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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

Happy New Year!

My message in the Fall issue of the *Municipal Lawyer* intended to entice you to sign on to at least one of the Municipal Law Section's committees by telling you about each of them and their chairs. I covered Ethics and Professionalism, Government Operations, Municipal Finance and Economic Development, Legislation and Bylaws; below are the rest of the committees. E-mail me at rminarik@courts.state.ny.us if you're interested, or I invite you to contact the Chair directly.

Land Use and Environmental

Committee Chair Henry M. Hocherman is a partner of Shamberg Marwell Hocherman Davis and Hollis PC in Mt. Kisco. Prior to becoming a member of the Section's Executive Committee, Henry was a repeat presenter at our programs on these issues. We all look forward to his Land Use and Environmental updates at the Annual and Fall Meetings. This committee identifies topics and speakers for MCLE programs and will become the keeper of a master Land Use and Environmental outline to be updated twice a year. Anyone interested in becoming a presenter and/or writing on topics in this area can e-mail me at rminarik@courts.state.ny.us or Henry at hmh@smhdh.com.

Employment Relations

An active committee member prior to her appointment as Chair in 2003, Sharon Naomi Berlin has been a strong advocate within our Section on employment relations issues. Past program chairs have counted on her to identify timely topics and effective speakers. Sharon understands that many of our Section members deal with employment issues on a daily basis and is interested in keeping us up-to-date on new developments in the area. Sharon is at the firm of Lamb & Barnosky, LLP. Please feel free to contact Sharon directly at snb@lambbarnosky.com.

Website

Howard Protter is a member of Jacobowitz and Gubits, LLP in Walden and has been a member of the Section's Executive Committee since June 1997. He volunteered to liaison with NYSBA to create a website for Section members and actually may have been one of the first members of the Executive Committee at that time who not only had an e-mail address, but

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used the Web for research. To this day, Howard continues to work with NYSBA staff keeping our Section's website content relevant to members and visitors. Howard is a committee of one and we would like to get him some help. He has worked hard to establish the listserve that many of our Section members have already put to good use. His present long-term goal is to have a searchable database of our publication, the *Municipal Lawyer*, on the website. We welcome any comments and suggestions regarding our website content. I would be happy to put anyone with an interest in technology and the law on this committee and give Howard some company. If you are interested, e-mail Howard at hp@jacobowitz.com.

Membership

Professor Patricia E. Salkin of Albany Law School's Government Law Center has worked closely with Patricia Wood, NYSBA Director of Membership, identifying ways to retain and attract members to our Section. Secretary of our Executive Committee, Patty has worked tirelessly creating and implementing plans to reach out to municipal lawyers across the state. Our current plan is to hold short meetings in several parts of the state in 2004. We hope to introduce you to Section members in your area and provide you with a CLE credit or two. Patty would like to hear from anyone interested in working on these regional meetings or the committee. Or, if you just desire to express an opinion on membership issues, you can e-mail her at psalk@mail.als.edu.

There is one service that all committees perform for our membership. From time to time the Municipal Law Section is asked to comment on proposed legislation, newspaper articles, television shows and the potential impact of a municipal officer or board's actions. Requests for comments may come through me, but I search out the best of our group to respond. I look to the committees to match up the request for information with an attorney knowledgeable on the subject. If you have developed an expertise in any of the areas discussed here and in my prior message and are willing to share that expertise, please join us today. It's just one other way of making the profession visible to the public in a positive way.

This particular message was sent to print prior to our Annual Meeting on January 26, 2004 in New York City. Committee chairs met with their respective members over the lunch hour and as ever, I am grateful to all those who took the time to attend those meetings.

Renee Forgensi Minarik

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *Municipal Lawyer* Editor

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

From the Editor

The practice of municipal law has radically changed over the past thirty years. In a largely bygone era, the county attorney, corporation counsel, or town or village attorney was usually chosen based upon his political allegiance, or his friendship with, or private representation of, the government's chief executive, rather than his municipal law knowledge or expertise. While certain of these considerations still are relevant today, the complexity of the practice of municipal law has given birth to a new generation of attorneys and law firms who specialize in the multifaceted areas of municipal law and represent multiple municipalities. Moreover, it is no longer unusual for a woman to be the chief municipal legal officer. For example, the county attorney and the corporation counsel or deputy corporation counsel in four of the largest municipalities in Westchester County are women. Leadership positions in our Section are equally divided among men and women.

Cognizant of the premium public employers place on expertise and experience in municipal law matters, the Municipal Law Section and the *Municipal Lawyer* have redoubled their efforts to provide the education, training and networking opportunities essential to professional growth and success. In this issue, Section Chair Renee Forgensi Minarik completes her review of the Section's Committee system and leadership structure, focusing on the Land Use and Environmental, Employment Relations, Website and Membership Committees. Participation in these committees and the Section's listserve provides invaluable opportunities to discuss issues of common interest with your peers, draft legislative proposals, write journal articles and speak at Section meetings on recent developments in your specialized area of practice.

For evidence of the diversity of municipal law practice, you need look no further than this issue of the *Municipal Lawyer*. Continuing our series on ethical considerations for local government officials, Marie Louise Victor, Associate Counsel at the New York City Conflicts of Interest Board, emphasizes the importance of an effective ethics program to demonstrate the seriousness of government's commitment to compliance with ethics laws, to educate public servants regarding situations which may lead to ethical violations and to deter public servants from unethical behavior. Fairness, confidentiality, an independent decision making body and an appropriate range of penalties are among the key components outlined by Ms. Victor for an effective enforcement system.

Focusing on the fiscal crisis that has beset many local governments, Todd Miles, a partner at Hawkins, Delafield and Wood, examines the increasingly common practice of deficit financing employed by local governments and school districts in New York. Beginning with the City of Yonkers' fiscal crisis in 1976, Mr. Miles traces the Legislature's enactment of enabling legislation authorizing the sale of municipal assets, the financing of current retirement system contributions and the creation of public benefit corporations empowered to oversee fiscal operations and to issue debt to liquidate deficits in order to bail out financially challenged local governments.

Turning to employment law issues, David M. Wirtz and Dan Messeloff of Grotta, Glassman & Hoffman, P.A. examine a public employer's duty to provide for the workplace safety and health of its employees under New York's Public Employee Safety and Health Act (PESHA) and its "Right-to-Know" Law. Cautioning municipal officials and attorneys that ignorance is no defense, the authors present a primer for public sector employers on developing practices and procedures to comply with the obligations of these laws.

Municipal governments throughout the State are slowly beginning to appreciate the significant impact that the establishment of an agricultural district can have on municipal local laws and ordinances. John Rusnica, an Associate Attorney with the New York State Department of Agriculture and Markets, provides us with an overview of the Department's guidelines to assist local governments in drafting and administering planning and zoning laws which may affect farming practices in agricultural districts.

Local land use and conservation practices are also the subject of a "Starting Ground Series" published by the Land Use Law Center of Pace University Law School. A valuable resource described in greater detail in this issue, these books summarize research papers prepared by professors, staff attorneys and law students in response to questions raised in training sessions, workshops and conferences conducted by the Center over the past few years.

I hope that reading these articles will inspire you to submit an article in your area of expertise for publication in this journal.

Lester D. Steinman

Enforcement: An Indispensable Component in the Success of Municipal Ethics Boards

By Marie Louise Victor

What Are Ethics Laws, as Opposed to Anti-Corruption Laws?

A search for the word "ethics" in the *Oxford English Dictionary* yields "science of or treatise on morals; moral principles." A search for the word "corruption" leads to "depraved"; and a further search for "depraved" leads to "wickedness, morally corrupt." So, why have ethics laws in addition to anti-corruption laws? The underlying assumption of ethics laws is that public servants are good, honest citizens who will make the right choice when their public duties and their private interests diverge, if only they know, or are told, what the right choice is. Therefore, unlike anti-corruption laws, which are geared toward the depraved, wicked, and morally corrupt and therefore focus on punishment, ethics laws and the boards that administer them are created to teach public servants what the right choice is when public duties come into conflict with private interests. Moreover, making that right choice promotes public confidence in government, protects the integrity of government decision making, limits financial waste, and promotes efficiency.

To that end, ethics boards usually have a training function to instruct public servants on the requirements of the ethics law, a legal advice function to give personal advice to public servants based on their particular circumstances, and a financial disclosure function to help create the reality of open government. To be truly effective, however, an ethics board *must* have enforcement power, that is, the power to prosecute public servants for violating the municipality's ethics law.

Components of an Effective Ethics Enforcement Program

Government ethics laws govern conflicts between a public servant's duties to his or her governmental employer and the public servant's private (usually financial) interests. Enforcement provides the incentive for public servants to make the right choice again and again; it deters public servants who, though honest most of the time, may be tempted to stray every now and then. An enforcement program can also be used as an educational tool to show public servants the real-life scenarios that often lead to a violation of the municipality's ethics laws. Also, an enforcement program shows public servants that the government is serious about compliance with those laws. The following are key components of an effective ethics enforcement program: (1) a range of appropriate penalties, including civil fines, disciplinary action, nullification of improper contracts, damages, disgorgement of ill-gotten gains, debarment from future government contracts, and, in particularly egregious cases, criminal penalties; (2) fairness; (3) an independent body to determine the facts and the law and to impose penalties for a violation; (4) appellate review; (5) a means of publishing cases after the independent body has issued a finding of a violation; and (6) confidentiality throughout the process.

"[U]nlike anti-corruption laws, which are geared toward the depraved, wicked, and morally corrupt and therefore focus on punishment, ethics laws and the boards that administer them are created to teach public servants what the right choice is when public duties come into conflict with private interests."

Enforcement Procedure

A review of government ethics in the United States shows that the laws are similar and that they tackle, among other issues, the following:

1. Use of position to obtain personal benefits—for example, hiring a relative or one's own company to do work for one's government agency;
2. Acceptance of gifts, money, and the like from those doing business with the government or compensation from anyone other than the government for doing one's government job (tips);

3. Use of confidential government information for private gain;
4. Post-governmental employment (revolving door) or dual employment (moonlighting);
5. Representation of private clients before a government agency, while employed by the government;
6. Financial conflicts, such as an ownership interest in private companies that do business with one's government employer;
7. Political solicitations of subordinates or government vendors;
8. Business or financial relationships with superiors or subordinates.

The enforcement process starts with a complaint, either oral or written; however, a newspaper article with the heading "Public servant hires entire family to run agency unit!" might trigger the process. Ethics boards must have the power to initiate enforcement without waiting for a complaint. Once an ethics board receives, or perceives, an allegation of wrongdoing, the board may either dismiss it for failure to state a claim and close the case, or may proceed with an investigation, an investigation that the ethics board must have the power to control. If the investigation does not garner sufficient evidence to support a claim, the case should be closed without further action. If, on the other hand, the investigation does produce evidence of a violation, then a notice of initial determination of probable cause should be sent to the respondent. The initial determination of probable cause should state the allegations against the respondent and should inform the respondent of his or her due process rights, such as (1) his or her right to respond in writing; (2) the deadline for the response; (3) the effect of not responding; (4) the right to have representation; (5) and the right to a hearing, should the case proceed further.

If after consideration of the public servant's response, the ethics board finds that there remains probable cause to believe that a violation of the ethics laws has occurred, the board may hold a hearing or direct a hearing to be held on the record to determine whether a violation has in fact occurred. The New York City Conflicts of Interest Board (COIB, New York City's ethics board), for instance, directs its hearings to be held at the New York City Office of Administrative Trials and Hearings (OATH). OATH is New York City's central administrative tribunal, which hears cases from a variety of city agencies. Directing hearings to be held by a third party adds a level of fairness and independence to the proceeding, while being cost-effective in that it eliminates the need for an ethics board to have its own hearing facilities. At the close of the hearing, after motions and discovery and all the machinations of litigation, if the administrative law judge finds that the respondent has not committed a violation, then the case should be closed. On the other hand, if the administrative law judge issues a report and recommendation stating that the respondent has violated the ethics laws, the ethics board's lawyers and the respondent may submit written comments on the report and recommendation to the ethics board, before the board makes a full review of the record, issues, findings of fact, and conclusions of law.

The administrative law judge may issue a report and recommendation, but the ethics board must have the final word on the outcome of cases prosecuted on the basis of its laws. The members of an ethics board are chosen for their independence and impartiality and should neither work for nor have any contracts with the municipality. If the ethics board finds that the respondent has not committed a violation, then the case should be closed. On the other hand, if the board does find a violation, then the board issues a public order finding a violation and may impose a fine or require disgorgement of ill-gotten gains. The publication is important because it serves as a powerful educational tool. The thinking behind publication is that public servants who read the facts and resulting order and fine will know what types of activities to avoid—and will feel a greater incentive to comply with the ethics law. Publication serves as an additional deterrent if a public servant cares about his or her reputation or fears disciplinary action, such as suspension or dismissal; these concerns are often a bigger deterrent than any fine. Respondents rarely take the Lord Wellington approach of "publish and be damned" and will go a long way to avoid publication.

That said, one must emphasize that it is very important to keep all aspects of a case confidential until there is, at the very least, a determination by the ethics board that sufficient evidence of a violation exists to warrant a trial. Some ethics laws, such as New York City's, make an ethics proceeding public only after the ethics board has made a final finding of a violation. Despite this tension between the public's right to know and the public servant's interest in protecting himself or herself against unjustified accusations, it is critical to safeguard the reputation of innocent public officials from malicious or unfounded complaints.

Finally, after exhausting their administrative remedies, that is, after receiving a final ruling from an ethics board, respondents have the right to appeal to the state court system by way of an Article 78 pro-

ceeding. Two good examples of such appeals in New York City are: *COIB v. Elizabeth Holtzman*[1] (where the Court of Appeals upheld the Board's reading of the high standard of care applicable to public officials under the ethics law and rejected as a defense the asserted lack of actual knowledge of business dealings between the respondent's city agency and the affiliate of a company from whom respondent had a campaign loan), and *COIB v. Kerry J. Katsorhis*[2] (where the COIB fined a former sheriff of the city of New York $84,000 for using city personnel, equipment, letterhead, and resources for his private law practice; the Appellate Division and the Court of Appeals dismissed the respondent's appeals as untimely).

"Ethics boards without full and effective enforcement power have often been criticized as toothless tigers—and worse. Such boards raise and then dash hopes of prompt and fair adjudication of ethics complaints and thus only increase the public's cynicism about the honesty and integrity of our public servants."

Ethics boards without full and effective enforcement power have often been criticized as toothless tigers—and worse. Such boards raise and then dash hopes of prompt and fair adjudication of ethics complaints and thus only increase the public's cynicism about the honesty and integrity of our public servants. Therefore, municipalities that adopt new ethics laws should do so *only* if they are prepared to grant their ethics boards the powers and duties outlined above. Anything less may well reap a whirlwind of censure and derision.

Additional information on enforcement laws and procedures is available on the New York City Conflicts of Interest Board's website: http://nyc.gov/ethics.

Endnotes

1. COIB Case No. 93-121 (1996), *aff'd sub nom. Holtzman v. Oliensis*, 240 A.D.2d 254, 659 N.Y.S.2d 732 (1st Dep't), *aff'd*, 91 N.Y.2d 488, 673 N.Y.2d 23 (1998).
2. COIB Case No. 94-351 (1998), *appeal dismissed*, M1723/M-1904 (1st Dep't 2000), *appeal dismissed*, 95 N.Y.2d 918 (2000).

Marie Louise Victor is Associate Counsel for Enforcement at the New York City Conflicts of Interest Board.

Deficit Financing in New York

By Todd Miles

Introduction

Deficits are symptoms of fiscal distress. Municipalities and school districts in fiscal crises can experience accumulated operating deficits from prior fiscal years and projected budget deficits for the current and future fiscal years. The causes of such deficits may vary, as illustrated by the legislative findings in legislation enacted by the New York legislature to address such fiscal crises through the imposition of oversight mechanisms together with authorization for deficit financing. For example, in one of the earliest examples of such legislation, addressing a fiscal crisis in the city of Yonkers, the legislature declared that:

> It is hereby found and declared that a condition of fiscal affairs now exists and has existed for several years in the city of Yonkers which involves inadequate regard for proper financial accounting procedures as required by law, improvident budgeting and taxing practices, inappropriate deferral of current expenditures, increased dependence on emergency legislation to fund resulting deficiencies, and other documented disregard for prudent management of its financial affairs.[1]

Contrast that rather strongly worded indictment of Yonkers fiscal management practices with the following mild-mannered scolding of Nassau County in legislation addressing a more recent fiscal crisis in that county:

> The legislature hereby finds and declares that a condition of fiscal difficulties now exists and has existed for several years in the county of Nassau, as highlighted in formal reports published by various public officials, including the state comptroller and the comptroller of the county of Nassau. . . . It is hereby further found and declared that interim county budgetary relief is necessary, together with enhanced budgetary and expenditure discipline, to allow the county to restore enduring fiscal health and the availability of adequate funding for the provision of essential services. . . .[2]

Demographic factors, as opposed to fiscal mismanagement, were cited by the legislature in legislation from the current session addressing the fiscal crisis in Buffalo:

> The legislature hereby finds and declares that a condition of fiscal difficulty has existed for several years in the city of Buffalo, as a result of a weakened economy, population declines, and job losses. In recent months, the city's fiscal condition has been further weakened by the impact of the national economic recession, which has had a greater negative impact in Buffalo than in many other areas of the state. These factors have led to a structural imbalance between revenues and expenditures which, when combined with the city's limited ability to increase taxes on its residents, has resulted in a downgrade of Buffalo's bonds by independent bond rating services. . . .[3]

Regardless of the root causes for deficits, maintaining balanced operations while experiencing deficits often necessitates the issuance of debt in order to either liquidate an accumulated deficit or provide financing of current-year expenditures to address a projected budget deficit. Borrowing for such purposes represents an extraordinary departure from normal practice, in terms of both public policy and legal authorization. The public policy issues raised by borrowing for current operating expenses were eloquently expressed by the Court of Appeals in *Cherey v. City of Long Beach*:[4]

> Experience has demonstrated that in public, as in private, business current expenses should ordinarily be paid from current income; and that when indebtedness is contracted to meet extraordinary expenditures or expenditures not expected to recur, the

> indebtedness should be paid within the period in which the benefit expected to result from such expenditures is enjoyed. Where public officers charged with the duty to maintain government and to provide the money required to meet its expense have unrestricted power to borrow money, there is danger that such power may be used to postpone payment of current expenses and to place upon later generations the burden of paying for benefits long after the benefits have ceased. Extravagance, waste and, eventually, impairment or destruction of the public credit may result.

The sensitivity of these issues is reflected in the current litigation between the Pataki Administration and the city of New York regarding the issuance of new debt by a local development corporation created by the city of New York to refinance outstanding debt originally issued by the Municipal Assistance Corporation for the City of New York, a public benefit corporation created pursuant to Chapter 169 of the Laws of 1975 and empowered to issue debt to refinance the existing debt of the city of New York. The overall purpose of this refinancing plan is to provide immediate budget savings to the city of New York by prolonging for 30 years the repayment of debt which financed expenditures incurred by such city in the 1970s.[5]

As an alternative to issuing debt to liquidate deficits, other more creative financing techniques involving asset and liability manipulation have been employed by certain municipalities. Examples to be discussed in more detail below include sales of a city water system and a county medical center to public benefit corporations in exchange for cash used to liquidate deficits, and the periodic financing of pension liabilities through issuance of debt.

Constitutional Constraints

In order to contract indebtedness, Article VIII, section 2 of the state Constitution provides that municipalities and school districts must pledge their faith and credit for repayment of the debt, and that such debt may not be contracted for longer than the period of probable usefulness of the object or purpose for which such debt is to be contracted as determined by the governing body of the municipality or school district pursuant to general or special laws of the state legislature.

The significance of the pledge of faith and credit provision was highlighted during the New York City fiscal crisis in the 1970s. The city of New York attempted, with the acquiescence of the state legislature, to deal with its multi-billion dollar deficit by postponing the payment of existing debt service. Through enactment of the New York State Emergency Moratorium Act for the City of New York, a three-year moratorium was imposed on actions to enforce the city's obligation to pay maturing notes, applicable to noteholders who declined the "opportunity" to exchange their notes for long-term bonds issued by the Municipal Assistance Corporation for the City of New York. The moratorium legislation was held by the Court of Appeals to be unconstitutional in a 1976 decision which included the following interpretation of Article VIII, section 2 of the Constitution:

> A pledge of the city's faith and credit is both a commitment to pay and a commitment of the city's revenue generating powers to produce the funds to pay. Hence, an obligation containing a pledge of the city's "faith and credit" is secured by a promise both to pay and to use in good faith the city's general revenue powers to produce sufficient funds to pay the principal and interest of the obligation as it becomes due. . . . The effect of the Moratorium Act is, however, to permit the city, having given it, to ignore its pledge of faith and credit to "pay" and to "pay punctually" the notes when due. Thus, the act would enable the city to proceed as if the pledge of faith and credit had never been. . . . The constitutional prescription of a pledge of faith and credit is designed, among other things, to protect rights vulnerable in the event of difficult economic circumstances. Thus, it is destructive of the constitutional purpose for the Legislature to enact a measure aimed at denying that very protection on the ground that government confronts the difficulties which, in the first instance, were envisioned. . . . Moreover, in denying access to the courts there is in effect a denial of all remedy. It is elementary that denial of a remedy is a denial of the right. . . . While phrased in permissive language, these provisions, when read together

> with the requirement of the pledge of faith and credit, express a constitutional imperative: debt obligations must be paid, even if tax limits be exceeded.[6]

As a result of the *Flushing* decision, avoiding payment of existing debt was effectively ruled out as an option, setting the stage for direct financing of deficits through issuance of new debt, either by the municipality or school district itself, or through new public benefit corporations created for such purpose. Since the constitutionality of issuing debt for deficit financing has not been addressed by New York courts, it is necessary for bond counsel to reason by analogy to a similar concept in order to establish the necessary comfort level for rendering of approving opinions.

The Court of Appeals has previously opined, in the *Cherey* case cited above, that under Article VIII, section 2 there must be some basis for a determination that the object or purpose being financed will probably be useful in the future as well as in the immediate present. In considering whether such constitutional provisions would permit the city of Long Beach to authorize the issuance of bonds to finance a judgment, the Court upheld a statute providing a period of probable usefulness of five years for the payment of judgments against a municipality:

> Where a levy of taxes sufficient to pay outstanding judgments would cause such undue hardship to the taxpayers that equity will permit the tax levy to be spread over a series of years, an indebtedness incurred to fund the judgment must necessarily serve a useful purpose during the period over which the tax levy might be spread, regardless of the nature or object of the original obligations enforced by the judgments.[7]

In the absence of similar case law construing these constitutional provisions in the context of deficit financing, the *Cherey* decision provides a striking analogy from which substantial comfort is derived by bond counsel faced with the task of rendering approving opinions on bonds issued to finance deficits. Assuming that a period of probable usefulness has been provided by the legislature, the issuance of bonds requiring annual tax levies to pay debt service within such period results in the same type of fiscal relief, in lieu of a single tax levy to liquidate a deficit and the accompanying undue hardship to taxpayers of the affected municipality or school district. In addition, the financing of a deficit over several years requires that the tax levy be spread during such period "regardless of the nature or object of the original obligations" funded by deficit expenditures, similar to the focus of the court in *Cherey* on the payment of the judgment as the purpose of the borrowing, as opposed to the original obligations enforced by the judgment.

Analysis of two additional cases addressing related constitutional principles is included below in the discussion of Liability Manipulation.

Statutory Authorization

The legislature has enacted section 11.00 of the Local Finance Law (LFL) to generally provide a period of probable usefulness (PPU) for each of the authorized objects or purposes to be financed through issuance of debt by municipalities and school districts in accordance with Article VIII, section 2 of the Constitution. However, LFL section 11.00 does not include a PPU for the object or purpose of financing a deficit. In the variety of fiscal crises which have resulted in the legislature's consideration of deficit financing authorization for the affected municipality or school district, the legislature has enacted special laws providing such PPUs for deficit financing on a case-by-case basis.

One of the earliest examples of such special laws is Chapter 488 of the Laws of 1976 which provided as follows with respect to the city of Yonkers:

> Notwithstanding the provisions or limitations of any other law, general, special or local, the city of Yonkers is hereby authorized and empowered from time to time but prior to June thirtieth, nineteen hundred seventy-seven to issue its serial bonds for the purpose of funding and paying all or any part of the general deficiency bill of the city. Said purpose is hereby determined and declared to be a specific object or purpose for which indebtedness of the city may be contracted and serial bonds of the city may be issued. . . . The period of probable usefulness of said specific object or purpose is hereby determined to be fifteen years, such period being found and declared by the legislature as appropriate and necessary for the orderly payment in full of all items aggregating the general deficiency bill without creating undue hardship on the taxpayers of the city or increasing the exposure of

> the city or its creditors or such taxpayers to the uncertainties of debt enforcement actions in bankruptcy or other judicial proceedings.

This language in the Yonkers statute demonstrates that the legislature cited the prevention of "undue hardship on the taxpayers of the city" as one of the fundamental bases for enactment of the fifteen-year period of probable usefulness for the city's deficit, closely tracking the rationale of the Court in the *Cherey* case with respect to judgments. Eight years later, the legislature enacted Chapter 984 of the Laws of 1984 providing that:

> The county of Erie is hereby authorized to issue serial bonds in an aggregate principal amount as not to exceed seventy-five million seven hundred thousand dollars for the sole purpose of liquidating the cumulative projected deficit of seventy-five million seven hundred thousand dollars in its general fund incurred during fiscal years ending December thirty-first, nineteen hundred eighty-three and December thirty-first, nineteen hundred eighty-four caused by overestimates of revenues and underestimates of expenditures. . . . It is hereby determined that the financing of the deficit hereinbefore described is an object or purpose of said county of Erie, for which indebtedness may be incurred, a period of probable usefulness of which is hereby determined to be ten years. . . .

While including some explanatory language as to the reasons for the deficit, the legislature in this instance gave no rationale for the ten-year period of probable usefulness. In recent years, enactment of legislation providing such periods of probable usefulness for deficit financing has become relatively commonplace in New York, including deficit financing for cities such as Glen Cove, Newburgh, Niagara Falls, Rome, and Utica, as well as a variety of other towns and school districts.

During the fiscal crises which enveloped New York State in the 1970s, legislation was enacted which requires submission to the State Comptroller of proposed budgets by municipalities or school districts which have been authorized to finance deficits through issuance of debt. Chapter 268 of the Laws of 1976 added subdivision b. to section 10.00 of the Local Finance Law providing as follows:

> In the case of a municipality or school district which is authorized by a special or general law to incur debt to fund operating deficits and a period of probable usefulness is provided therefore in such law, the chief fiscal officer or the individual or individuals responsible for the preparation of the tentative budget, or in the case of towns the preliminary budget, shall submit in each of the fiscal years during the time for which such period of probable usefulness has been granted, such tentative or preliminary budget to the state comptroller within five days after its preparation. The state comptroller shall in each such year examine such proposed budget and make his recommendations thereon to the municipality or school district. Such recommendations shall be made after examination into the estimates of revenues and expenditures of such government and shall be made prior to the adoption of such budget. The action or inaction of the state comptroller under this paragraph shall not be construed to affect the legal validity of any budget of a municipality or school district nor to affect the powers or duties of a municipality or school district with respect to the local budget process.

In addition to this general oversight provision, the enactment of such legislation has sometimes included various forms of oversight and information reporting requirements: For example, the 1976 Yonkers legislation imposed a rigorous budgeting framework on that city and was accompanied by companion legislation imposing a state control board to oversee the fiscal affairs of the city. This "Special Local Finance and Budget Act for the City of Yonkers" requires that the city's budget for each fiscal year be based on the operating results for the most recent audited fiscal year, with any expenditures below the audited amounts or revenues above the audited amounts justified in writing, and requires the State Comptroller to certify the city's revenue estimates before the budget is deemed to be legally effective. Such zero-based budgeting forces a rigorous examination of all assumptions underlying each proposed budget and subjects such assumptions to oversight by state officials.

The principles embodied in the 1976 Yonkers legislation have been incorporated in subsequent legislation enacted for more recent fiscal crises in other local governments, including Troy,[8] Nassau County,[9] and Buffalo.[10] In each of these cases, the legislature has created new public benefit corporations with both oversight powers and the power to issue revenue bonds on behalf of the related municipality in order to finance deficits and refinance such municipality's outstanding general obligation debt.

The issuance of such revenue bonds by these public benefit corporations allows additional flexibility in the structuring of deficit and refinancing debt issues since the constraints of Article VIII and the Local Finance Law do not apply to such corporations. For example, instead of having to limit the term of deficit bonds issued by the municipality to a period of probable usefulness provided by the legislature, the corporation's debt is only constrained by applicable federal tax law and the general provisions in each corporation's enabling statute (i.e., thirty-year maximum term).

Asset Manipulation

In certain cases, municipalities have employed asset sales in order to generate sufficient proceeds to liquidate deficits. These transactions require statutory authorization by the legislature as well as compliance with applicable provisions of federal tax law.

For example, in 1985 the legislature authorized the creation of the Buffalo Municipal Water Finance Authority and stated the following legislative findings:

> . . . It is further found that alternative financing methods which, according to the provision of the state constitution, must be approved by the legislature, can be used to directly provide the capital necessary to maintain the city's water in an adequate condition so that they continue to provide vital water service to the public. The maintenance of such service is declared to be a state as well as a local concern. . . . It is further found that one such alternative method, the issuance of municipal securities secured by local user fees for the use or services of any self-sufficient water system, or other revenues, has been favorably received by investors even during periods when market conditions restrict the sale of municipal general obligations. Such an alternative method is currently in use in many of the nation's largest cities with which the city of Buffalo must compete for public credit. The problems of the cost and availability of capital make necessary the creation of a new, single-purpose entity to assist such city in financing water system improvements through the issuance of such securities.[11]

This Authority was not activated until 1992, during a fiscal year in which the city of Buffalo had incurred a substantial general fund deficit. The legislature was persuaded to accommodate the city's need to finance this deficit using the sale of its municipal water system as the financing vehicle, by enacting the following amendment to the 1985 enabling statute for the Buffalo Municipal Water Finance Authority:

> Notwithstanding the provisions of any general, special or local law or charter to the contrary, any moneys received by the city in consideration for the transfer of such water system to the water board may be deposited in the general fund of the city and used for any lawful city purpose.[12]

On December 29, 1992 the sale of the city's water system to the new authority was consummated and the deficit was liquidated.

Another example of such asset manipulation was authorized by the Nassau Health Care Corporation legislation in 1997, which included the following statement of legislative findings:

> In order to accomplish the purposes recited in this section to provide health care services and health facilities for the benefit of the residents of the state of New York and the county of Nassau, including to persons in need of health care services without the ability to pay as required by law, a public benefit corporation to be known as the Nassau Health Care Corporation shall be created to provide such services and facilities and to otherwise carry out such purposes; that the creation and operation of the Nassau Health Care Corporation, as hereinafter provided, is in all respects for the benefit of the people of the state of New York and of the county of Nassau, and is a state,

> county and public purpose; and that the exercise by such corporation of the functions, powers and duties as hereinafter provided constitutes the performance of an essential public and governmental function.[13]

On September 24, 1999 the new corporation issued $259,734,845 of bonds, of which $82,000,000 was paid to Nassau County as the "purchase price" for the county's medical center facilities and which was applied to liquidate the existing county deficit for that fiscal year.

Liability Manipulation

Under certain circumstances, the legislature has authorized municipalities and school districts to issue debt to finance liabilities associated with their participation in the state retirement systems which benefit their employees. For example, Chapter 62 of the Laws of 1989 authorized municipalities and school districts to defer their required contributions for the fiscal years of the retirement systems which ended on March 31, 1988 and March 31, 1989, to amortize such contributions over a seventeen-year period, as well as to prepay such remaining amortization installments through the issuance of bonds.

More recently, as part of a legislative package authorizing the state Comptroller to implement a comprehensive structural reform program for such retirement systems, Chapter 49 of the Laws of 2003 authorized municipalities to amortize a portion of their retirement contribution payments payable on December 15, 2004 at a rate of 8 percent over a five year period, and authorized a five-year period of probable usefulness allowing the issuance of bonds to prepay such amortized amounts. In addition, Chapter 49 authorizes the issuance of bonds with a five-year period of probable usefulness to finance certain retirement incentive program payments.

The New York courts have decided two major cases which have addressed the constitutionality of similar legislation. In *Bugeja v. City of New York*,[14] the Court affirmed a lower court decision upholding a statute which authorized the city of New York to issue bonds to finance the city's payment of its retirement system contribution for its 1965 fiscal year. In upholding the statute, the lower court held as follows:

> . . . Though we agree with our dissenting colleagues that the Constitution prohibits a city from incurring debts payable in the future for objects or purposes of "purely transient usefulness" (*Cherey v. City of Long Beach*, 282 N. Y. 382, 390), we cannot hold that payments by the city of current pension or retirement liabilities involve payments of "purely transient usefulness." Municipal default in the payment of pension or retirement liabilities would undoubtedly jeopardize the continuing employment, and impair the future recruitment, of civil servants. It would signal the collapse of the city's civil service system, or at least it is within the judgment of the Legislature to foresee that result. . . .[15]

This 1965 case would appear to provide a sound legal foundation for the issuance of debt pursuant to the above-described statutes. However, it was followed by a more troubling decision in the case of *Hurd v. City of Buffalo*,[16] addressing the constitutionality of a statute which determined a period of probable usefulness for the city of Buffalo's future annual contributions to the retirement system, thus allowing the city to levy property taxes above its constitutional operating tax limit to fund such payments. In affirming the lower court decision declaring that such statute was unconstitutional, the court held that:

> As for the element for futurity suggested in the dissenting opinion, to be sure such an element is present in a retirement system or in any funded pension plan. The point is that no retirement or pension plan is actuarially sound unless the annual amortization reflects the current burden in disbursements and in reserves for future payments. The current burden is satisfied or exhausted whichever way one would analytically phrase it by the annual payment. A contrary view which is perhaps verbally appealing is economically and actuarially unsound. Otherwise, the theory of annual leveling payments would hardly be justified, because a current tax-paying generation should not bear a burden other than one that is appropriate to it, or shift to future generations a burden not appropriate to them. Indeed, the tax and debt-contracting limitations of the Constitution for the State and its subdivisions have that very purpose.[17]

It is possible to distinguish the statutes upheld in the *Cherey* and *Bugeja* cases from the statute struck down in the *Hurd* case by focusing on the contrast between one-time "emergency" types of obligations (i.e., unforeseen judgments or extraordinary retirement system contributions due in a single fiscal year) from recurring annual operating expenses such as a municipality's or school district's annual retirement system contributions. However the line of distinction was blurred to some extent by the following language from the *per curiam* Court of Appeals opinion in the *Hurd* case: ". . . To the extent that the rationales expressed in *Cherey v. City of Long Beach* . . . and *Bugeja v. City of New York* . . . may appear broader than that upon which this holding rests, they should be considered limited. . . ."[18]

"Given the current fiscal difficulties faced by the State and its local government entities, it is expected that deficit financing will become even more commonplace in the near future."

Summary

The financing of deficits through issuance of debt either by municipalities or school districts themselves or through public benefit corporations created by the legislature for such purpose has become an increasingly common practice in New York. While the courts have addressed the constitutional imperative of paying outstanding debt by ruling out the validity of a statutory moratorium on enforcement of such debt, they have not ruled on the constitutionality of deficit financing. By analogy to the case law on financing of judgments, however, bond counsel have a sound basis for rendering approving opinions on deficit bond issues.

The legislature, beginning essentially with the Yonkers fiscal crisis in 1976, has enacted statutes authorizing deficit financing for many municipalities and some school districts. Under some circumstances, legislation has been enacted to authorize the sale of municipal assets and the financing of current retirement system contributions in order to provide cash infusions for fiscally challenged local governments.

In more recent fiscal crises in larger municipalities, the legislature has favored the creation of new public benefit corporations with extensive oversight powers, together with power to issue debt for the liquidation of deficits and overall restructuring of existing debt, in order to provide immediate budgetary relief for such municipalities. Given the current fiscal difficulties faced by the State and its local government entities, it is expected that deficit financing will become even more commonplace in the near future.

Endnotes

1. Chapter 488 of the Laws of 1976.
2. Chapter 84 of the Laws of 2000.
3. Chapter 122 of the Laws of 2003.
4. 282 N.Y. 382, 386 (1940).
5. *See Local Government Assistance Corporation v. Sales Tax Asset Receivable Corporation*, Index No. 5218-03, Sup. Ct., Albany Co., Sept. 17, 2003.
6. *Flushing National Bank v. Municipal Assistance Corporation for the City of New York,* 40 N.Y.2d 731, 390 N.Y.S.2d 22 (1976).
7. 282 N.Y. at 391.
8. Chapter 187 of the Laws of 1995.
9. Chapter 84 of the Laws of 2000.
10. Chapter 122 of the Laws of 2003.
11. Chapter 796 of the Laws of 1985.
12. Chapter 634 of the Laws of 1992.
13. Chapter 9 of the Laws of 1997.
14. 17 N.Y.2d 606, 268 N.Y.S.2d 564 (1966).
15. 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 82 (2d Dep't 1965).
16. 34 N.Y.2d 628, 355 N.Y.S.2d 369 (1974).
17. *Id.* at 630.
18. *Id.* at 630–631.

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The "Pesh Mesh"—What It Is and What You Can Do About It

By David M. Wirtz and Dan Messeloff

David M. Wirtz

The following accusation appeared in a recent publication: "*These People Haven't Got A Clue About Their Safety Obligations.*" Who are the "people" who supposedly have no clue? The trustees and manager, of course.

The charge is inflammatory and harsh. Unfortunately, it is a charge that can be leveled at many other public employers in this state. If you don't have your "MSDSs" in order, or if your "PRCSs" aren't labeled, or if you cannot produce upon demand a written "Hazard Communication Program," a written "Energy Control Plan," a written "Hearing Conservation Program," a written "Rabies Exposure Control Program," a written "Lyme Disease Exposure Control Program," or if you haven't trained your employees on proper "PPEs" this year, or if you have yet to perform a certified "hazard assessment and equipment selection process," or if you have not set up an eyewash and safety shower station, then you are included among those many public employers who are subject to the charge that they "haven't got a clue."

"While remedying violations of PESH or OSHA regulations may appear to be costly, the cost is actually negligible compared to the sanctions, including monetary penalties, available to the government, and civil liability costs."

Much has been said and written in the last few years about the use of "safety" by private sector unions as an organizing tool. Less has been said in the public sector, where organizing is not as much of an issue, at least in New York. But if recent trends are any indication, public employee unions are coming to recognize that they have a powerful weapon in their arsenal—"PESHA" violations.

Dan Messleoff

PESHA (Public Employee Safety and Health Act)[1] is the state law that governs the workplace safety and health of public sector employees at the state and local levels. The state-run Public Employee Safety & Health Bureau (PESH) is a branch of the New York State Department of Labor. It is distinct from, but closely related to, the federal Occupational Safety & Health Administration (OSHA), which is the agency responsible for the enforcement of workplace safety and health guidelines in the private sector. PESH officials inspect workplaces, equipment, and employment practices and procedures to ensure compliance with PESH guidelines. Public employers who violate PESHA can find themselves subject to significant monetary penalties and other sanctions, not to mention inflammatory headlines.

With knowledge of these sanctions possibly in mind, public sector unions "invite" PESH officials to inspect workplaces for possible violations. While employees are permitted by law to bring any potential violation to the attention of a PESH official, it is often unions that have used PESH as a shield to protect members from unsafe working conditions. With growing frequency, however, unions are also using PESH as a sword, whether in response to or in anticipation of contentious labor relations, or simply to embarrass employers that they don't like for one reason or another. And if a PESHA complaint gets served on you and you think the unions have no influence on those in state government who are enforcing the statute, think again. As one state inspector recently told an employer: "Well, it seems reasonable to me, but the union would never tolerate it."

While remedying violations of PESH or OSHA regulations may appear to be costly, the cost is actually negligible compared to the sanctions, including monetary penalties, available to the government, and civil liability costs. This is not to mention the negative publicity that comes from having to defend

yourself as someone who does not care about safety. If the first requirements and acronyms set forth in the first paragraph seem daunting, in fact, much of what is required to achieve compliance is readily available.

While the laws can be very specific and technical, the following are some general guidelines on what needs to be done to achieve compliance:

What to Look For

Under OSHA's "general duty clause," which is made applicable to public employers through PESHA, "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[2] This clause, while extremely broad, nevertheless provides a helpful place from which to start. Public sector work sites range from subway tunnels to hospitals, and public employers should explore and inspect all aspects of all such worksites, whether the workplace is a public landfill or a public office building, for unsafe conditions and "recognized hazards." Employers must consider hazards that are plainly visible, such as broken or loose steps and faulty windows or unlabeled exit doors, as well as hazards that might not be visible, such as electrical systems (including wires, switches, outlets, fuses, and breakers), ventilation units, and fire alarm systems. Employers must also recognize and identify hazardous chemicals, which can take the form of solids (toner powder, carbon paper), liquids (oil-based paints, paint thinner, fuel, cleaning fluids), or gases (ammonia gas, vapors, carbon monoxide). Employers should be sure to inspect "common" chemicals as well, such as toners, for copy machines and computer printers, correction fluids, and glues to determine whether such materials are "hazardous."

What to Do

Generally, under PESHA and New York's "Right-to-Know" law,[3] employers are responsible for maintaining a safe working environment for their employees, and for instructing their employees on the dangers of hazardous materials in the workplace. The list of "hazardous materials" is broader than one might expect. Employers must inform employees of the possible health effects and hazards of all hazardous materials used by the employees, and inform the employees of their rights to such information. All employers are required to post both PESHA awareness and "Right-to-Know" posters in employee areas to describe the protections provided to employees under PESHA, or to direct employees where they may locate the necessary information. Employers must develop and implement a "Hazard Communication" program under OSHA and New York's "Right-to-Know" law. All public employees must be informed of the potential hazards of their workplace, and significantly, employees must be trained *annually* so that they will know how to use the chemicals, and how to respond to their misuse.

PESHA obligates public employers to undertake a litany of other measures as well. For example, hazardous chemicals must be labeled clearly and stored properly. Employers are responsible for making a list of all chemicals used, and contacting the supplier of each chemical to obtain the requisite Material Safety Data Sheets (MSDSs), so that employees may review the potential hazards of the chemicals they are using.

"All employers are required to post both PESHA awareness and 'Right-to-Know' posters in employee areas to describe the protections provided to employees under PESHA, or to direct employees where they may locate the necessary information."

Furthermore, if there are any "Permit-Required Confined Spaces" (PRCSs) on the job, such as sewers, steam pits, electrical pits, or underground vaults, these facilities must be assessed for potential hazards, and employees must be instructed on how to work in or around such spaces. All entrances must be marked clearly with warning signs, prohibiting unauthorized employees from entering.

All employers must also develop and implement an Emergency Action Plan (EAP), and train employees on the proper response to fires, chemical spills, and other emergencies.

To round out some of the examples of employers' obligations under PESHA mentioned earlier in this article, Energy Control Plans must be implemented, and equipment-specific energy control plans must be established, for all pieces of equipment that could start unexpectedly and injure employees working on or around the equipment. The term "equipment" includes all motorized vehicles, heavy machinery, and certain power tools, as well as other tools. All employees who work in certain inherently hazardous positions must be outfitted with Personal Protective Equipment (PPE), to reduce the risk of injury. Positions requiring PPE include practically all

maintenance workers and mechanics, and many other types of positions. Each employee whose work requires PPE must be provided with the necessary equipment, and each employee must also be trained in the proper use and storage of the PPE.

"And remember that if you think you were *in compliance, but you have not done anything affirmatively in this area for a year, then you are* not now *in compliance. "*

There are many reasons for compliance with PESHA, including avoidance of government sanctions and leverage in labor relations. Employees have the right to refuse to subject themselves "to serious injury or death arising from a hazardous condition at the workplace," so a PESHA-noncompliant workplace is ultimately an unproductive workplace. That being said, PESHA is a lengthy, complicated, and highly technical piece of legislation, and while the suggestions above might reduce or eliminate certain hazards, each workplace will be scrutinized for case-specific violations. And remember that if you think you *were* in compliance, but you have not done anything affirmatively in this area for a year, then you are *not now* in compliance.

In sum, *before* the union files a complaint, or threatens to do so, or if you have doubt about your level of PESHA compliance, be certain you are in compliance. And if you are not certain, contact either your local Department of Labor office or an experienced professional, whether a health inspector or a lawyer familiar with the requirements, for guidance and supervision. By doing so, you can avoid putting yourself on the defensive on safety issues and subjecting yourself to the charge that you "don't have a clue."

Endnotes

1. N.Y. Labor Law § 27-a.
2. 29 U.S.C. § 654(a)(1).
3. N.Y. Labor Law art. 28.

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Local Laws and Agricultural Districts: Guidance for Local Governments and Farmers

By John Rusnica

Introduction

Counties, towns and villages in New York State have broad powers to enact laws to govern their own affairs. However, state laws impose certain restrictions on local government authority. One such restriction is found in Agriculture and Markets Law (AML) § 305-a. The New York State Department of Agriculture and Markets has prepared guidelines which address a number of agricultural practices and issues to assist municipalities in drafting and administering local laws and ordinances which may affect farming in an agricultural district.[1] The latest document is "Guidelines for Review of Local Zoning and Planning Laws," which is reprinted in its entirety. Also reprinted is a Department cover document to all of the guidelines, which are available on the Department's website at http://www.agmkt.state.ny.us.

Enabling Authority

Article XIV, section 4 of the New York State Constitution, added in 1970, provides that the policy of the state shall be to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products, and states that the legislature, in implementing this policy, shall include adequate provision for the protection of agricultural lands. Shortly thereafter, in 1971, the Agricultural Districts Law, Agriculture and Markets Law Article 25-AA, was enacted implementing that policy. Section 305-a of Article 25-AA contains the following mandate:

> Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.

For purposes of AML § 305-a, subdivision 1, "Farm operation" means:

> . . . the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a 'commercial horse boarding operation' as defined in subdivision thirteen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

The definition of "crops, livestock and livestock products" is contained in AML § 301(2).

The brochure *Local Laws and Agricultural Districts: How Do They Relate?* was prepared by the Department to assist municipalities in drafting and administering local laws and ordinances which may affect farming in an agricultural district. The brochure also offers guidance to farmers on the application of AML § 305-a. Local governments and farmers are encouraged to review that document for information on the procedure for requesting Department assistance as well as general discussion of the law. The following guidelines provide more details on the application of AML § 305-a to several common agricultural topics. However, they should not be substituted for legal advice from a municipality's attorney. The Department hopes that this information will assist local governments and farmers in resolving issues that may impact farm operations within their communities.[2]

General Information

In examining whether a local law is unreasonably restrictive, the Department of Agriculture and Markets considers several factors, including, but not limited to: whether the requirements adversely affect the farm operator's ability to manage the farm operation effectively and efficiently, whether the requirements restrict production options which could affect the economic viability of the farm, whether the requirements will cause a lengthy delay in the construction of a farm building or implementation of a practice, the cost of compliance for the farm opera-

tion affected, and the availability of less onerous means to achieve the locality's objective. The Department also takes into account any relevant standards established under state law and regulations. Where local standards have exceeded the state standards, the Department has, in many instances, found the local laws to be unreasonably restrictive. Each law, however, is examined on its own merits. If a local government believes that local conditions warrant standards that differ from the state's, the Department considers those conditions in evaluating whether the local standards are unreasonably restrictive.

The Department recognizes and encourages the efforts of some local governments to comply with AML § 305-a by providing a Right to Farm exemption, for example, stating that "[n]othing contained herein shall be deemed to limit the right to farm as set forth in Article 25-AA of the NYS Agriculture & Markets Law. . . ." Such local laws often further provide that no "sound agricultural practice" as defined in Article 25-AA shall be deemed prohibited under the ordinance or subject to its permit requirements. This provision could be problematic for both the local government and farm operations. AML § 308 (New York's Right to Farm law) does not define "sound agricultural practices." The Department does not make prospective judgments on agricultural practices and has not defined what constitutes a sound agricultural practice. Section 308 requires that agricultural practices be evaluated on a case-by-case basis. Department staff review each practice, for which an opinion is requested, on its own merit and a Commissioner's Opinion only examines the condition and management of the practice in effect at the time of the review. Further, the absence of an opinion from the Commissioner does not mean that a particular practice is unsound.

Under the procedures followed by the Department in conducting sound agricultural practice reviews, generally staff consult the landowner, neighbors, state and local agencies, pertinent literature and experts in the particular field of interest. The landowner whose practice is under review generally needs to be a willing participant for the Department to fully evaluate a practice and reach a valid conclusion as to its soundness. Information regarding management of the practice and grant of access to the farm premises is usually needed from the farmer. The review process is time-consuming and generally takes from six to twelve months before an opinion is issued. To require a farmer to obtain an opinion to avoid prosecution or permitting under the local law would be unduly burdensome and, generally, unreasonably restrictive.

Guidelines for Review of Local Zoning and Planning Laws

Background and Objective

As communities adopt or amend zoning regulations, potential conflicts between farm operations and local land use controls may increase. This, coupled with continuing exurban development pressures on many of the state's agricultural communities, increases the need to better coordinate local planning and the agricultural districts program, and to develop guidelines to help address conflicts which may occur. Proactively, guidelines can aid in crafting zoning regulations by municipalities with significant farming activities.

Zoning and Farm Operations: Practical Limitations and Problems

Farms are host to several discrete but interdependent land uses which may include barns, commodity sheds, farm worker housing, garages, direct farm markets, silos, manure storage facilities, milking parlors, stables, poultry houses and greenhouses, to name but a few. The typical zoning regulation, in addition to establishing minimum lot sizes and separations between uses, often prohibits more than one "principal" structure on each parcel of record. Many zoning devices, then, are unable to distinguish between on-farm structures as part of a *farm operation* from the same building when it is used for an independent, freestanding use.

The minimum separation and "yard" requirements of zoning are designed to avoid over-concentration, maintain adequate spaces for light and air, and to reduce fire hazard in more urban environments. The application of such requirements to suburban and rural communities and farm operations often results in the unintended regulation of farm operations and uses not as an integrated whole, but as separate improvements.

The rapidly changing nature of the agricultural industry does not always allow zoning and the comprehensive planning process to keep pace. This can result in the application of outdated regulations to contemporary land uses and gives rise to potentially unreasonable restrictions. Local governments may run afoul of the letter and intent of the Agricultural Districts Law by limiting the type and intensity of agricultural uses in their communities and by narrowly defining "farm" or "agricultural activity." This is sometimes problematic even in municipalities with a significant base of large, "production"-level farming operations. Inadequately defined terms also give rise to conflict between the zoning device and farm operations.

Because of the inherent nature of zoning, there is essentially no discrete administrative authority to waive its standards, even when those standards are at variance with the community's land use policy and what may be deemed its "intent." A municipal zoning board of appeals may, consistent with specific tests found in Town, Village and City Law, vary the use and area standards of a zoning regulation, and reverse or affirm determinations of the zoning administrative official. Such a remedy, i.e., an area or use variance, may, however, in and of itself be considered "unreasonably restrictive" if it is the only means available to establish, expand or improve a "farm operation" in a county-adopted, state-certified agricultural district.

These and other limitations and problems that can lead to AML § 305-a violations may be avoided in the first instance by sound comprehensive planning. The Town Law, Village Law, General City Law and the Agricultural Districts Law are designed to encourage coordination of local planning and land use decision making with the agricultural districts program.

Agricultural Districts and County Agricultural and Farmland Protection Plans: Their Influence on the Municipal Comprehensive Plan and the Zoning Process

The preparation, adoption and administration of a municipal comprehensive plan and zoning regulation are not independent actions of local government, but should be part of a well-thought-out, seamless process. A zoning regulation is, in the final analysis, simply a device to implement the community plan and, in fact, ". . . must be in accordance with a comprehensive plan. . . ."[3]

The state legislature has codified the intent, definition and content of the comprehensive plan (Town Law § 272-a, Village Law § 7-722 and General City Law § 28-a). In so doing, the legislature has given significant status to "agricultural uses" in general, and state-certified agricultural districts and county agricultural and farmland protection plans created under Agriculture and Markets Law Articles 25-AA and 25-AAA in particular. Town Law § 272-a(9) requires agricultural review and coordination with the comprehensive planning process:

> A town comprehensive plan and any amendments thereto, for a town containing all or part of an agricultural district or lands receiving agricultural assessments within its jurisdiction, shall continue to be subject to the provisions of article twenty-five-AA of the agriculture and markets law relating to the enactment and administration of local laws, ordinances, rules or regulations. A newly adopted or amended town comprehensive plan shall take into consideration applicable county agricultural and farmland protection plans as created under article twenty-five-AAA of the agriculture and markets law.

(The same language is found in Village Law and General City Law.)

Thus, the statutory influence the Agricultural Districts Law and the Agricultural and Farmland Protection programs have on the comprehensive planning process and zoning regulations is significant. State-certified agricultural districts and county agricultural and farmland protection plans are community-shaping influences in much the same way as existing and proposed infrastructure; wetlands, floodplains, topographical features; cultural, historic and social amenities; and economic needs, etc. are viewed. The Agricultural Districts Law is a valuable planning tool to conserve, protect and encourage the development and improvement of the agricultural economy; protect agricultural lands as valued natural and ecological resources; and preserve open space.

In addition to AML § 305-a, limitations on local authority in Town Law § 283-a and Village Law § 7-739 were enacted to ensure that agricultural interests are taken into consideration during the review of specific land use proposals. Town Law § 283-a(1) and Village Law § 7-739(1), as recently amended by Chapter 331 of the Laws of 2002, require local governments to

> ". . . exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm operations in contravention of the purposes of article twenty-five-AA of the agriculture and markets law, unless it can be shown that the public health or safety is threatened."

The recent amendments make the Town and Village Law provisions consistent with AML § 305-a regarding showing a threat to the public health or safety. AML § 305-a, subdivision 1 is not a standalone requirement for coordination of local planning

and land use decision making with the agricultural districts program. Rather, it is one that is fully integrated with the comprehensive planning, zoning and land use review process.

Application of Local Laws to Farm Operations Within Agricultural Districts

In general, the construction of on-farm buildings and the use of land for agricultural purposes should not be subject to site plan review, special use permits or non-conforming use requirements when conducted in a county-adopted, state-certified agricultural district. The purpose of an agricultural district is to encourage the development and improvement of agricultural land and the use of agricultural land for the production of food and other agricultural products as recognized by the New York State Constitution, Article XIV, section 4. Therefore, generally, agricultural uses and the construction of on-farm buildings as part of a farm operation should be allowed uses when the farm operation is located within an agricultural district.

Town Law § 274-b, subdivision 1 allows a town board to authorize a planning board or other designated administrative body to grant special use permits as set forth in a zoning ordinance or local law. "Special use permit" is defined as ". . . an authorization of a particular land use which is permitted in a zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Agricultural uses in an agricultural district are not, however, "special uses." They are constitutionally recognized land uses which are protected by AML § 305-a, subdivision 1. Further, agricultural districts are created and reviewed locally through a process which includes public notice and hearing, much like zoning laws are adopted and amended. Therefore, absent any showing of an overriding local concern, generally, an exemption from special use permit requirements should be provided to farm operations located within an agricultural district.

The application of site plan and special permit requirements to farm operations can have significant adverse impacts on such operations. Site plan and special permit review, depending upon the specific requirements in a local law, can be expensive due to the need to retain professional assistance to certify plans or simply to prepare the type of detailed plans required by the law. The lengthy approval process in some local laws can be burdensome, especially considering a farm's need to undertake management and production practices in a timely and efficient manner. Site plan and special permit fees can be especially costly for start-up farm operations.

Generally, farmers should exhaust their local administrative remedies and seek, for example, permits, exemptions available under local law or area variances before the Department reviews the administration of a local law. However, an administrative requirement/process may, itself, be unreasonably restrictive. The Department evaluates the reasonableness of the specific requirement/process, as well as the substantive requirements imposed on the farm operation. The Department has found local laws which regulate the health and safety aspects of the construction of farm buildings through provisions to meet local building codes or the state Building Code (unless exempt from the state Building Code[4]) and Health Department requirements not to be unreasonably restrictive. Requirements for local building permits and certificates of occupancy to ensure that health and safety requirements are met are also generally not unreasonably restrictive.

Site Plan Review for Farm Operations Within an Agricultural District

Many local governments share the Department's view that farm operations should not have to undergo site plan review and exempt farms from that requirement. However, the Department recognizes the desire of some local governments to have an opportunity to review agricultural development and projects within their borders, as well as the need of farmers for an efficient, economical, and predictable process. In view of both interests, the Department developed a model streamlined site plan review process which attempts to respond to the farmers' concerns while ensuring the ability to have local issues examined. The process could be used for farm buildings and structures (new and significant expansions) proposed for a site, but should not be required for non-structural agricultural uses. For example, to require farm operations in an agricultural district to undergo site plan review to engage in the production, preparation and marketing of crops, livestock and livestock products, would generally be unreasonably restrictive.

The authorizing statutes for requiring site plan review are quite broad and under "home rule" municipalities retain significant flexibility in crafting specialized procedures (e.g., the selection of a reviewing board; uses which trigger submission of site plans; whether to have a public hearing and the length of time to review an application). Town Law § 274-a and Village Law § 7-725-a define a site plan as "a rendering, drawing, or sketch prepared to specifications and containing necessary elements as set

forth in the applicable zoning ordinance or local law which shows the arrangement, layout and design of the proposed use of a single parcel of land. . . ." These sections of law further outline a list of potential site plan elements including parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses, as well as additional elements.

Many municipalities have also added optional phases to the site plan review. While a preliminary conference, preliminary site plan review and public hearings may assist the applicant earlier in the review process and provide the public an opportunity to respond to a project, they can result in a costly delay for the farmer.

For the sake of simplicity, the model site plan process and the following guidance presume that the planning board is the reviewing authority.

Site Plan Process

The applicant for site plan review and approval shall submit the following:

1. Sketch of the parcel on a location map (e.g., tax map) showing boundaries and dimensions of the parcel of land involved and identifying contiguous properties and any known easements or rights-of-way and roadways.

   Show the existing features of the site, including land and water areas, water or sewer systems and the approximate location of all existing structures on or immediately adjacent to the site.

2. Show the proposed location and arrangement of buildings and uses on the site, including means of ingress and egress, parking and circulation of traffic.

3. Sketch of any proposed building, structure or sign, including exterior dimensions and elevations of front, side and rear views. Include copies of any available blueprints, plans or drawings.

4. Provide a description of the project and a narrative of the intended use of such proposed buildings, structures or signs, including any anticipated changes in the existing topography and natural features of the parcel to accommodate the changes. Include the name and address of the applicant and any professional advisors. If the applicant is not the owner of the property, provide authorization of the owner.

5. If any new structures are going to be located adjacent to a stream or wetland, provide a copy of the floodplain map and wetland map that corresponds with the boundaries of the property.

6. Application form and fee (if required).

If the municipality issues a permit for the structure, the Code Enforcement Officer (CEO) determines if the structures are subject to and comply with the local building code or New York State Uniform Fire Prevention and Building Code prior to issuing the permit. Similarly, the Zoning Enforcement Officer (or the CEO in certain municipalities) would ensure compliance with applicable zoning provisions.

The Department urges local governments to take into account the size and nature of the particular farm buildings and structures when setting and administering any site plan requirements for farm operations. The review process, as outlined above, should generally not require professional assistance (e.g., architects, engineers or surveyors) to complete or review and could be completed relatively quickly.[5] The Department understands, however, that in some cases, a public hearing and/or a more detailed review of the project which may include submission of a survey, architectural or engineering drawings or plans, etc., may be necessary. The degree of regulation that may be considered unreasonably restrictive depends on the nature of the proposed activities, the size and complexity of the proposed buildings or structures and whether a state agricultural exemption applies.

Time Frame for Review and Decision

Town Law § 274-a and Village Law § 7-725-a require that a decision on a site plan application be made within a maximum of 62 days after receipt of the application or date of a public hearing, if one is required. Town and Village Law authorize town boards and village boards of trustees to adopt public hearing requirements, and local laws often provide planning boards with the discretion whether to hold a public hearing. The Department recommends that if the municipality requires that construction of farm buildings and structures within a state-certified agricultural district undergo site plan review, that the review and decision be expedited within 45 days, with no public hearing. The Department recognizes that the Town Law allows municipalities to determine which uses must undergo site plan review, the time frame for review (within the 62 day maximum), and whether to conduct a public hearing. A protracted review of most agricultural projects could, how-

ever, result in significant economic impacts to farmers.

The process outlined above affords the community an opportunity to examine a proposed agricultural project and to evaluate and mitigate potential impacts in light of public health, safety and welfare without unduly burdening farm operations. Of course, the "process" must also be administered in a manner that does not unreasonably restrict or regulate farm operations. For example, conditions placed upon an approval or the cost and time involved to complete the review process could be unreasonably restrictive.

Agricultural Exemptions

State Environmental Quality Review—Agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with "generally accepted principles of farming" are designated as Type II actions which do not require preparation of an Environmental Assessment Form (EAF) and are not subject to compliance with State Environmental Quality Review (SEQR).[6] The SEQR regulations require localities to recognize the Type II actions contained in the statewide list.

New York State Uniform Fire Prevention and Building Code—While farmers must comply with local requirements which regulate health and safety aspects of the construction of farm buildings, many farm buildings are exempt from the state Uniform Fire Prevention and Building Code ("Uniform Code"). The Uniform Code recently underwent major revisions and now is comprised of seven subcodes (the Building Code, Fire Code, Residential Code, Plumbing Code, Mechanical Code, Fuel Gas Code, and the Property Maintenance Code). The exemption for agricultural buildings has been incorporated in the following portions of the revised Uniform Code and the Energy Conservation Construction Code, which became fully effective on January 1, 2003:

- Agricultural building is defined in section 202 of the Building Code as "A structure designed and constructed to house farm implements, hay, grain, poultry, livestock, or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged, nor shall it be a place used by the public."
- Building Code § 101.2(2) provides an exemption from the Building Code for "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation."
- Section 102.1(5) of the Fire Code of New York State provides that "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation" are exempt from the provisions of the Fire Code pertaining to construction but are subject to applicable requirements of fire safety practice and methodology.
- Section 101.4.2.5 of the Energy Conservation Construction Code (ECCC) exempts "nonresidential farm buildings, including barns, sheds, poultry houses and other buildings and equipment on the premises used directly and solely for agricultural purposes" from the provisions of the ECCC.

The above briefly highlights the agricultural buildings exemptions. Any specific questions regarding the interpretation and applicability of the revised state Uniform Fire Protection and Building Code should be directed to the Department of State's Codes Division at (518) 474-4073.

Professionally Stamped Plans—Education Law § 7209(1) provides that no official of the state or any city, county, town or village charged with the enforcement of laws, ordinances or regulations may accept or approve any plans or specifications that are not stamped with the seal of an architect, professional engineer, or land surveyor licensed or authorized to practice in the state. Thus, where local laws, ordinances or regulations require that plans and specifications for private construction be accepted or approved, they may not be accepted or approved without the required seal, subject to the exceptions set forth in the statute.[7]

However, the exceptions contained in Education Law § 7209(7)(b) include "farm buildings, including barns, sheds, poultry houses and other buildings used directly and solely for agricultural purposes." As a result, plans and specifications for such buildings are not required to be stamped by an architect, professional engineer or land surveyor.[8]

Against this backdrop, specific guidelines for review of zoning and planning regulations by local governments and the Department can best be understood.

Generic Review Guidelines

Generic reviews are those of entire zoning regulations or sections of zoning regulations that impact

the municipality's farm community as a class or several farm operations in the same way. Examples of actions which might result in a generic review include the adoption or administration of an entirely new or substantially amended zoning regulation that results in a material change in the use and area standards applied to farm operations in a state-certified agricultural district. In such cases, the Department recommends that the municipality ask itself the following questions:

- Do the regulations materially limit the definition of farm operation, farm or agriculture in a way that conflicts with the definition of "farm operation" in AML § 301, subdivision 11?
- Do the regulations relegate any farm operations in agricultural districts to "non-conforming" status?
- Is the production, preparation and marketing of any crop, livestock or livestock product as a commercial enterprise materially limited, restricted or prohibited?
- Are certain classes of agriculture subject to more intensive reviews or permitting requirements than others? For example, is "animal agriculture" treated differently than crop production without demonstrated links to a specific and meaningful public health or safety standard designed to address a real and tangible threat?
- Are any classes of agricultural activities meeting the definition of "farm operation" subject to special permit, site plan review or other original jurisdiction review standard over and above ministerial review?
- Are "farm operations" subject to more intensive reviews than non-farm uses in the same zoning district?
- Are "farm operations" treated as integrated and interdependent uses, or collections of independent and competing uses on the same property?
- Is the regulation in accordance with a comprehensive plan and is such a plan crafted consistent with AML Article 25-AA as required by law?

If the answer to any of the first six questions is "yes," or if the answer to either of the last two is "no," the zoning regulations under review are likely to be problematic and may be in violation of AML § 305-a, subdivision 1. Certainly such regulations would appear to be on their "face" inconsistent with the statutory requirement that *"Local governments . . . shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25AA-Agricultural Districts]."*

Guidelines for Site Specific Reviews

AML § 305-a zoning case reviews often involve application of zoning regulations to a specific farm operation. Such cases typically result from applying the site plan, special use permit, use or non-conforming use sections, yard requirements, or lot density sections of the municipal zoning device to an existing farm operation.

These cases often evolve because although the zoning regulation may appear to be consistent with the agricultural districts law, its application to a specific issue or set of facts is not. In such cases, the Department recommends that the municipality ask itself the following questions:

- Is the zoning regulation or restriction being applied to a use normally and customarily associated with a "farm operation" as defined in AML Article 25-AA?
- Does the regulation or restriction materially limit the expansion or improvement of the operation without offering some compelling public benefit?
- Is the regulation or restriction applicable to the specific farm operation in question or, under the same circumstances, would it apply to other farm operations in the community?
- Does the zoning regulation impose greater regulation or restriction on a use or farming activity than may already be imposed by state or federal statute, rule or regulation?
- Is the regulation or restriction the result of legislative action that rendered the farm operation a "non-conforming use"?

If the answer to any of these questions is "yes," then the zoning regulation or restriction under review is likely to be problematic and may be in violation of the statutory prohibitions against unreasonably restrictive regulation of farm operations in an agricultural district, unless a threat to the public health or safety is demonstrated.

Guidance on Specific Zoning Issues

The following are some specific factors that the Department considers when reviewing local zoning laws[9]:

A. Minimum and Maximum Dimensions

Generally the Department will consider whether minimum and maximum dimensions imposed by a local law can accommodate existing and/or future farm needs. For example, many roadside stands are located within existing garages, barns, and outbuildings that may have dimensions greater than those set by a local ordinance. Also, buildings specifically designed and constructed to accommodate farm activities may not meet the local size requirements (e.g., silos and barns which may exceed maximum height limitations). The size and scope of the farm operation should also be considered. Larger farms, for example, cannot effectively market their produce through a traditional roadside stand and may require larger farm markets with utilities, parking, sanitary facilities, etc.

B. Lot Size

Establishing a minimum lot size for farm operations within a zoning district that includes land within a state-certified agricultural district might be unreasonably restrictive. The definition of "farm operation" in AML § 301, subdivision 11 does not include an acreage threshold. Therefore, the Department has not set a minimum acreage necessary for protection under AML § 305-a and conducts reviews on a case-by-case basis. For example, a nursery/greenhouse operation conducted on less than 5 or 10 acres may be protected as a "farm operation" under section 305-a if the operation is a "commercial enterprise" and more than a hobby farm.

For agricultural assessment purposes, however, AML § 301, subdivision 4 states that a farm must have "land used in agricultural production" to qualify (either seven or more acres and gross sales of an average of $10,000 or more in the preceding two years *or* have less than seven acres and average gross sales of more than $50,000 in the preceding two years). A recent amendment to AML § 301, subdivision 4 also provides for an agricultural assessment on seven or more acres which has *annual* gross sales of $10,000 or more ". . . when such land is owned or rented by a newly established farm operation in the first year of operation."[10]

Local requirements for minimum lot sizes for farm buildings raise concerns similar to those involving minimum and maximum building dimensions. A farmer may be unable to meet a minimum lot size due to the configuration of the land used for production or lying fallow as part of a conservation reserve program. The need to be proximate to existing farm roads, a water supply, sewage disposal and other utilities is also essential. Farm buildings are usually located on the same property that supports other farm structures. Presumably, minimum lot size requirements are adopted to prevent over-concentration of buildings and to assure an adequate area to install any necessary utilities. Farm buildings should be allowed to be sited on the same lot as other agricultural use structures subject to the provision of adequate water and sewage disposal facilities and meeting minimum setbacks between structures.

C. Setbacks

Minimum setbacks from front, back and side yards for farm buildings have not been viewed as unreasonably restrictive unless a setback distance is unusually long. Setbacks that coincide with those required for other similar structures have, in general, been viewed as reasonable.

A farm operation's barns, storage buildings and other facilities may already be located within a required setback, or the farm operation may need to locate new facilities within the setback to meet the farm operation's needs. Also, adjoining land may consist of vacant land, woodland or farmland. The establishment of unreasonable setback distances increases the cost of doing business for farmers because the infrastructure needed to support the operation (e.g., water supply, utilities and farm roads) is often already located within, and adjacent to, the farmstead area or existing farm structures. Setbacks can also increase the cost of, or make it impracticable to construct, new structures for the farm operation.

D. Sign Limitations

Whether or not a limitation on the size and/or number of signs that may be used to advertise a farm operation is unreasonably restrictive of a farm operation depends upon the location of the farm and the type of operation. A farmer who is located on a principally traveled road probably will not need as many signs as one who is located on a less traveled road and who may need directional signs to direct the public to the farm. The size of a sign needed may depend on whether the sign is used to advertise the farm's produce or services (e.g., for a commercial horse boarding operation) as part of the farm's direct marketing, or just for directional purposes.

E. Maximum Lot Coverage

Establishing a maximum lot coverage that may be occupied by structures may be unreasonably restrictive. For example, it may be difficult for horticultural operations to recoup their investment in the purchase of land if they are not allowed to more fully utilize a lot/acreage for greenhouses. Farm opera-

tions within an agricultural district should be allowed the maximum use of available land, consistent with the need to protect the public health or safety. Generally, if setbacks between buildings are met and adequate space is available for interior roads, parking areas (where required), and safe operation of vehicles and equipment, health and safety concerns are minimized.

F. Screening and Buffers

Some municipalities impose buffer requirements, including setbacks where vegetation, landscaping, a wall or fencing is required to partially or completely screen adjacent land uses. Often, the buffer area cannot be used or encroached upon by any activities on the lot. Requirements for buffers or setbacks to graze animals, construct fences and otherwise use land for agricultural purposes are generally unreasonably restrictive.

Buffers and associated setbacks may require farmers to remove land from production or otherwise remove land from use for the farm operation. The impact on nursery/greenhouse operations is especially significant since they are often conducted on smaller parcels of land. Maintenance of the buffer also creates a hardship to the landowner. If a setback is required for fencing, the farmer may have to incur the expense of double fencing the perimeter of the property, or portion thereof, to prevent encroachment by neighboring property owners.

A requirement to screen a farm operation or agricultural structures such as farm labor housing or greenhouses from view has been found by the Department to be unreasonably restrictive. Screening requirements suggest that farm operations and associated structures are, in some way, objectionable or different from other forms of land use that do not have to be screened. Farmers should not be required to bear the extra costs to provide screening unless such requirements are otherwise warranted by special local conditions or necessary to address a threat to the public health or safety. While aesthetics are an appropriate and important consideration under zoning and planning laws, the purpose of the Agricultural Districts Law is to conserve and protect agricultural lands by promoting the retention of farmland in active agricultural use.

For information concerning program and agricultural issues, Dr. Robert Somers, Chief of the Agricultural Protection Unit, may be contacted at (518) 457-2713; e-mail: Bob.Somers@agmkt.state.ny.us. Attorneys who have legal questions on AML § 305-a and Article 25-AA may contact John Rusnica, Associate Attorney at (518) 457-2449; e-mail: John.Rusnica@agmkt.state.ny.us.

Endnotes

1. Available Guidance Documents
    1. Application to Request a Review Pursuant to Section 305-a of the AML.
    2. Brochure entitled "Local Laws and Agricultural Districts: How Do They Relate?"
    3. Guideline for Review of Local Laws Affecting Farm Worker Housing.
    4. Guideline for Review of Local Laws Affecting Nutrient Management Practices (i.e., Land Application of Animal Waste, Recognizable and Non-recognizable Food Waste, Sewage Sludge and Septage, Animal Waste Storage/Management).
    5. Guideline for Review of Local Laws Affecting On-Farm Open Burning.
    6. Guideline for Review of Local Laws Affecting the Control of Farm Animals.
    7. Guideline for Review of Local Laws Affecting Farm Operations' Use of Wetlands.
    8. Guideline for Review of Local Laws Affecting Direct Farm Marketing Activities.
    9. Guideline for Review of Local Laws Affecting On-Farm Composting Facilities.
    10. Guideline for Review of Local Laws Affecting Temporary Greenhouses.
    11. Guideline for Review of Local Zoning and Planning Laws.
    12. Guideline for Review of Local Laws Affecting Commercial Horse Boarding Operations (under development).
2. Local laws and their administration are reviewed on a case-by-case basis. These guidance documents are intended to inform local governments and farmers generally of how the Department interprets and applies AML § 305-a. The facts and circumstances of each particular matter are addressed uniformly and in accordance with applicable statutory requirements.
3. Town Law § 272-a(11)(a).
4. A discussion of the New York State Uniform Fire Prevention and Building Code follows below.
5. Please see discussion of Agricultural Exemptions below.
6. 6 N.Y.C.R.R. § 617.5(a), (c)(3). *See In re Pure Air and Water Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998), for application of the exemption to the manure management activities of a hog farm.
7. 1981 Op. Att'y Gen., Apr. 27 (Informal).
8. Similar requirements and exceptions are also provided in Education Law § 7307(1) and (5).
9. Please see other Department guidance documents for further information on issues related to specific types of farm buildings and practices.
10. AML § 301, subdivision 4.h. Laws of 2003, Chapter 479, effective Sept. 9, 2003.

John Rusnica is an Associate Attorney with the New York State Department of Agriculture and Markets.

Land Use Resources

The Land Use Law Center of Pace University School of Law has published 12 small books on local land use and conservation practices ("Starting Ground Series"). Each of these books responds to questions that have been asked by local officials, citizens, land developers, environmentalists, and their professional advisers in the dozens of training sessions, workshops, and conferences that the Center has conducted over the past five years.

Each book is a concise and readable summary of research papers prepared by professors, staff attorneys, or senior law students written in response to local questions. The books contain appendices including references to additional readings, New York statutes and cases, and other information that supplements the text's clear and concise description of the subject matter. Most of the books are about 100 pages in length.

These local leader guidebooks cover the following subjects:

Basics of Land Use Practice

This book explains how local governments regulate the development and conservation of the land. It covers planning, zoning, subdivision and site plan approval, special permits, permitted and accessory uses, and the basics of local board practice. It also explains how meetings are conducted and how development projects are approved, conditioned, or rejected.

Ground Rules: Answers to Common Smart Growth Questions

Over two dozen questions raised by local leaders concerning the implementation of smart growth practices are answered in a few pages. The book provides the reader with a clear understanding of strategic local responses to a host of local dilemmas: how to conserve open space, preserve farmland, develop growth districts, and use floating zones, overlay zoning, planned unit development districts, traditional neighborhood districts, and a variety of additional techniques to achieve the community's plan for its future.

Smart Growth Strategies

Smart growth is the current label applied to integrated strategies employed by localities to encourage growth in appropriate places and to preserve critical environmental areas. This complex subject is made understandable by clear descriptions of what smart growth is and how communities achieve it.

Smart Growth Case Studies

A good complement to Smart Growth Strategies, this book presents case studies of New York communities that have adopted noteworthy smart growth initiatives.

Local Environmental Strategies

New York law is unique in the nation for giving its 1600 local governments vast authority to protect the physical and visual environment. This book fully describes that authority and explains, in detail, how local governments can use it to protect specific environmental resources.

Local Environmental Ordinances

This book describes and contains extensive text of several local environmental ordinances adopted and enforced by communities in New York. It complements the reader's understanding of Local Environmental Strategies and illustrates precisely how local laws can protect environmental functions and natural resources—including the all-important matter of enforcing their provisions.

Environmental Review of Land Use Projects

New York's environmental review law provides local governments with broad authority to ensure that the environment is protected as projects are reviewed and approved by local land use agencies. It also provides local governments with the means of conducting area-wide environmental planning as well as streamlining the development review process in areas where development is encouraged.

Open Space Preservation

This book describes in detail how local governments have used their regulatory and financial authority to create comprehensive approaches to open space preservation. It explains how to attract widespread support for conservation practices and avoid regulatory takings challenges by treating landowners fairly. The book contains a chapter detailing how development affects the functioning of the environment: this helps local land use boards

understand how to approve development projects while retaining critical environmental benefits.

Meeting Housing Needs

Social and economic factors have caused a housing crisis in many parts of the state. While the need to accommodate young families, seniors, and the workforce has been mounting, local governments have been adopting a large number of strategies to meet their local housing needs. This book explains the relationship between comprehensive planning and achieving demographic balance and how a desirable balance of income groups, workers and retired, young and old can be achieved by effective local housing initiatives.

Intermunicipal Land Use Cooperation

New York leads the nation in providing local government with legal authority to create intermunicipal land use compacts and councils. These agreements are needed to manage intermunicipal environmental resources such as watersheds, to provide a vibrant regional economy, and to avoid border wars where projects in one community adversely impact others. In recent years, several groups of adjacent communities have formed land use councils to tackle critical intermunicipal land use issues. All of this is explained and illustrated.

Common Ground: Land Use Mediation

Local leaders, citizens, developers, and advocates report serious frustration with the traditional land use approval process, which often makes them adversaries and achieves compromised results that fail to meet the interests of the parties. Recent studies and real experiences with land use mediation show how the participants can use mediation methods to supplement the land use approval process and achieve much more satisfactory results when faced with controversial decisions. The recent success of consensus committees involving developers and those affected by their proposed projects is highlighted.

Significant Land Use Cases

New York courts have handed down a large number of cases over the years that define what local governments may and may not do to achieve their land use objectives. Whereas most summaries of court decisions are limited to recent cases, this book assembles the most significant appellate court cases in the state's history and describes them clearly so that lay readers and professionals can understand the state's judge-made law of development and conservation.

For more information on any of these books, please access our website at http://www.law.pace.edu/landuse/book_publications.html.

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