lead agency and the approving agency are not the same board or officer are distinguishable from the instant case, indicating that a different rule may apply in such cases, without expanding upon the logic of the distinction. Similarly, the factual context of this case leaves open the issue of the accrual of the statute of limitations when the petitioner challenging the SEQRA review of an agency action is the applicant, rather than an opponent.

II. Accrual of a Claim Challenging the Imposition of Consultant Review Fees

In *Properties of New York, Inc. v. Planning Board of The Town of Stuyvesant*,[16] the Third Department held that the Town Planning Board's imposition of consultants' fees became final and binding on the date that the fees were imposed, not the date on which the approval in connection with which the fees were paid was granted, as argued by the petitioner, or on the date on which the fees were paid, as held by the lower court. Because the Planning Board's decision with regard to the consultant review fees became binding when imposed, a challenge to those fees accrued on the date the Planning Board imposed the fees.

In *Properties of New York, Inc.*, the petitioners applied to the Stuyvesant Planning Board for subdivision approval. The Planning Board informed the petitioner that it would be responsible for attorney and engineer review fees incurred by the Board in its review of petitioner's application, and the petitioner initially paid the fees as requested. However, the petitioner stopped paying the fees as they mounted, questioning the amount of the charges. The Planning Board informed the petitioner that it would not process its application until the fees were paid in full, and, on April 20, 2004, petitioner paid the fees in full under protest. Eight

days later the Planning Board approved petitioner's subdivision application. On June 24, 2004, petitioner submitted a written demand to the Planning Board for an audit of the consultant charges and return of the fees paid, but the Planning Board declined. On August 27, 2004, more than four months after the imposition of the fees by the Planning Board and the payment of the fees by the petitioner, but less than four months after the approval was granted, petitioners brought an article 78 proceeding challenging the imposition of the fees.

The Supreme Court dismissed the petition as time-barred, holding that the statute of limitations accrued on the date of the last payment (April 20th) rather than the date of the approval (presumably April 28th). The Third Department affirmed the Supreme Court's decision that the petitioner's claim was time-barred, but on different grounds, holding that the statute of limitations accrued when the Planning Board informed the petitioner that it would not process its application unless petitioner paid the required review fee, not on the date the fee was actually paid. In so holding, the Third Department said,

> While we agree that the proceeding is time barred, we cannot agree with Supreme Court that petitioner's last payment commenced the limitations period. The question of when the four months began to run is answered by identifying the administrative action or determination to be reviewed and deciding when it became final and binding. . . . It is well settled that an administrative action becomes final and binding when it has an impact upon a party and the party is clearly aggrieved by it [citing cases]. The Court of Appeals has articulated a two-part test for identifying when an administrative action is final and binding upon a petitioner. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated either by further administrative action or by steps available to the complaining party" [citing cases].[17]

Applying this standard the Court held that the Planning Board's unambiguous notice that the fees were required and that it would not process petitioner's application unless it paid the fee, and not the actual payment of the fee or the endorsement of the plat, was "the definitive position on the issue that inflict[ed] actual, concrete injury"[18] and thus the date on which the statute of limitations accrued.

III. New York Court of Appeals: 2007 Decisions

A. *Nilsson v. Department of Environmental Protection of the City of New York*

In *Nilsson v. Department of Environmental Protection of the City of New York*,[19] the Court of Appeals made clear that the grant of a variance by the New York City Department of Environmental Protection ("DEP") from its stormwater regulations does not extend the DEP's jurisdiction to regulate the potential environmental effects of the development made possible by the variance when the DEP does not have jurisdiction to regulate those effects in the first instance. And, as a corollary thereto, the DEP may not deny a variance from its watershed regulations based on those unrelated environmental impacts. The Court also held that the showing of hardship required as a part of the DEP's watershed regulations variance standard is not as stringent as that of the statutory use variance hardship standard, and that when determining whether a hardship exists, the DEP may consider the applicant's contiguous properties; however, non-contiguous properties owned by the applicant in the area of the subject parcel may not be considered.

In *Nilsson*, the petitioners owned a 3.73-acre parcel of property in Putnam County and wanted to develop a single family residence thereon.[20] The petitioners' property was within the New York City Watershed, and was subject to the DEP's regulations regarding subsurface sewage treatment systems ("SSTS").[21] The DEP regulations provide that a maximum forty-two inches of soil in a SSTS may be filled (soil added to property to raise the level of the site). Petitioners wanted to install an SSTS on the property, however, because of site characteristics, seventy-eight inches of fill were required in order to construct the system. The DEP denied petitioners a permit for an SSTS and petitioners sought a variance from the forty-two inch limitation, arguing that absent a variance from this requirement their lot would not be buildable, and that therefore the regulations impose a substantial hardship. Notably, the petitioners' property was exempt from the DEP's stormwater runoff regulations.[22]

In response to petitioners' application, the DEP asked the petitioners to provide (1) proposed mitigation measures to reduce contamination from the excess fill, (2) proposed mitigation measures for potential stormwater runoff caused by the development of a house, driveway, and the SSTS on the property, and (3) the date on which they acquired the property.

The petitioners' engineers submitted proposed mitigation measures as requested by the DEP and

provided the DEP with information about petitioners' acquisition of the property. The DEP then requested a list of properties owned by the petitioners in the vicinity of the subject property, but petitioners' engineer refused to submit that information. The DEP denied the variance, stating

> [w]hile the applicant has proposed adequate mitigation for the SSTS itself, [he] has not proposed adequate mitigation measures to offset the potential for adverse water quality impacts associated with stormwater runoff from the new residence, driveway and septic system area. . . . In addition, DEP stated that [t]he applicant has not provided information on his other real estate holdings in the immediate vicinity of the project area, as requested by [DEP], to substantiate a hardship case.[23]

Petitioners commenced an article 78 proceeding to vacate the DEP's denial, and to order the DEP to grant the variance. The Supreme Court denied the petition and dismissed the proceeding. The Appellate Division, Second Department reversed, holding that the DEP acted outside of its authority when it considered stormwater runoff and impervious surfaces, for which no variance was necessary, as the basis for its denial.[24] It also held that the petitioners' non-contiguous property holdings were irrelevant to the instant application.[25] Accordingly, it directed the DEP to issue the variance.[26] The Court of Appeals granted the DEP's leave to appeal and modified the decision of the Second Department, remanding the case to the DEP.

In its decision, the Court of Appeals recognized that the determination of whether to grant or deny a variance from the requirements of the DEP's watershed regulations rests within the sound discretion of the DEP.[27] It noted that the burden of proof is on the applicant to show that if the DEP were to grant the requested variance the applicant would apply mitigation measures that are at least as protective of the environment as strict application of the regulations would be. However, the Court rejected the DEP's bootstrap argument that despite the fact that the petitioners' property was not subject to the DEP's stormwater regulations, it had jurisdiction to regulate the stormwater runoff produced as a result of the proposed construction because by granting the variance it would be creating the condition (the development of the house, driveway, and SSTS) that would cause the stormwater runoff, and held that the DEP could not extend its jurisdiction to regulate otherwise unregulated sources of contamination simply because they might arise from the grant of a variance. Thus, it was improper for the DEP to deny the requested variance based on the potential stormwater runoff impacts.

Additionally the Court discussed the prong of the watershed regulation variance standard that requires an applicant for a variance to "'[d]emonstrate that for the proposed use or activity for which the variance is requested, compliance with the identified provisions of the rules and regulations would create a substantial hardship *due to site conditions or limitations*.'"[28] Applying this standard, the Court held that because the standard is focused on site limitations, it was an abuse of discretion for the DEP to request information on properties in the vicinity of, but not contiguous to, the subject site. The Court held that the DEP may reasonably request information regarding an applicant's contiguous real estate because an applicant claiming a hardship may be able to combine contiguous lots to minimize any hardship imposed by the watershed regulations. Moreover, the Court, distinguishing the watershed regulation variance standard from the statutory use variance standard, explained that although both types of variances require a showing of hardship that is economic in nature, the watershed regulations require something less than a showing of financial loss or the inability to recover a reasonable return as required by the use variance standard. Because the petitioners did not provide information on their ownership of contiguous properties, the Court of Appeals remanded the case to the DEP.

B. *Palm Management v. Goldstein*

In *Palm Management v. Goldstein*,[29] the Court of Appeals held that those aggrieved by the decision of an administrative official expressed in a certificate of occupancy will have sixty days from the date the decision is first manifested in a certificate of occupancy within which to challenge that decision. After the initial sixty-day period has lapsed, aggrieved parties will not have another opportunity to challenge the decision, even if the decision is repeated in a subsequently issued certificate of occupancy.[30]

In *Palm Management v. Goldstein*, the petitioner operated an inn and restaurant as a non-conforming use in the Village of East Hampton. In 1987, the Village issued a building permit to petitioner for the construction of a large awning over a patio on the property. In 1989, the Village's Division of Building Inspection issued a certificate of occupancy approving the use of a barn on the property as a dormitory for staff. In 1993, the Division of Building Inspection (for reasons not identified in the opinion) again issued a certificate of occupancy permitting the awning and the use of the barn as a dormitory for staff. In response to the complaints of neighboring property owners, in 2000 the Village Code Enforcement Officer again made a de-

termination that the awning and the use of the barn as a dormitory were both permitted on the property. The aggrieved neighbors appealed to the Village's Zoning Board of Appeals, and, in 2001, the Zoning Board of Appeals held that the neighbors' claims were barred by the statute of limitations. In October 2003, the property owner obtained a new certificate of occupancy, apparently in connection with a refinancing, for the awning, the use of the patio for outdoor dining (apparently on the theory that outdoor dining was either an accessory use to the restaurant or a non-conforming use), and the use of the barn as a dormitory. The neighboring property owners appealed the issuance of the 2003 certificate of occupancy to the Zoning Board of Appeals. In September 2004, the Zoning Board of Appeals invalidated the 2003 certificate of occupancy and petitioner commenced an article 78 proceeding to reverse the decision of that board.

The Supreme Court, Suffolk County denied the petition and dismissed the proceeding, finding the Zoning Board of Appeals' decision rational and not barred by its 2001 decision. The Appellate Division, Second Department reversed in part, holding that the Zoning Board of Appeals properly annulled the portion of the 2003 decision approving the use of the patio for outdoor dining because the petitioner failed to prove that outdoor dining was a non-conforming use, and the Zoning Board of Appeals' decision that the use of the patio for outdoor dining was not an accessory use is entitled to deference.[31] However, the court held that the Zoning Board of Appeals was prohibited from annulling that portion of the 2003 certificate of occupancy that permitted the awning and the use of the barn as a dormitory because the Zoning Board of Appeals decided in 2001 that a challenge to those aspects of the use of the property was barred by the statute of limitations and that decision was *res judicata* with regard to those issues.

The Village Zoning Board of Appeals appealed to the Court of Appeals, which held that the issuance of the 2003 certificate of occupancy was not appealable, and thus the Court of Appeals was not required to address the *res judicata* effect of the Zoning Board of Appeals' 2001 decision. Specifically, the issue decided by the Court was:

> whether a new determination occurs, and a new 60-day period runs, when the administrative official issues a new certificate of occupancy that is unchanged, in relevant respects, from an earlier certificate relating to the same property.[32]

The Court held that there is no new determination upon the issuance of a certificate of occupancy that is substantially the same as a prior certificate of occupancy. In so holding, the Court reasoned as follows:

> Village Law § 7-712-a specifies procedures to be followed by village zoning boards of appeal. Section 7-712-a (5)(a) provides for the public filing of each "order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of the zoning local law," and section 7-712-a (5)(b) provides that any appeal to the ZBA from such a ruling "shall be taken within sixty days" of its filing. Here, the ZBA treated the neighbors' appeal as timely because it was taken within 60 days of the filing of the 2003 certificate of occupancy. This was no doubt correct as to those parts of the neighbors' appeal—no longer in issue—that challenged uses that had not been authorized by a certificate of occupancy before 2003. But the mere repetition, in words or substance, of an authorization contained in the old certificate of occupancy should not be treated as a newly appealable "order, requirement, decision, interpretation or determination." The village official who issued the new certificate of occupancy in 2003 did not decide or determine anything about the dormitory or the awning, except that they had already been approved years before.[33]

Thus, the decision of an administrative official, memorialized in a certificate of occupancy, is appealable by those aggrieved by that decision within the prescribed limitations period following that decision, and within that time frame only. Aggrieved parties will not get multiple opportunities to challenge a decision, unchanged in relevant respects from a prior decision, simply because it is repeated in a subsequent certificate of occupancy.

Although the language of the *Palm Management* opinion seems relatively tailored to the facts of that case,[34] it remains to be seen whether New York courts will extend its rationale to other types of approvals.

IV. Conditions Imposed on the Issuance of a Special Use Permit

The Second Department has recently confirmed the well-established principle that when issuing a special use permit, a municipal board may not regulate the internal operations of a business.[35] Additionally, the court held that a municipality may not impose restrictions on the grant of special use permit that regulate a field that has been preempted by state law.[36]

In *Amerada Hess Corporation v. Town of Oyster Bay*,[37] the Town Board of the Town of Oyster Bay conditioned the grant of a special use permit on the imposition of a restrictive covenant prohibiting the sale of alcohol on the plaintiff's premises, and then subsequently revoked the permit presumably (although the decision is unclear) because the covenant had been violated. The property owner brought a hybrid action for a judgment invalidating and rendering unenforceable the restrictive covenant and an article 78 proceeding to review the revocation of the special permit by the Town Board.[38] The Supreme Court invalidated the restrictive covenant, enjoined the Town from enforcing it, and vacated the Town Board's resolution revoking the special permit.[39]

The Second Department affirmed, holding that the restrictive covenant "'improperly invaded a field which has been preempted by a comprehensive and detailed State regulatory scheme,'"[40] namely the sale of alcohol. The Court further held that "the Board acted arbitrarily and capriciously by revoking the special use permit"[41] because the prohibition on the sale of alcohol is unenforceable based on preemption. Moreover, the Court held that the Board is not permitted to "'regulate the details of the [plaintiff's] enterprise.'"[42]

V. Application of the Statutory Area Variance Standard by Zoning Boards of Appeal

Zoning Boards of Appeal in towns, villages, and cities are authorized to permit land owners to utilize their property "in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."[43] The mechanism for permitting such use of property is by application to the zoning board of appeals for an area variance. When considering an application for an area variance, a zoning board of appeals is required to engage in a balancing test weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community by such grant.[44] When applying this test, zoning boards are required to consider the following five factors:

> (i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.[45]

Courts will uphold the decision of a zoning board of appeals to grant or deny an area variance unless that decision is illegal, arbitrary, or an abuse of discretion.[46] Notwithstanding this deferential standard, courts will not hesitate to invalidate a grant or denial of an area variance when the board has not considered and addressed in its written decision each and every factor of the statutory area variance standard.[47] Although each turns on its individual facts, the following recent cases illustrate the courts' insistence on the strict application of each of the area variance factors, particularly in circumstances where the requested area variance is denied.

In *Russia House at Kings Point, Inc. v. Zoning Board of Appeals of the Village of Kings Point*[48] and *Hannett v. Scheyer*,[49] the Second Department reversed the decisions of the Zoning Boards of Appeal denying the petitioners' area variance applications because neither of the Zoning Boards of Appeal specifically considered each and every factor of the five-factor area variance standard. Similarly, in *Filipowski v. Zoning Board of Appeals of the Village of Greenwood Lake*,[50] the Second Department invalidated the Greenwood Lake Zoning Board of Appeals' denial of a variance from the Village's minimum lot size requirements because the record did not indicate whether the variance, if granted, would have an undesirable effect on the character of the neighborhood, or would otherwise negatively impact the health, safety and welfare of the community as required by the statutory area variance standard. However, in the same decision, the *Filipowski* court upheld the Zoning Board of Appeals' denial of a variance from the Village's steep slopes law, reasoning that the Zoning Board of Appeals properly "engaged in the required balancing test and considered the relevant statutory factors[,]" demonstrating that a court will uphold the denial of a variance when each of the statutory factors has been considered and the denial is supported by the record.[51]

VI. Are Open Space Restrictions Imposed During the Subdivision Approval Process and Indicated on a Filed Subdivision Plat Enforceable Against a Subsequent Purchaser?

Is an open space restriction imposed by a subdivision plat under New York Town Law § 276 enforceable against a subsequent purchaser, and if so, under what circumstances?[52] This is the question that the United

States Court of Appeals for the Second Circuit posed to the New York Court of Appeals in *O'Mara v. Town of Wappinger*.[53]

In *O'Mara*,[54] developers purchased and sought to develop a parcel of property in the Town of Wappinger in 1962. In 1963 the Town approved a plat for a condominium project which divided the property into seven parcels. A condition of the approval, reflected in the Town Planning Board's meeting minutes, was that "'no building permits will be issued for [two of the seven parcels], as indicated on the [1963] Plat.'"[55] The words "Open Space" were printed over the two parcels so designated on the final plat. The final plat and the Planning Board's meeting minutes were filed with the Town Clerk and the final plat was filed with the Dutchess County Clerk. In 2000, plaintiffs (the "O'Maras") purchased the parcels which contained the open space restriction at a tax sale with the intent of developing ten single-family houses thereon. In 2002, the O'Maras were granted a building permit to construct the first house on the property and began construction on the house. In 2003, the Town became aware of the open space restriction on the property and issued a stop-work order. The Town made a settlement proposal in which it offered the O'Maras a certificate of occupancy for the house being constructed if they would dedicate the remainder of the two parcels to the Town. The O'Maras' declined the offer and commenced an action in federal court alleging a claim under the Takings Clause and claims for fraud and negligent misrepresentation, and asking for a judgment declaring that the they own the open space parcels free and clear of the open space restriction and asking for damages pursuant to 42 U.S.C. § 1983.

The district court held that the open space restriction was unenforceable against the O'Maras because the O'Maras did not have actual notice of the restriction and could not be charged with constructive notice of the restriction because the restriction was not recorded in the office of the Dutchess County Clerk as provided in Real Property Law § 291.[56] The district court made a point of distinguishing the *recording* of the plat in the office of the County Clerk pursuant to Real Property Law § 291 with the *filing* of subdivision plats as required by Real Property Law § 334, noting that the former places the plat in the chain of title whereas the latter does not.[57] Because the open space restriction was unenforceable against the O'Maras (and because the Town Building Inspector stated that he could have issued a certificate of occupancy for the house but for the dispute over the enforceability of the open space restriction),[58] the court held that the O'Maras had a "legitimate claim of entitlement" to a certificate of occupancy for the house constructed on the property, and that by failing to issue a certificate of occupancy the Town violated the O'Maras' right to substantive due process, thereby entitling them to damages under U.S.C. § 1983.[59]

The Second Circuit, questioning the district court's reliance on Real Property Law § 291 reversed, reasoning that "No New York court decision appears to have identified explicitly the law governing the enforceability of a zoning regulation imposed during a subdivision process against a subsequent purchaser."[60] Because the New York courts have not decided this issue, and because it is an important issue of state law, the Second Circuit certified the question of whether "an open space restriction imposed by a subdivision plat under New York Town Law § 276 [is] enforceable against a subsequent purchaser, and under what circumstances" to the New York Court of Appeals, and the Court of Appeals has accepted.[61] A discussion of the Court of Appeals' decision will most certainly be a part of a future land use law case update.

Endnotes

1. *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam*, 39 A.D.3d 1098 (3d Dep't 2007).
2. *Properties of New York, Inc. v. Planning Board of the Town of Stuyvesant*, 35 A.D.3d 941 (3d Dep't 2006).
3. *Nilsson v. Department of Environmental Protection of the City of New York*, 8 N.Y.3d 398 (2007).
4. *Palm Management Corp. v. Goldstein*, 8 N.Y.3d 337 (2007).
5. *Amerada Hess Corp. v. Town of Oyster Bay*, 36 A.D.3d 729 (2d Dep't 2007).
6. *Russia House at Kings Point, Inc. v. Zoning Board of Appeals of the Village of Kings Point*, 40 A.D.3d 767 (2d Dep't 2007); *Hannett v. Scheyer*, 37 A.D.3d 603 (2d Dep't 2007); *Filipowski v. Zoning Board of Appeals of Village of Greenwood Lake*, 38 A.D.3d 545 (2d Dep't 2007).
7. *O'Mara v. Town of Wappinger*, 485 F.3d 693 (2d Cir. 2007).
8. *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam*, 39 A.D.3d 1098 (3d Dep't 2007).
9. *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 200 (1987) ("[holding] that a proceeding alleging SEQRA violations in the enactment of legislation must be commenced within four months of the date of enactment of the ordinance").
10. *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218 (2003) (holding that a challenge to the SEQRA review of the issuance of a conditional negative declaration ("CND") issued by the New York City Department of Environmental Protection ("DEP") and an air permit issued by the New York State Department of Environmental Conservation ("DEC"), which permitted a floating power generator to be constructed in Brooklyn, accrued when the DEP issued the CND, rather than when the DEC issued its air permit because the CND ended the DEP's SEQRA review of the project).
11. In *Eadie v. Town Board of the Town of North Greenbush*, 7 N.Y.3d 306 (2006), the Court of Appeals held that the statute of limitations within which to challenge the SEQRA review of an action accrues on the date on which the petitioner "suffered a concrete injury not amenable to further administrative review and corrective action." Therein, the Town Board of the Town of North Greenbush considered rezoning a parcel of property within the Town and conducted a full SEQRA review of the rezoning, which culminated in the issuance of a findings statement. The Town Board subsequently adopted legislation rezoning the subject parcel. Petitioners, neighboring property owners

opposed to the rezoning, commenced an article 78 proceeding challenging, *inter alia*, the SEQRA review of the rezoning more than four months (the applicable statute of limitations in this case) after the findings were adopted but less than four months after the Town Board rezoned the property. The Court, reaffirming its holding in *Save the Pine Bush*, held that the challenge to the SEQRA review of the rezoning in this case commenced when the rezoning was adopted because before such adoption, the petitioner-opponents suffered no concrete injury. Significantly, the Court did not reverse its holding in *Stop-the-Barge*, but rather distinguished that case on its facts and reiterated that the accrual date in each case is dependent on the facts of each case. For an in-depth discussion of *Eadie* and the accrual of SEQRA claims, *see* Adam L. Wekstein, *Clarity and Confusion*: *The Court of Appeals Addresses Protest Petitions and the Accrual of SEQRA Claims in Eadie v. Town Board of the Town of North Greenbush*, 20 Municipal Lawyer 4 (Fall 2006).

12. *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam*, 39 A.D.3d at 1103 (quoting *Eadie*, *supra* at 316).
13. *Id*.
14. *Id.* at 1103-1104.
15. *Id.* at 1103.
16. *Properties of New York, Inc. v. Planning Board of the Town of Stuyvesant*, 35 A.D.3d 941 (3d Dep't 2006).
17. *Id.* at 942-943 (citations omitted).
18. *Id.* at 942.
19. *Nilsson v. Department of Environmental Protection of City of New York*, 8 N.Y.3d 398 (2007), *modifying* 28 A.D.3d 773 (2d Dep't 2006).
20. *Nilsson v. Department of Environmental Protection of City of New York*, 28 A.D.3d 773, 774 (2d Dep't 2006).
21. *Nilsson*, 8 N.Y.3d at 401-402.
22. *Nilsson*, 28 A.D.3d at 774.
23. *Nilsson*, 8 N.Y.3d at 401-402 (citations omitted).
24. *Nilsson*, 28 A.D.3d at 775.
25. *Id.*
26. *Id.* at 773.
27. *Nilsson*, 8 N.Y.3d at 402.
28. *Id.* at 404 (emphasis in original).
29. *Palm Management Corp. v. Goldstein,* 8 N.Y.3d 337 (2007).
30. *Id.*
31. *Palm Management v. Goldstein*, 29 A.D.3d 801 (2d Dep't 2006).
32. *Palm Management Corp.*, 8 N.Y.3d at 339.
33. *Id.* at 340-341.
34. *Id.* at 341.
35. *Amerada Hess Corporation v. Town of Oyster Bay*, 36 A.D.3d 729, 731 (2d Dep't 2007).
36. *Id.* at 730.
37. *Amerada Hess Corporation v. Town of Oyster Bay*, 36 A.D.3d 729 (2d Dep't 2007).
38. *Id.* at 730.
39. *Id.*
40. *Id.* (citations omitted).
41. *Id.*
42. *Id.* at 731 (citations omitted).
43. Town Law § 267[1](b); Village Law § 7-712[1](b); General City Law § 81-b[1](b).
44. Town Law § 267-b[3](b); Village Law § 7-712-b[3](b); General City Law § 81-b[4](b); *Russia House at Kings Point, Inc. v. Zoning Board of Appeals of Village of Kings Point*, 40 A.D.3d 767, 768 (2d Dep't 2007).
45. *Id.*
46. *Conway v. Town of Irondequoit Zoning Board of Appeals*, 38 A.D.3d 1279, 1280 (4th Dep't 2007).
47. *See Margaritis v. Zoning Board of Appeals of the Incorporated Village of Flower Hill*, 32 A.D.3d 855, 856-857 (2d Dep't 2006) (zoning board of appeals must issue specific findings for each factor in the five-factor area variance standard when deciding whether to grant or deny a variance application).
48. *Russia House at Kings Point, Inc. v. Zoning Board of Appeals of the Village of Kings Point*, 40 A.D.3d 767 (2d Dep't 2007).
49. *Hannett v. Scheyer,* 37 A.D.3d 603 (2d Dep't 2007).
50. *Filipowski v. Zoning Board of Appeals of the Village of Greenwood Lake*, 38 A.D.3d 545 (2d Dep't 2007).
51. *Filipowski v. Zoning Board of Appeals of the Village of Greenwood Lake*, 38 A.D.3d 545 (2d Dep't 2007); s*ee also North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*, 39 A.D.3d 1098, 1101-1102 (3d Dep't 2007) ("In deciding whether to issue the area variance, the ZBA addressed the five specific criteria. . . . Under these circumstances, the ZBA's conclusions were supported by substantial evidence in the record, and accordingly, its determination was not irrational, arbitrary or capricious."); *Rivero v. Voelker*, 38 A.D.3d 784, 785 (2d Dep't 2007) ("here, the ZBA weighed the relevant statutory factors and its determination was rational, and not arbitrary and capricious."); *Clark v. Town of North Salem*, 38 A.D.3d 773 (2d Dep't 2007).
52. *O'Mara v. Town of Wappinger*, 485 F.3d 693, 699 (2d Cir. 2007).
53. *O'Mara v. Town of Wappinger*, 485 F.3d 693 (2d Cir. 2007).
54. *Id.*
55. *Id.* at 695.
56. O'*Mara v. Town of Wappinger*, 400 F. Supp. 2d 634, 641-644 (S.D.N.Y. 2005); *see also O'Mara*, 485 F.3d at 696-698.
57. O'*Mara*, 400 F. Supp. 2d at 643.
58. *Id.* at 645.
59. *O'Mara,* 485 F.3d at 696-697. The court also held that the O'Maras were not entitled to relief on their fraud or negligent misrepresentation claims. The O'Maras' takings claim was dismissed before trial.
60. *Id.*
61. *O'Mara v. Town of Wappinger*, 8 N.Y.3d 957 (2007).

Henry M. Hocherman is a member of the Executive Committee of the Municipal Law Section of the New York State Bar Association and is a partner in the law firm of Hocherman Tortorella & Wekstein, LLP of White Plains, New York. He is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.

Noelle V. Crisalli is an associate in the law firm of Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the *Pace Environmental Law Review*.

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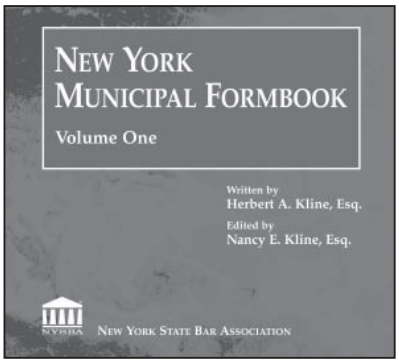

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NYSBA Municipal Law Section

Fall Meeting

The Thayer Hotel
West Point, New York
October 19-21, 2007

THIS PROGRAM PROVIDES 6 MCLE CREDIT HOURS - INCLUDING TWO HOURS IN ETHICS. TOPICS INCLUDE:

- Hot Topics in Land Use Law
- Trends in Public Sector Labor Law
- Ethics for Municipal Attorneys
- Climate Change and the Law

and more...

NYSBA

SCHEDULE OF EVENTS

Friday, October 19

3:00 p.m. **Registration** - Hotel Lobby

3:30 p.m. **Executive Committee Meeting** - Highlands Room

6:00 p.m. **Welcoming Reception** - Garden Terrace
During the reception, Dr. James M. Johnson, professor of history and executive director of the Hudson Valley Institute at Marist College will be entertaining attendees with his extensive knowledge of the Hudson Valley and its importance to winning the American Revolutionary War.

Saturday, October 20

7:30 - 9:00 a.m. **Continental Breakfast** - Hudson Gallery

7:30 a.m. **Registration** - Hotel Lobby

8:45 a.m. **New York State Bar Association Update**
A. Vincent Buzard, Esq.
Past President, New York State Bar Association

9:00 a.m. **Welcoming Remarks:**
Robert B. Koegel, Esq.
Section Chair
Remington Gifford, Rochester

Introductory Remarks:
Frederick H. Ahrens, Esq.
Program Co-Chair
Steuben County Law Department, Bath

9:15 - 11:00 a.m. **HOT TOPICS IN LAND USE LAW** - Hudson Gallery
- Religious Land Uses and Community Development: RLUIPA and Local Planning and Zoning Authority
- The Changing Landscape of Home Occupations: Modernizing Local Zoning Codes to Accommodate
- Siting of Wind Farms: Land Use and Community Development
- Right to Farm

Moderator: **Henry M. Hocherman, Esq.**
Hocherman Tortorella & Wekstein, LLP
White Plains

Speakers: **Dwight H. Merriam, FAICP, CRE**
Robinson & Cole LLP
Hartford, Connecticut

Kevin J. Plunkett, Esq.
Thacher Proffitt & Wood LLP
White Plains

Daniel A. Spitzer, Esq.
Hodgson Russ LLP
Buffalo

Saturday, October 20 continued

11:10 - 12:00 p.m. **HOT TOPICS IN PUBLIC SECTOR LABOR LAW** - Hudson Gallery
- Freezing Wages
- Trends in Public Sector Labor Law

Moderator: **Sharon N. Berlin, Esq.**
Lamb & Barnosky, LLP
Melville

Speakers: **A. Vincent Buzard, Esq.**
Harris Beach PLLC
Rochester

Richard K. Zuckerman, Esq.
Lamb & Barnosky, LLP
Melville

12:15 p.m. **Lunch** - Highlands Room

Guest Speaker: **John Clarkson**
Executive Director
New York State Commission on Local Government Efficiency and Competitiveness
Albany

Afternoon in the Hudson Valley
- Walking Historic West Point
- Bear Mountain State Park
- DIA: Beacon Riggio Galleries
- Washington's Headquarters State Historic Site in Newburgh
- Boscobel Mansion in Garrison

6:30 - 7:30 p.m. **Cocktail Reception** - West Point Officers' Club

7:30 p.m. **Dinner** - West Point Officers' Club

Guest Speaker: **The Honorable Eugene F. Pigott, Jr.**
Associate Judge of the Court of Appeals
Buffalo

SCHEDULE OF EVENTS

Sunday, October 21

7:30 - 8:45 a.m. **Continental Breakfast** - Hudson Gallery

7:30 a.m. **Registration** - Hotel Lobby

8:45 - 9:00 a.m. **Introductory Remarks:**
Professor Patricia E. Salkin
Government Law Center
Albany Law School
Albany

9:00 - 10:45 a.m. **ETHICS FOR MUNICIPAL ATTORNEYS** - Hudson Gallery
- Public Employee Ethics Reform Act of 2007
- Government Attorney-Client Confidentiality: Update from the Federal Courts
- Lobbying Laws

Moderator: **Mark L. Davies, Esq.**
New York City Conflicts of Interest Board
New York City

Speakers: **George W. Cregg, Jr., Esq.**
Hodgson Russ LLP
Albany

Paul T. Rephen, Esq.
New York City Department of Law
New York City

Robert J. Ryan, Esq.
Harris Beach PLLC
Albany

10:45 - 11:00 a.m. **Coffee Break**

11:00 - 12:00 p.m. **GLOBAL WARMING, CLIMATE CHANGE AND THE MUNICIPAL LAWYER: WHAT DOES MASSACHUSETTS v. EPA and NEW YORK STATE INITIATIVES TO REDUCE GREENHOUSE GAS EMISSIONS MEAN FOR MUNICIPALITIES?** - Hudson Gallery

Speaker: **Peter M. Iwanowicz, Esq.**
Director, Climate Change Office
New York State Department of Environmental Conservation
Albany

Noon **Program Concludes**

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Bylaws Committee
Owen B. Walsh
8 Willard Avenue
PO Box 448
Madison, CT 06443-0448
obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky, LLP
534 Broadhollow Road
PO Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Mark L. Davies
11 East Franklin St
Tarrytown, NY 10591-4116
mldavies@aol.com

Land Use and Environmental
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, 7th Floor
White Plains, NY 10601
h.hocherman@htwlegal.com

Membership
Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Ave.
Albany, NY 12208-3494
psalk@albanylaw.edu

Municipal Finance and Economic Development
Kenneth W. Bond
Squire, Sanders & Dempsey, 15th Floor
350 Park Ave.
New York, NY 10022-6022
kbond@ssd.com

Legislation Committee
Darrin B. Derosia
City of Cohoes, Corporation Counsel
97 Mohawk Street
City Hall
Cohoes, NY 12047-2897
dderosia@ci.cohoes.ny.us

Website Committee
Howard Protter
Jacobowitz and Gubits, LLP
PO Box 367
158 Orange Ave.
Walden, NY 12586-2029
hp@jacobowitz.com

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Lester D. Steinman
Editor-in-Chief

NEW YORK STATE BAR ASSOCIATION
MUNICIPAL LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

MUNICIPAL LAWYER

Editor-in-Chief
Lester D. Steinman
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, NY 10606
Lsteinman@pace.edu

Executive Editor
Ralph W. Bandel

Section Officers

Chair
Robert B. Koegel
Remington Gifford
183 East Main Street, Suite 1400
Rochester, NY 14604
rbk@remgiff.com

First Vice-Chair
Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
psalk@albanylaw.edu

Second Vice-Chair
Howard Protter
Jacobowitz and Gubits, LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586
hp@jacobowitz.com

Secretary
Frederick H. Ahrens
Steuben County Law Dept.
3 E. Pulteney Square
Bath, NY 14810
freda@co.steuben.ny.us

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