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A Message from the Chair

Robert B. Koegel

No doubt you've heard that our state attorney general is investigating attorneys who receive pension and other fringe benefits from the school districts they represent. It is alleged that some attorneys who are on a school district's payroll do no work whatsoever and others pile up excessive benefits from multiple districts. The attention is not just on waste and abuse. It is also directed at the means of providing legal services, by employment rather than by independent contracting. The notion is that it is never proper for a school district to hire an attorney on a part-time basis and pay salary and benefits, instead of a fee for services rendered. The scope of the investigation has reportedly been expanded to scrutinize the hiring practices of municipalities as well as school districts.

As a taxpayer, I'm as outraged by greed and corruption as the next guy, and I applaud the attorney general's effort to ferret out and prosecute fraud where it is found. But as a municipal lawyer, I know that municipalities have the right and obligation to retain legal services by the most effective and economical means. I also know that it is often a much better deal for municipalities and their taxpayers to employ an attorney for a relatively low salary plus benefits than to shell out that attorney's much-higher hourly billable rate for each item of work performed. To maintain otherwise not only impugns the character of diligent, undercompensated attorneys for municipalities, but also distracts the public from the real question, which is whether any particular hire has been influenced by unbridled cronyism.

The investigation has also spawned a state bill, S. 7820 / A. 10712. The bill would create an office of education legal services in the state department of law which would have the "power and duty" to provide "all" legal services required by all school districts, except for those districts in the six big cities (New York, Albany, Buffalo, Rochester, Syracuse, and Yonkers). The expenses of the new office would be a state charge. All covered school districts would be prohibited from "employing any legal counsel" and prohibited from spending any public funds to do so.

Replace the words "school districts" in the bill with the word "municipalities," and consider the consequences. Who would provide the legal review of all claims, contracts, and leases that face municipalities on a day-to-day basis? A state lawyer in Albany or in a regional office?

Inside

Who would provide legal guidance to public officials faced with a rogue police officer or a recalcitrant public works employee, or wonder whether a certain action is subject to SEQRA, or decide whether to pay for a sewer backup? Some anonymous state attorney? What about litigation? All handled by state attorneys?

What about the cost of this proposal? The bill's supporting memorandum asserts that the state's new office for legal services would ease property taxes and increase the effectiveness of the scholastic legal system. If this bill were extended to municipalities, wouldn't it mandate a far more inefficient way to provide legal services to them?

These are just practical considerations. A state law prohibiting public entities from retaining counsel of their choice must face constitutional and statutory impediments. For example, under Town Law § 20, a town can create a salaried office of the town attorney or employ an attorney to provide professional advice as the town may require. Should we repeal this way of doing business?

Perhaps this bill will go nowhere. Perhaps some kind of "reform" bill will be enacted. There's no way of knowing without following the legislation. Through active participation in our section, you can find out what bills are pending that affect your livelihood, discuss them with your peers, and participate in comments that may very well determine their outcome.

Let's hear from you.

Robert B. Koegel

From the Editor

Allegations of misconduct by municipal officials have become a staple of local media reporting. While public officials may have limited legal recourse for inaccurate or unfair accusations, two recent cases highlight circumstances that gave rise to defamation actions brought by government attorneys against the press.

In *Mann v. Abel*,[1] the New York Court of Appeals dismissed a libel action brought by Rye Town Attorney, Monroe Mann, against Westmore News and its founder, Bernard Abel, predicated upon an article written by Abel during a hotly contested election for the Rye Town Board. In the article, which appeared on the opinion page of the publication, Abel described Mann as a "political hatchet Mann" and as "one of the biggest powers behind the throne in the Town of Rye government." Abel wrote that it appeared that "Mann pulls the strings" in the Town and questioned whether Mann was "leading the Town of Rye to destruction."

The jury found that the statements were defamatory and were published either with knowledge of their falsity or with reckless disregard for their truth or falsity. Mann was awarded $75,000 in compensatory damages against the newspaper and punitive damages of $15,000 each against Abel and the newspaper.

On appeal, the Defendants argued that the statements were constitutionally protected opinion. While it is well settled that "expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation,"[2] the court's essential inquiry is to distinguish between facts and opinion.

Here, considering "the context of the communications as a whole," the Court of Appeals determined that the statements at issue were opinions and dismissed the complaint. In reaching this result, the Court opined:

> Although not dispositive, we note that the column was on the "opinion" page of the newspaper accompanied by an editor's note that the article was an expression of an opinion by the author. Moreover, the tenor of the column, including allegations that Mann was a "political hatchet Mann" who appeared to "pull [] the strings," clearly signals the reader that the piece is likely to be opinion, not fact. Likewise, the statement that Mann's actions were "leading the Town of Rye to destruction" could not be anything but a statement of opinion.[3]

The press was not so fortunate in a libel action brought by an associate corporation counsel of the City of Yonkers against *The Journal News Westchester*, a regional publication of the Gannett chain.[4] There, a staff writer wrote an article identifying the Plaintiff, Lawrence A. Porcari, Jr., as an attorney with the Yonkers Corporation Counsel's Office who had been sanctioned for frivolous conduct by a New York City judge. However, it was the Plaintiff's father Lawrence Porcari, also an attorney who maintained an office in Yonkers, who was sanctioned in the matter referred to in the article. A retraction and corrected follow up story was published the next day.

Nevertheless, Lawrence Porcari, Jr. filed a defamation suit against the reporter and the newspaper. The Supreme Court denied the Defendants' motion to dismiss the complaint and the Appellate Division affirmed that decision.

In its ruling, the Appeals Court found the lower court properly determined that the Defendants' statements could reasonably be construed as defamatory, insofar as they "tend to disparage the Plaintiff in his trade, business or profession" thereby obviating the need to plead or prove special damages. The Court also noted that the Plaintiff is not required to prove or plead actual malice because Plaintiff's "position as an associate corporation counsel, did not qualify as a 'public official' under the standard enunciated by the United States Supreme Court . . . in New York Times Co. v. Sullivan (376 U.S. 254)."[5] Rather, the Court stated, that as set forth in *Chapadeau v. Utica Observer – Dispatch*,[6] in a defamation action by a private person involving an issue of public concern, the plaintiff must plead and prove that "the publisher 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.'"[7] Finally, the Court also ruled that the "single instance rule" did not bar Plaintiff's claim. Under that rule, statements accusing a professional of ignorance on a single occasion, as opposed to a general lack of skill, are not defamatory on their face and thus not actionable absent proof of special damages. Here, the Court opined, the rule does

not apply because the defamatory statements "accuse the plaintiff of much more than a mere mistake, dereliction or lapse in judgment on a single occasion, as they indicate that he had been sanctioned by a judge for ongoing frivolous conduct and noncompliance with prior court orders."[8]

Aside from media scrutiny, attorneys representing public entities have now come under investigation by the New York State Attorney General and Comptroller's office. As discussed by Robert Koegel in his "A Message from the Chair," the hiring practices of school districts and municipalities are now being examined amidst charges of improper payments of public dollars for services not rendered or for excessive or duplicative benefits provided to part-time attorneys.

Also, in this issue of the *Municipal Lawyer*, Henry Hocherman and Noelle Crisalli of Hocherman Tortorella and Wekstein, LLP present their quarterly review of noteworthy land use cases. Of particular interest is their discussion of the Court of Appeals decision in *Riverkeeper v. Planning Board of the Town of Southeast*, which addressed several important SEQRA issues involving when a supplemental environmental impact statement is required, the standards for judicial review of that decision and the involved agency's obligation to solicit comments from other interested and involved agencies as part of its decision making process on whether a SEIS is required. The decision also addressed whether a lead agency must await another involved agency's permitting decision before exercising its judgment on the environmental issues underlying such permit.

In "Navigating through *Rapanos*: Delineating Where Lands End and Wetlands Begin," Dominic Cordisco of Drake Loeb Heller Kennedy Gogerty Gaba and Rodd PLLC examines the extent of federal jurisdiction over wetlands under the Clean Water Act as interpreted by the United States Supreme Court in *Rapanos v. United States* and other recent decisions. His article also discusses the current procedures for delineating federally regulated wetlands and for assessing the impact of a development project on endangered species.

Finally, Robert Freeman, Executive Director of the Committee on Open Government of the New York State Department of State, examines the interplay of the Freedom of Information Law and the Open Meetings Law with the operation of a local board of ethics and illustrates how these statutes afford ethics boards sufficient flexibility to effectively carry out their duties.

Lester D. Steinman

Endnotes

1. 10 N.Y. 3d 271 (2008).
2. *Id*.
3. *Id*.
4. *Porcari v. Gannett Satellite Information Network, Inc*. ___ A.D.2d ___ (2d Dep't 2008).
5. *Id*.
6. 38 N.Y.2d 196 (1975).
7. *See Porcari*, *supra* note 4.
8. *Id*.

Navigating Through *Rapanos*: Delineating Where Lands End and Wetlands Begin

By Dominic Cordisco

Introduction

Unlike wetlands regulated by the New York State Department of Environmental Conservation (NYSDEC), where an official map identifies the boundaries of what are regulated wetlands,[1] federal wetlands are regulated if they are connected to the "Waters of the United States."[2] Defining the "Waters of the United States," and, more particularly, the extent of federal regulation of non-navigable waters, has been an ongoing source of struggle and litigation that to this day remains difficult to determine. I will provide some history as to how this situation arose. I will discuss the current process for delineating federally regulated wetlands, and I will also discuss some current issues in endangered species protection.

Navigable Waters = The Waters of the United States

The federal Clean Water Act of 1972 ("CWA") is the basis for all federal regulation of wetlands today. However, the Clean Water Act does not expressly regulate wetlands, per se. Rather, § 404(a) of the Clean Water Act defines the scope of the federal government's regulation as "Navigable Waters." The Clean Water Act enlighteningly defines "Navigable Waters" as the "Waters of the United States." Certainly the concept that wetlands are regulated is not readily apparent in that circular definition. In order to understand how the words "Navigable Waters" and the "Waters of the United States" include non-navigable wetlands, then one must look at how the Clean Water Act was cobbled together, as well as the subsequent cases that have interpreted that language.

Generally speaking, the Commerce Clause of the United States Constitution provides the basis for the federal government to regulate activities that affect interstate commerce, even if the activity would appear to be primarily intrastate.[3] Without an effect on interstate commerce, the federal government's ability to regulate activities is extremely limited. The regulation of commerce naturally includes the regulation of trade routes. Navigable waterways have always been important trade routes subject to regulation by the federal government.

As a means of protecting trade routes, the U.S. Rivers and Harbors Act of 1899 prohibited the discharge of "refuse" into any "navigable water" or its tributaries, as well as the deposit of "refuse" on the bank of a navigable water "whereby navigation shall or may be impeded or obstructed" without first obtaining a permit from the Secretary of the Army.[4] Obviously, the federal government was rightly concerned that the placement of fill might obstruct navigation, and thus impede the flow of trade—all of which is reasonably within the scope of the federal government's authority under the Commerce Clause. As a result, the placement of fill in any "navigable water," tributaries to navigable water, or the banks of either, required a permit from the United States Army Corps of Engineers (ACOE).

"Defining the 'Waters of the United States,' and, more particularly, the extent of federal regulation of non-navigable waters, has been an ongoing source of struggle and litigation that to this day remains difficult to determine."

Seventy years later, when the federal government began drafting a series of laws intended to protect the environment, the federal government needed a Constitutional basis to regulate discharges that might not directly impede navigation, but would nevertheless adversely impact navigable waters. Thus, when drafting the Clean Water Act, the federal government merely extended its tested authority to regulate the placement of fill in navigable waters. However, this time the concern was not primarily the avoidance of obstacles that would impede trade, but rather the discharge of pollutants that would impact the health of the nation's environment. As a result, the Clean Water Act's regulation is defined solely as "navigable waters, which itself is defined as the 'Waters of the United States.'" It would be left to the ACOE, and the federal courts, to wrestle with defining where the federally regulated navigable waters end and private land begins.

The Supreme Court Gets Involved

The first Supreme Court case that dealt with the issue of defining the extent of federal wetland jurisdiction was the 1985 decision known as *Riverside Bayview*.[5] Riverside Bayview Homes, Inc. was a developer that owned 80 acres of "low-lying marshy land near the shores of Lake St. Clair in Macomb County, Michigan." In 1976, Riverside Bayview started placing fill to prepare the site for development.

The ACOE, which administers the federal government's regulation of wetlands under the Clean Water Act, brought suit to stop Riverside Bayview Homes from filling in these wetlands located near the shore of Lake St. Clair. Riverside Bayview Homes appealed, and took its appeal all the way to the United States Supreme Court. It claimed that non-navigable wetlands are not navigable waters, even if they lie adjacent to navigable waters.

The Supreme Court disagreed. In a unanimous opinion, the Supreme Court said:

> Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined.[6]

Thus, the Supreme Court clearly found that wetlands adjacent to navigable waters are regulated. But the unanswered question now became, how adjacent is adjacent? How far could it be from the regulated wetland to the nearest place one could put in a canoe?

The federal courts and the Supreme Court continued to wrestle with this issue. The next Supreme Court case to change the jurisdictional landscape of wetland regulation came about in 2001 in a decision known as the Solid Waste Agency of Northern Cook County, or SWANCC for short.[7] SWANCC was the agency overseeing solid-waste landfills in Cook County, Illinois, home of the City of Chicago. SWANCC selected an abandoned sand and gravel pit to serve as a much-needed landfill to meet the county's needs. The site had two man-made trenches that evolved into seasonal ponds that became home to some migratory birds. SWANCC proposed filling these man-made trenches. It is important to note that these man-made trenches were completely isolated from **any** navigable water.

Unlike *Riverside Bayview*, here the Supreme Court was split. Five justices, a majority, held that the completely isolated man-made trenches could not possibly fall within the meaning of "navigable waters":

> We decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within Illinois, meet § 404(a)'s definition of "navigable waters" merely because they serve as habitat for migratory birds.

While it may have been an unfortunate decision for the migratory birds, it was now clear that the meaning of "navigable waters" and wetlands "adjacent" to navigable waters had some limitation. As a result, the ACOE changed its practices to comply with the Supreme Court's decision in *SWANCC* by excluding from its oversight isolated, non-navigable wetlands. Nevertheless, the extent of the federal government's scope of regulation continued to spur litigation.

The latest Supreme Court case to tangle with the issue of where "navigable water" ends and land begins is known as *Rapanos*.[8] At the time of *Rapanos*, the ACOE's regulations interpreted "the waters of the United States" to include, in addition to "traditional interstate navigable waters";[9] "[a]ll interstate waters including interstate wetlands";[10] "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce";[11] "[t]ributaries of [such] waters";[12] and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands). . . ."[13] The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States.[14] It specifically provided that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[15]

In April 1989, John Rapanos backfilled wetlands on land in Michigan he wanted to develop. Mr. Rapanos filled four wetlands lying near man-made drainage ditches. The nearest body of navigable water was 11 to 20 miles away. Nevertheless, the ACOE argued that any connection to a navigable water, no matter how far, was sufficient to establish federal regulation on such non-navigable wetlands. This time, the Supreme Court was completely split. The justices wrote five separate opinions, with no single opinion supported by a majority of the Court.

Four justices, led by Justice Antonin Scalia in an opinion he authored, dismissed the ACOE's "any connection" theory in that the phrase "the waters of the United States . . . cannot bear the expansive meaning that the [ACOE] would give it."[16] Four other justices, in an opinion authored by Justice John Paul Stevens, opined that the Clean Water Act "authorizes the [ACOE] to require landowners to obtain permits from the Corps before discharging fill material into wetlands

adjacent to navigable bodies of water and their tributaries," regardless of how near or far from a traditionally navigable water.[17]

Thus, with four justices stating that the man-made trenches were not regulated because they were not adjacent to a navigable waterway, and four others declining to set an outer limit on adjacency, the Supreme Court was deadlocked. The deciding vote came from Justice Anthony Kennedy.

Justice Kennedy wrote his own opinion, in which he joined in the outcome of Justice Scalia's opinion—that the man-made trenches were not regulated—but not for Justice Scalia's reasoning. Rather, Justice Kennedy wrote that "absent more specific regulations, the Corps must establish a significant nexus on a **case-by-case** basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[18]

Because Justice Kennedy concurred in the opinion written by Justice Scalia and supported by three other justices, the Court now had a majority ruling that the man-made trenches were not federally regulated wetlands. However, with no majority agreement on the rationale for such a ruling, the ACOE and the rest of us must continue to grapple with the absence of a rule establishing how far federal jurisdiction extends upstream. This issue has not been clarified by the Supreme Court, nor has Congress taken action by amending the Clean Water Act. The issue is left open for interpretation, as well as implementation by the ACOE and the United States Environmental Protection Agency (EPA).

The ACOE Approval Process

On May 30, 2007 the ACOE and EPA came out with their own guidance which applies Justice Kennedy's "substantial nexus" rationale in determining whether a wetland is federally regulated.[19] Thus, the ACOE and EPA guidance, coupled with their new jurisdictional determination application forms, are used to determine whether a wetland has a substantial nexus to a traditional navigable water.

According to the ACOE,

> The [*Rapanos*] decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs.[20]

ACOE wetlands are not based on filed maps, unlike NYSDEC wetlands. If it's wet, and there is either an adjacent navigable water or a "substantial nexus" connecting the wetland to a "Water of United States," then it is regulated by the ACOE. The ACOE regulations define wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[21]

The current guidance from the ACOE now states that the ACOE will assert jurisdiction over the following:

> Traditional Navigable Waterways (TNWs); all wetlands adjacent to TNWs; non-navigable tributaries of TNWs that are relatively permanent (i.e., tributaries that typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such tributaries. In addition, the agencies will assert jurisdiction over every water body that is not an RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water body that are subject to CWA jurisdiction only if such a significant nexus is demonstrated are: non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent, non-navigable tributary. A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW. Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW, plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.[22]

Thus, if anything is clear, a case-by-case analysis is now required to define the limits of federal jurisdiction. The ACOE's jurisdictional determination form requires an analysis of every wetland and water from the wetland being delineated to the nearest navigable water.

In order to delineate the boundary of a federally regulated wetland, a wetland biologist, working with a surveyor, first identifies what he or she believes to be the boundary of the ACOE wetland by the placement of flags in the field. Then, ACOE staff is asked to verify the flagged wetland. If the ACOE agrees with the boundary, the ACOE will issue a jurisdictional determination (called a "JD") that the wetlands are regulated by the ACOE. This is similar to a wetland delineation from the NYSDEC; however, the ACOE issues a JD in the form of a letter, where the NYSDEC will sign a certified wetland delineation map. Currently, ACOE jurisdictional determinations are valid for five years.[23]

Figure A
Marbled Salamander
Ambystoma opacum

The jurisdictional determination is not a permit, however. Unlike the NYSDEC process, the ACOE has issued general permits, known as Nationwide Permits (NWPs), which apply to every project, provided that their conditions are met. Individual permits for disturbances greater than that permitted as part of an NWP may also be sought, but the time involved is substantially greater. All disturbances require review by the ACOE, and wetland mitigation on a two-for-one ratio may also be required.[24] A key difference between NYSDEC and ACOE wetlands is that for ACOE wetlands there is no (1) regulated buffer, or (2) minimum size. Thus, development can be located directly adjacent to the boundary of an ACOE wetland (unless it is a known endangered species habitat, discussed below).

Obtaining a JD from the ACOE is not the end of the process. Rather, most disturbances to regulated wetlands require the filing and review of a pre-construction notification (or "PCN") for coverage under one of the ACOE's NWPs. Coverage in excess of that allowed by the NWPs requires an individual permit from the ACOE. The ACOE NWP permit program under section 404(e) of the CWA authorizes specific activities that have minimal individual and cumulative impacts on the aquatic environment. The vast majority of ACOE authorized activities come under the NWP program. Recently, the ACOE reissued 34 activity-specific NWPs and added 6 new NWPs with a number of new and modified general conditions designed to protect the aquatic environment.[25]

The PCN is more than just a notification, however. It is, in all practical terms, an application for coverage under one of the NWPs. This means that it will be reviewed by ACOE staff. If ACOE staff determine that additional information is needed, then they will ask for it. From the time a complete submission is made, the ACOE staff have 30 days to determine whether additional information is required. If the ACOE does not respond to the PCN within 45 days, then the application is deemed approved. Note, however, that any other condition imposed by the NWPs must also be followed, even in the case of a default approval.

One of the other general conditions of the ACOE NWP review process requires coordination between the ACOE and the United States Fish & Wildlife Service (FWS) regarding protected species issues. Under current procedures, that means that an applicant must submit a habitat analysis for locally known protected species as part of each PCN application package.

Turtles, Bats and Fairy Wands

No, This Isn't a Wicked Witch Recipe

Larger developments, especially in rural areas, may be affected by the presence of a protected habitat, of both plants and animals. Endangered species protection is both a state and federal responsibility, involving both the NYSDEC and the FWS. There are three classifications: endangered, threatened, and species of special concern. Only species that have been classified as endangered or threatened are protected by the Endangered Species Act ("ESA"); species of special concern, (see Figure A) although not legally protected, are nevertheless often treated as protected by the Endangered Species Act, especially as part of the State Environmental Quality Review Act (SEQRA) process.

The Natural Heritage Program of the NYSDEC maintains maps showing the location of protected species. These maps are not available for public review. Instead, a request is submitted to NYSDEC for information as to whether there is any known habitat for endangered species in the vicinity of a given site. NYSDEC will respond, stating the species that may ex-

ist in the area without locating any specific area. This is to protect the species, so their habitat is not intentionally disturbed. At present, the FWS responds to inquiries about the presence of any protected species by directing the requestor to the FWS's website.[26]

If the NYSDEC's response states there are no known habitat areas in the vicinity of the site, then that response was once the end of any inquiry. While that response should be sufficient to conclude there are no impacts for the State Environmental Quality Review Act (SEQRA), it may not be sufficient to satisfy the ACOE's obligation to consult with the FWS. Recent changes in the ACOE NWPs now require as a general condition for all the NWPs that the ACOE consult with the FWS regarding the potential impact to protected species.

If the NYSDEC response states there are protected species nearby, then it would be prudent to have a consulting biologist conduct a survey to see if any protected species are actually found on site. Timing and duration is important here. For instance, some protected plants only flower during a certain month. For example, the Fairy Wand (see Figure B), a protected plant, can only be found by its flower—and it only flowers from late May until early July in New York. Likewise, some animal species are only up and about during certain months. Blandings Turtles move around, looking for potential mates, in April and May. Missing that time may mean waiting a year to do the study, especially if the study requires trapping or radio telemetry.

Figure B
Fairy Wand
Chamaelirium luteum

A complicating factor is whether or not the development will require permits from the NYSDEC. If it does, then NYSDEC is likely to require that the habitat be evaluated. If no NYSDEC permits are necessary, the adequacy of any habitat analysis will be up to the SEQRA lead agency, the ACOE and FWS.

The ESA requires all federal agencies, including the ACOE, to coordinate with the FWS before making decisions, including decisions on a NWP. Before engaging in any type of activity that may have direct or indirect effects on endangered species or critical habitat, agencies must "consult" with the FWS in order to evaluate the impact of such agency action. This consultation may be "formal" or "informal" in nature. The ACOE, for instance, must prepare a "biological assessment" evaluating the potential impacts of a particular project or approval. After reviewing the biological assessment prepared by the agency, the FWS prepares a "biological opinion" that ultimately determines whether the proposed agency action is likely to have an adverse impact on a listed species. If such an impact will occur, the FWS will then provide written requirements for minimizing the impact on the listed species in the form of an "incidental take" statement. The ESA requires consulting agencies to utilize the best scientific and commercial data available, and failure to consult properly may result in the proposed activity being enjoined.

Many activities involving the discharge of dredged or fill material in waters of the United States and adjacent wetlands trigger ESA consultation because of the activities' impact on protected species and their habitat. These activities include, for example, infrastructure projects such as water and sewer lines, dams and impoundments, housing and commercial development. The consultation process can be lengthy and complex with extensive negotiations between a project applicant, the ACOE and the FWS. Most NWPs require a 45-day pre-construction notification prior to commencing work. General Condition 17 covers endangered species, stating that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation or which would destroy or adversely modify critical habitat."

Applicants must notify the ACOE if any listed species or designated critical habitat might be affected or is in the vicinity of the project and cannot begin work until notified by the ACOE that the requirements of the ESA have been met. The ACOE will determine whether the proposed activity "may affect" or will have "no effect" to a listed species and designated critical habitat and will notify the applicant within 45 days of receipt of a complete PCN. Where a "may effect" finding is made, the ACOE and the FWS or National Marine Fisheries Service ("NMFS") will engage in section 7 consultation, which may result in the ACOE adding species specific regional endangered species conditions to the NWPs. Further, the NWP rule makes clear that the authorization of an activity by an NWP does not authorize the "take" of a listed species in the absence of separate authorizations under the ESA (e.g., an ESA Section 10 permit, a Biological Opinion with "incidental take" provisions).

Section 7(a)(2) requires each federal agency to consult with the FWS to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (unless an exemption is obtained under

Figure C
Bog Turtle
Clemmys Muhlenbergii

subsection (h)). In turn, an applicant may request prospective or "early consultation" if the applicant "has reason to believe that an endangered species or threatened species may be present" at a proposed project.

Biological opinions are not mandatory directives. Once the opinion is received it is ultimately within the discretion of the agency (here, the ACOE) to decide how to proceed. If an agency chooses not to follow the advice set forth in a biological opinion, it will not constitute a violation of the ESA per se, so long as the agency's chosen course is a reasonable alternative measure.

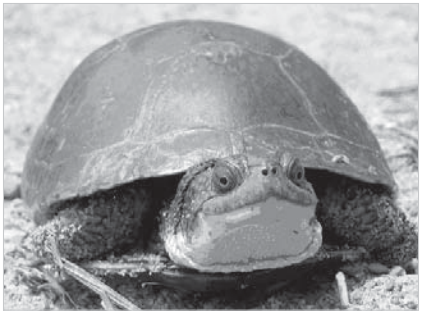

Figure D
Blandings Turtle
Emydoidea blandingii

Yet, the Supreme Court has noted "while the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency." As the Court explained:

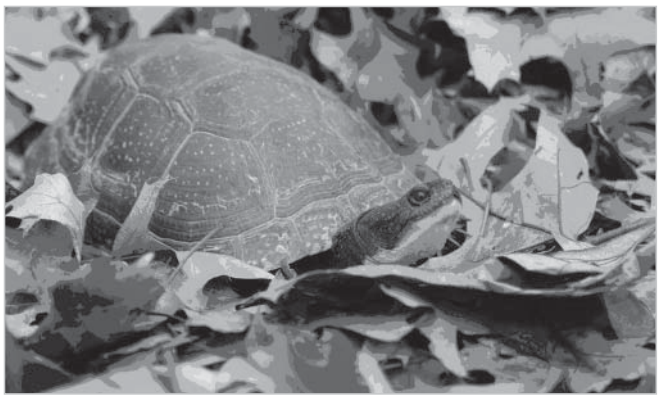

Figure D
Blandings Turtle
Emydoidea blandingii

> The Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to "take" the endangered or threatened species so long as it respects the Service's "terms and conditions." The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.[27]

Thus, for all practicable purposes, the measures suggested by the Service become non-discretionary for the action agency and applicant.

Figure E
Indiana Bat
Myotis Sodalis

The presence of some species, such as Bog (See Figure C) or Blandings (See Figure D) Turtles, may add other complications. If ACOE wetlands are involved, the ACOE, in conjunction with the FWS, has been imposing buffers to protect the turtles' habitat. This has a tremendous impact on the development potential for such sites, and must be analyzed early in the approval process.

The Indiana Bat (see Figure E) is a protected species that has been the focus of much attention in recent years. Long endangered, there are nine hibernacula, or winter caves, in New York. The Indiana Bats swarm to these caves to spend the winter months in hibernation. During March and April, they emerge from their caves, and spend the summer roosting outdoors. They prefer trees with shaggy bark,[28] but will take advantage of various trees or other structures that have deep crevices allowing the bats to hide from predators during daylight hours. The presence of Indiana Bats,

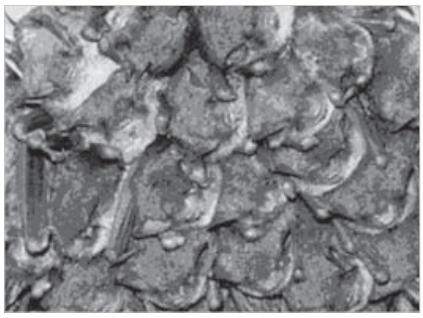

Figure E
Indiana Bat habitat
Myotis Sodalis

or even a potential Indiana Bat habitat, on a given site will impact the site's potential for development.

The Indiana Bat has been in the news lately, as the species is suffering from what has been called White Nose Syndrome. According to the FWS,[29] last year, some 8,000 to 11,000 bats died in several Albany-area hibernacula, more than half the wintering bat population in those caves. Many of the dead bats had a white fungus. This year, biologists are seeing the white fungus on bats hibernating in New York, southwest Vermont, northwest Connecticut and western Massachusetts. Little brown bats are sustaining the largest number of deaths. Also dying are northern long-eared and small-footed bats, eastern pipistrelle and other bat species using the same caves. Biologists are still not certain if the bats are transmitting White Nose Syndrome among themselves, or if people or both bats and people are spreading it. Affected dead and dying bats are generally emaciated, and those found outside are often severely dehydrated. What this means for the study and mitigation of disturbances to an Indiana Bat habitat remains to be seen.

"Navigating the extent of the limits of federal jurisdiction over wetlands is perhaps more confusing than ever."

Conclusion

Navigating the extent of the limits of federal jurisdiction over wetlands is perhaps more confusing than ever. Recent ACOE guidance requires a substantial analysis as to whether a wetland falls under the ACOE's jurisdiction. In addition recent changes to the ACOE NWPs require the ACOE to consult with the FWS whenever there may be a potential impact to protected species resulting from an application.

Every project has its own peculiarities and requirements. These comments are intended to identify potential issues that often arise during the approval process. Significant time and expense can be saved by identifying, early on, a critical path of approvals. Approval from the ACOE, and consultation with the FWS (when required) should be the first issues identified in any project, as they may likely be the last approvals received.

Endnotes

1. *See* New York Environmental Conservation Law (ECL) Article 24.
2. 33 U.S.C.A. § 1362(7).
3. United States Constitution, Article I, Section 8, Clause 3 (The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;).
4. *See* 33 U.S.C. § 403.
5. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
6. *Riverside Bayview*, 474 U.S. at 133.
7. *United States Army Corps of Engineers v. Solid Waste Agency of Northern Cook County*, 531 U.S. 159 (2001).
8. *Rapanos v. United States,* 126 S. Ct. 2208 (2006).
9. 33 C.F.R. § 328.3(a)(1) (2004).
10. 33 C.F.R. § 328.3(a)(2).
11. 33 C.F.R. § 328.3(a)(3).
12. 33 C.F.R. § 328.3(a)(5).
13. 33 C.F.R. § 328.3(a)(7).
14. 33 C.F.R. § 328.3(c).
15. *Id.*
16. *Rapanos,* 126 S. Ct. at 2222.
17. *Id.* at 2255.
18. *Id.*
19. A copy of the ACOE's May 30, 2007 Jurisdictional Determination Form Instructional Guidebook can be found online at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf.
20. ACOE Jurisdictional Determination Form Instructional Guidebook (May 30, 2007) at page 6.
21. 33 C.F.R. § 328.3(b).
22. ACOE Jurisdictional Determination Form Instructional Guidebook (May 30, 2007) at page 7.
23. *Cf.* NYSDEC wetland delineations are currently valid for ten years.
24. Under the NWPs that expired in March 2007, wetland disturbances of less than one-tenth acre did not require a pre-construction notice to the ACOE. Since the new NWPs went into effect in March 2007, all disturbances to federally regulated wetlands require a pre-construction notice to the ACOE.
25. The new NWPs can be found at Vol. 72 Fed. Reg. 11092 (March 12, 2007) or online at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf.
26. The FWS website regarding protected species can be found here: http://www.fws.gov/endangered/wildlife.html.
27. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).
28. For example, shag-bark hickory.
29. http://www.fws.gov/northeast/white_nose.html.

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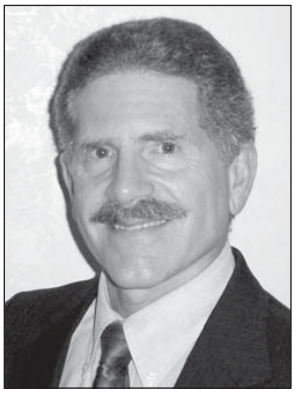
Boards of Ethics: Public Disclosure?

By Robert J. Freeman



This is an interesting time for government in New York, and boards of ethics are being called upon more frequently, and in some instances, for the first time in years, to review matters involving the conduct of public officers and employees. Often the activities of those boards will lead to questions involving access to their records under the Freedom of Information Law (FOIL)[1] and to their meetings under the Open Meetings Law (OML).[2]

Section 806(1)(a) of the General Municipal Law provides that the governing body of every county, city, town, village, school district and fire district *shall* and the governing body of any other municipality *may* by local law, ordinance or resolution adopt a code of ethics. Section 808(1) states that the governing body of a county may establish a county board of ethics, and subdivision (2) indicates that it "shall render advisory opinions to officers and employees of municipalities wholly or partly within the county. . . ." Subdivision (3) authorizes any municipality other than a county to establish a local board of ethics, which has the same powers and duties with respect to that municipality as the county board of ethics. In short, although thousands of municipalities other than counties are required to adopt codes of ethics, while many choose to do so, they are not required to create ethics boards.

Ethics at the State Agency Level

Before considering the application of open government laws, it is emphasized that the statutory guidance concerning the Commission on Public Integrity—the state agency that recently supplanted the State Ethics Commission—is largely irrelevant. The Commission functions in accordance with § 4 of the Executive Law. Paragraph (a) of subdivision (17) of § 4 specifies that the records of the Commission are not subject to FOIL, and that only certain records listed in that provision are accessible to the public; similarly, paragraph (b) states that the meetings of the Commission are not subject to the OML. There are no similar statutes that deal with the records and meetings of municipal ethics boards. Therefore, their records and meetings are subject to FOIL and the OML respectively.

Boards of Ethics Under the Open Meetings Law

As indicated earlier, the General Municipal Law states that a board of ethics renders advisory opinions, and questions frequently arise concerning the status of advisory bodies under the Open Meetings Law. However, since boards of ethics are creations of and carry out their functions based on statutory direction, they clearly constitute "public bodies" required to comply with the Open Meetings Law. A "meeting" is a gathering of a majority of the members of a public body, and every meeting must be preceded by notice of the time and place given in accordance with § 104. When a meeting is convened, the OML is based on a presumption of openness: meetings must be conducted and open to the public, except to the extent that an executive session may be held. Section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and § 105(1) prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. In brief, a motion to enter into executive session must be made in public; the motion must indicate the subject or subjects to be considered; and the motion must be carried by a majority of the total membership of the body. Most importantly, paragraphs (a) through (h) specify and limit the grounds for entry into executive session.

The most pertinent basis for conducting an executive session relative to the functions of boards of ethics is also the most commonly cited, and perhaps the most misunderstood. A term heard constantly as a basis for entry into executive sessions is "personnel," even though it appears nowhere in the OML. To be sure, some personnel-related issues may clearly be considered during an executive session. Nevertheless, others cannot. Moreover, often the so-called "personnel" exception has nothing to do with personnel matters. That provision permits a public body to enter into an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation. . . ." If, for example, the issue before a board of ethics involves a policy concerning outside employment, the issue would be a personnel matter, but there would be no basis for closing the doors. On the other hand, when an issue involves a particular person in conjunction with one or more of the subjects listed in

§ 105(1)(f), an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, § 105(1)(f) may be cited for the purpose of entering into an executive session.

It is emphasized that a motion indicating the issue to be discussed involving "personnel," without more, is inadequate, for it does not provide sufficient information to enable the public to know whether the subject matter is appropriate for consideration in executive session. It has been advised and confirmed judicially that a motion under § 105(1)(f) should include two elements: first, the inclusion of the key word "particular," so that the public can know the focus is on a specific individual; and second, one of the qualifying terms appearing in that provision. For example, a proper motion might be: "I move to enter into executive session to discuss the financial history of a particular person." Although the identity of the subject of the discussion need not be given, a motion of that nature demonstrates a recognition of the scope of the exception and the topic may properly be considered in executive session.[3]

The executive session is one of two vehicles that potentially permits a public body to confer or meet in private. The other involves "exemptions," and § 108 of the OML contains three. When an exemption applies, the OML does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the OML, a public body need not follow the procedure imposed by § 105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the OML.

Often relevant to the functions of boards of ethics is § 108(3), which exempts from the OML: "any matter made confidential by federal or state law." When an attorney-client relationship has been invoked, it is considered confidential under § 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would be confidential under state law and, therefore, exempt from the OML.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney.[4] However, such a relationship is operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

Insofar as a board of ethics seeks legal advice from its attorney and the attorney renders legal advice, the attorney-client privilege may validly be asserted and communications made within the scope of the privilege would be outside the coverage of the OML. Therefore, even though there may be no basis for conducting an executive session pursuant to § 105 of the OML, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to § 108, and legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session[5] would not apply, there may be a proper assertion of the attorney-client privilege.

Following a meeting, minutes must be prepared, and § 106 provides what might be viewed as minimum requirements pertaining to their contents, stating that:

> 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

In view of the foregoing, as a general rule a public body may take action during a properly convened executive session.[6] If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to § 106(2) of the OML. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Minutes of executive sessions need not include information that may be withheld under FOIL, which may be more significant in many ways than the OML.

FOIL

An initial key point regarding FOIL involves its breadth, for it pertains to all government agency records and defines the term "record" in § 86(4) to mean:

> any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

In consideration of the definition, information "in any physical form" maintained by or for a municipality, irrespective of its function, origin, or the means by which it is stored or transmitted, constitutes a "record" falling within the scope of FOIL.

Like the OML, FOIL is based on a presumption of access, directing that all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (j) of FOIL.

In consideration of the functions and the kinds of records likely maintained by or for boards of ethics, it is likely that two of the grounds for denial are particularly relevant.

Section 87(2)(b) authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. The courts have found, as a general rule, that records that are relevant to the performance of the duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.[7] Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.[8]

Several of the decisions referenced above dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available.[9] However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld, for disclosure would result in an unwarranted invasion of personal privacy.[10] Further, to the extent that charges are dismissed or allegations are found to be without merit, they may be withheld.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy. Ordinarily, the identity of a complainant is irrelevant to the board; what is relevant is whether the complaint has merit. Moreover, if the identities of complainants or whistleblowers are made known, they are less likely to complain or blow the whistle. In that event, the government would not learn what it needs to know to carry out its duties effectively and accountably.

The other provision of relevance, § 87(2)(g), states that an agency may withhold records that:

> are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government . . .

The language quoted above contains what is in effect a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may be withheld.

Records prepared in conjunction with an inquiry or investigation by a board of ethics would constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, they may be withheld. Factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Because a board of ethics provides advisory opinions, which may be accepted, rejected or modified by the person or entity making a final decision, those opinions may be withheld under § 87(2)(g). If the decision maker specifies that it has adopted the recommendation of the board as its own, the opinion has become a final agency determination. When that determination reflects a finding of misconduct or imposes a penalty, it is accessible under subparagraph (iii) of § 87(2)(g).[11]

An area of frequent controversy and requests by the public and the news media involves financial disclosure statements. One of the issues relates to a former provision of the statute dealing with statements filed with what had been the State Ethics Commission, which indicated they were available for inspection, but not for copying. Again, that provision pertained only to that state agency; it never applied to a municipality. Consequently, when financial disclosure statements are prepared pursuant to a municipal ethics law, they are subject to FOIL, which requires that agencies prepare copies of records pursuant to § 89(3)(a) and authorizes the assessment of fees for copying in accordance with § 87(1)(b)(iii). When a local law permitting only the inspection of financial disclosure statements was challenged, it was held that FOIL applied and required the agency to produce photocopies.[12]

In terms of access to those statements, they are typically available to the public, except those portions indicating the value of an asset or liability of a public officer or employee, or other portions which are demonstrated to be irrelevant to the performance of that person's duties.

In short, although municipal boards of ethics are required to comply with both FOIL and the OML, those statutes generally offer those boards the flexibility and the capacity to withhold records or to conduct their meetings in private to enable them to carry out their duties effectively.

Endnotes

1. Public Officers Law, Article 6, §§ 84–90.
2. Public Officers Law, Article 7, §§ 100–11.
3. *Gordon v. Village of Monticello*, August 5, 1993 (Supreme Court, Ulster Co.), *modified*, 620 N.Y.S.2d 573, 207 A.D.2d 55 (3d Dep't 1994), *reversed on other grounds*, 87 N.Y.2d 124 (1995).
4. *People ex rel. Updyke v. Gilon*, 9 N.Y.S. 243 (Sup. Ct., N.Y. Co. 1889); *Pennock v. Lane*, 36 Misc. 2d 253, 231 N.Y.S.2d 897, 898 (Sup. Ct., Albany Co. 1962).
5. Public Officers Law § 105(1)(d).
6. Public Officers Law § 105(1).
7. *See, e.g.*, *Farrell v. Village Board of Trustees*, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct., Broome Co. 1975); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954 (1978); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980); *Geneva Printing Co. v. Village of Lyons*, March 25, 1981 (Sup. Ct., Wayne Co.); *Montes v. State*, 94 Misc. 2d 972, 406 N.Y.S.2d 664 (Ct. Cl. 1978); *Powhida v. City of Albany*, 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989); *Scaccia v. NYS Division of State Police*, 138 A.D.2d 50, 530 N.Y.S.2d 309 (3d Dep't 1988); *Steinmetz v. Board of Education, East Moriches*, N.Y.L.J., Oct. 30, 1980 (Sup. Ct., Suffolk Co.); *Capital Newspapers v. Burns*, 67 N.Y.2d 562 (1986).
8. *See, e.g.*, *In re Wool*, N.Y.L.J., Nov. 22, 1977 (Sup. Ct., Nassau Co.).
9. *See Farrell*, *Sinicropi*, *Geneva Printing Co.*, *Scaccia*, and *Powhida*, *supra* note 7.
10. *See, e.g.*, *Herald Company v. School District of City of Syracuse*, 104 Misc. 2d 1041, 430 N.Y.S.2d 460 (Sup. Ct., Onondaga Co. 1980).
11. *Miller v. Hewlett-Woodmere Union Free School District #14*, N.Y.L.J., May 16, 1990 (Supreme Court, Nassau Co.).
12. *See, e.g.*, *Herald Company, supra* note 10.

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Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

In this issue of the *Municipal Lawyer* we report a number of cases addressing a fair range of issues in the land use context. We are reminded, in two cases, of the importance (for petitioners and practitioners alike) of adhering to the strict letter of procedure. In a SEQRA case involving a project which had been before a planning board for 15 years, the Court of Appeals rejected an attempt to delay the project further when the procedural labyrinth of the statutory scheme threatened to overwhelm the underlying purpose of the statute. In a refreshing number of the reported cases, the rule of reason prevails. In one case, the faulty logic of the court's reasoning is laid bare in a thoughtful dissent.

In all, while this quarter's crop of cases brings no precedent-shattering revelations, and while, as noted in the discussion below, it may leave some questions unanswered, it does include some timely warnings for the unwary, some food for thought on the SEQRA and constitutional fronts, and at least one occasion for head scratching among those of us who deem logic to be the soul of the law.

I. Court of Appeals

A. *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*: Supplemental Environmental Impact Statements

In *Riverkeeper v. Planning Board of the Town of Southeast*,[1] the Court of Appeals took an important step in the direction of injecting the rule of reason into the chaotic and sometimes endless process of environmental review under the State Environmental Quality Review Act ("SEQRA"; collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617). The Court unanimously upheld the decision of the Planning Board of the Town of Southeast (the "Planning Board"), acting as lead agency in the review of a residential subdivision application under SEQRA not to require a *second* Supplemental Environmental Impact Statement ("SEIS"), after SEQRA Findings had been adopted, which Petitioners claimed was needed to address certain regulatory changes adopted following the Planning Board's issuance of its SEQRA Findings and its issuance of final subdivision approval to the applicant. The Court held that (a) the decision whether to require an SEIS (as opposed to a Draft EIS or Final

EIS) lies in the discretion of the lead agency; (b) judicial review of a lead agency's decision to require an SEIS is limited to whether the lead agency took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its decision; (c) a lead agency need not wait until all project permits are issued before it issues a Findings statement, provided that it considers the environmental concerns addressed by the particular permits in its review; and (d) generally a lead agency does not have an obligation to seek comments from other involved agencies in its deliberations on whether to require an SEIS to be prepared.

In 1988, Glickenhaus Brewster Development, Inc. ("Glickenhaus") applied to the Planning Board to develop a residential subdivision on a 309-acre parcel of property in the Town of Southeast, Putnam County (the "Property"). A stream that runs through the Property is a tributary to the Muscoot Reservoir, which is a part of the Croton Watershed, a source of drinking water for the City of New York. The Planning Board declared itself lead agency in the SEQRA review of Glickenhaus's application and issued a Positive Declaration, which required the preparation of an Environmental Impact Statement to study the project's potential environmental impacts. Glickenhaus submitted a Draft EIS ("DEIS"), a Final EIS ("FEIS"), a Draft SEIS and a Final SEIS during the SEQRA review of the project, and on February 25, 1991, the Planning Board issued a Findings Statement which found that the project '"minimized or avoid[ed] adverse environmental effects to the maximum extent practicable."'[2]

Preliminary subdivision approval was granted on August 10, 1998 and conditional final subdivision approval was granted on June 10, 2002.[3] Petitioners challenged the Planning Board's issuance of conditional final approval on the grounds that subsequent developments pertaining to, among other things, changes in the regulatory requirements of several state and federal agencies regarding water quality mandated yet a second SEIS and that by failing to require a second SEIS, the Planning Board failed to take a hard look at environmental concerns in its SEQRA review of the project. The Supreme Court invalidated the approval and remanded the case to the Planning Board for that Board to determine whether a second SEIS was required.[4]

The Planning Board's chairman reviewed the project file, which included, among other things, applications for a local wetlands permit, a State Pollutant Discharge Elimination System permit, and a wetlands permit from the United States Army Corps of Engineers. Further, the Planning Board reviewed reports prepared by environmental experts for the applicant and hired independently by the Planning Board. After reviewing this information, on April 14, 2003, the Planning Board determined that a second SEIS was not necessary.[5] On February 23, 2004, the Planning Board granted conditional final subdivision approval for a second time.[6]

In May 2003, petitioners commenced *Riverkeeper, Inc. v Planning Board of the Town of Southeast*,[7] in which they challenged the Planning Board's determination not to require a second SEIS on the grounds that, among other things (a) the Planning Board improperly delegated its SEQRA responsibilities by taking into account the recommendation of its own consultants regarding the environmental concerns addressed by permits to be issued by other involved agencies, and by making its determination that a second SEIS was not required before applications for such involved agency permits were decided, and (b) that the Planning Board failed to solicit comments from other involved and interested agencies before it decided not to require an SEIS.[8] In March 2004, petitioners challenged the February 23, 2004 issuance of conditional final subdivision approval in a case captioned *Ingraham v. Planning Board of the Town of Southeast*,[9] on the ground that the Planning Board violated the Town's subdivision regulations when granting the approval.[10]

The Supreme Court dismissed the petitions in both cases. In *Riverkeeper, Inc.*, the lower court held that the Planning Board took the requisite hard look and made the required reasoned elaboration of its basis not to require a second SEIS. In *Ingraham*, the lower court held that the Planning Board did not violate the Town's subdivision regulations when granting the February 2004 conditional final subdivision approval.[11] However, in both cases the Appellate Division reversed. In *Riverkeeper, Inc.*, the Appellate Division held that the Planning Board "'could not have met its obligation under SEQRA without requiring a [second] SEIS to analyze the current subdivision plat in light of the change in circumstances since 1991.'"[12] In *Ingraham*, the Appellate Division, while agreeing with the lower court that the Planning Board did not violate the Town's subdivision regulations, annulled the approval based on the Planning Board's failure to require a second SEIS.[13]

The Court of Appeals consolidated the cases, granted leave to appeal, and reversed the decisions of the Appellate Division. The Court of Appeals held that the Planning Board was not obligated to require Glickenhaus to prepare a second SEIS and reinstated the conditional final subdivision approval, since it had been annulled on the sole ground that no SEIS was prepared.[14]

The Court began its analysis by describing that the SEQRA regulations provide lead agencies with broad discretion regarding whether to require an SEIS as a part of the SEQRA review of a project, looking to the express language of the SEQRA regulations that "[t]he lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (*a*) changes proposed for the project; (*b*) newly discovered information; or (*c*) a change in circumstances related to the project."[15] Further, a court, when reviewing the lead agency's decision, is limited to '"whether the agency identified the relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis for its determination[,]"' the standard that applies to review of a lead agency's ultimate SEQRA Findings.[16] Here, the Court held that in reviewing the voluminous record before it, the Planning Board took a hard look at the relevant areas of environmental concern and provided a reasoned elaboration of the basis for its decision not to require a second SEIS. The Planning Board, after reviewing its project file including all of the original SEQRA materials, applications for environmental permits, and wetlands and engineering reports, found that the changes made to the proposed plan actually anticipated and sought to minimize environmental impacts, particularly the impacts on the Muscoot Reservoir and the Croton Watershed. Since the changes were more protective of the environment than the actions proposed as a part of the initial SEQRA materials, the Board reasonably determined that no SEIS was necessary.[17]

Addressing the issue of improper delegation of SEQRA responsibilities, the Court stated that

> A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking [citing cases]. . . . While a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment. Though the SEQRA process and individual agency permitting processes are intertwined, they are two distinct avenues of environmental review. Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not

> await another agency's permitting decision before exercising its independent judgment on that issue.[18]

In this case, the Planning Board reviewed the permitting applications and other reports and studies relevant to its determination of whether to require a second SEIS. Because it reviewed and independently evaluated the relevant material, it was not required to wait for a determination on another agency's environmental permits before deciding whether a second SEIS would be required.[19]

Finally, the Court dismissed Petitioner's contention that the Planning Board was required to notify and solicit comments from other involved and interested agencies before making its determination regarding whether to require a second SEIS. The Court held that SEQRA does not expressly require lead agencies to seek comments from other agencies when considering whether to require an SEIS, noting that while SEQRA encourages the interchange of information among agencies, the benefit of such an interchange must be evaluated against "SEQRA's mandate that the regulations be implemented 'with minimum procedural and administrative delay . . . [and] in the interest of prompt review.'"[20] The Court recognized that failure to solicit input from other agencies may evidence a failure to take a "hard look" at the relevant areas of environmental concern, but that had not occurred in this case.[21]

In concluding her opinion, Chief Judge Kaye noted in passing the astounding fact that the project had been before the Planning Board for 15 years, perhaps implicitly recognizing (and seeking to halt) the transmogrification of SEQRA from its original salutary purpose to protect the environment into an instrument of limitless oppression and delay.

B. *City of Utica v. Town of Frankfort*: Municipal Annexations

In *City of Utica v. Town of Frankfort*,[22] the Court of Appeals (issuing a strict warning to practitioners) held that strict compliance with General Municipal Law Section 713—which requires that a special election be held before a municipal annexation can be completed—is required "no matter how few eligible voters there are or how superfluous such election might be[;]"[23] reminding practitioners that strict compliance with the procedural requirements provided by statute in land use matters is essential.

In *City of Utica*, the City of Utica sought to annex 225 acres of property, owned by intervenors-respondents Masonic Care Community ("MCC") (the proponent of the annexation), into the City from the Town of Frankfort and Herkimer County pursuant to the Municipal Annexation Law (General Municipal Law Article 17).[24] The issue of whether annexation was in the overall public interest was, in accordance with the statutory scheme, submitted to three referees appointed by the Appellate Division, who issued a report recommending the annexation. The Appellate Division entered a judgment to that effect. MCC, after the entry of the judgment, obtained the election records of the area to be annexed and determined that there were 65 eligible voters in the area. It then proceeded to obtain the signatures of 53 of the 65 persons entitled to vote on a petition in support of the annexation.[25]

The Town of Frankfort and Herkimer County moved for reargument or leave to appeal to the Court of Appeals. MCC cross-moved for, among other things, an order dispensing with the requirement that a special election be held on the annexation. The Appellate Division denied the Town's motion to reargue and granted MCC's cross-motion. The Court of Appeals granted the County's motion for leave to appeal.[26]

The Court of Appeals affirmed the Appellate Division's finding that the annexation was in the overall public interest, but reversed its decision granting the City's cross-motion to dispense with the special-election requirement.[27] With regard to the Appellate Division's finding that the annexation was in the overall public interest, the Court of Appeals stated that when the Appellate Division is asked to determine whether an annexation is in the overall public interest, it is acting in a quasi-legislative capacity and its decision will not be overturned unless it lacks a rational basis. Here, the Appellate Division correctly applied the "overall public interest" standard and had a rational basis for its finding that annexation was in the overall public interest since, among other things, the City was better equipped to provide municipal services to the area to be annexed and that annexation would have only a minimal impact to the Town and County.[28] With regard to the special election, the Court held that the special election before annexation is required by the Municipal Annexation Law, the New York State Constitution, and the Election Law and that it is beyond the Appellate Division's discretion to dispense with that requirement, "no matter how few eligible voters there are or how superfluous such election might be[,]" thus confirming that, at least in the realm of municipal annexation, adhering to form over substance can be a virtue.[29]

C. *Haberman v. Zoning Board of Appeals of City of Long Beach*: Variance Amendments; Authority of Counsel

In *Haberman v. Zoning Board of Appeals of City of Long Beach*,[30] the Court of Appeals held that a zoning board of appeals' attorney, when acting with actual or apparent authority, could extend the duration of a variance granted by the zoning board of appeals without

the board holding a public hearing and vote on the extension. However, a reading of the case suggests that its holding may be dependent upon its unique factual context, and thus the applicability of the Court's holding is unclear.

In *Haberman*, Sinclair Haberman ("Haberman") sought and obtained a variance from the City of Long Beach Zoning Board of Appeals (the "ZBA") to develop a four-building multi-family residential complex in the City of Long Beach.[31] After the first building was constructed, an issue arose regarding the other three buildings, which resulted in litigation brought by Haberman against the City, its Building Commissioner, and its Zoning Board of Appeals.[32] The litigation was settled by a stipulation of settlement in which, among other things, Haberman agreed to apply for a new variance and the City agreed to install infrastructure to serve the proposed buildings after receiving funding from Haberman for the public improvements.[33] Haberman's obligations under the stipulation required him to apply for building permits within a certain time after the variance was granted, and the City was obligated to commence the installation of the infrastructure within a certain time after receiving the funding from Haberman.[34]

Haberman applied for and received a new variance and made the required payments to the City. However, the City did not meet its deadline to install the infrastructure improvements and asked Haberman for an extension of time. Haberman agreed on the condition that the time within which he was required to apply for building permits would be similarly extended.[35] The terms of this agreement were memorialized in a letter dated April 7, 1992, which was signed by the City's Corporation Counsel, who represented all defendants in the litigation on this matter, and which indicated that the Corporation Counsel was signing on behalf of all defendants, including the ZBA. The letter was attached to a new stipulation which modified the 1989 stipulation and was so ordered by the Supreme Court.[36]

In 2002, after the time within which he was originally required to apply for a building permit for the second building under the 1989 stipulation had expired, but within the time required under the 1992 stipulation, Haberman applied for a building permit to construct the second building. The building permit was granted in 2003.[37] However, the ZBA, at the request of the cooperative corporation which owned the first building constructed on the property, revoked the permit on the grounds that Haberman did not comply with the schedule in the 1989 stipulation. With regard to the 1992 amendment, the ZBA took the position that it did not effectively extend the time within which Haberman had to apply for building permits since it was not ratified by the ZBA after a public hearing.[38] Haberman brought the instant litigation to annul the findings of the ZBA and for the reinstatement of the building permit. The Supreme Court granted Haberman's petition and annulled the ZBA's decision, but the Second Department reversed.[39] The Court of Appeals granted leave to appeal to answer the following question:

> [W]hether the ZBA is bound by the Corporation Counsel's agreement, as its attorney, to the April 1992 letter extending Haberman's time to apply for building permits.[40]

The Court held that the Corporation Counsel had the authority to bind the ZBA and that ratification of the extension by the ZBA was not required.[41] In so holding, the Court, relying on a prior holding in *New York Life Insurance Company v. Galvin*,[42] reasoned that "once a variance has been issued, the same formality is not required to extend the variance's duration."[43] Furthermore, the ZBA could point to no authority for the rule that it had to ratify an agreement entered into by its counsel extending the applicable time limitations included in the variance. Here, the Corporation Counsel acted with at least apparent authority from Haberman's perspective to extend the time limitation on which the variance was conditioned, and the Corporation Counsel did not act contrary to the instruction of the ZBA or try to conceal his action from the Board. Accordingly, it would be unfair to undo an agreement, extensively negotiated and benefiting both parties, entered into in writing, and approved by the Court, based on the ZBA's argument that it was required to ratify the extension, when that argument had no basis in statute, precedent, or other authority.[44]

The general applicability of this case is unclear at best. Here the Court was faced with a situation where the ZBA was apparently trying to free itself from an obligation agreed to by its attorney for which the City received a benefit—an extension of the time within which it was to complete the utility improvements it was required to install. The agreement was negotiated and agreed to by the parties and approved by the Court. In light of these facts, it is not clear from this case whether a zoning board of appeals' attorney—in the ordinary course of representation, but not in the context of a negotiated, bilateral stipulation of settlement—has the authority to unilaterally extend an approval granted by the zoning board of appeals without the board's formal consent. Although some language underlying the Court's reasoning would seem to answer the question in the affirmative, the specific facts of the case, including the fact that Petitioner had performed his side of the bargain that the ZBA was now seeking to repudiate, leaves some question as to the broader applicability of the decision.

D. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*: Issuance of Building Permits; Anticipatory Rejection

In *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*,[45] the Court of Appeals upheld the determination of the New York City Department of Buildings to withhold a building permit where the petitioner could not show that it could use the proposed building for a lawful purpose.[46] In so doing, the Court clarified the rule, previously enunciated in the decisions of the Court of Appeals and the Appellate Division, Second Department,[47] that a building permit cannot be withheld because of concern that the building would be used illegally.

Petitioner had purchased a parcel of property in the City of New York, the use of which, pursuant to a deed restriction, was limited to "Community Facility Use," as that term was defined in the New York City Zoning Resolution. Community facility uses, including college or school student dormitories, were permitted on the property under the New York City Zoning Resolution. The petitioner applied to the New York City Department of Buildings for a building permit to construct a 19-story dormitory on the property, which would be configured much like an ordinary apartment building. Apartment buildings were also permitted in the district in which the property was located; however, they were limited to 10 stories, and, with regard to petitioner's property, would have been prohibited by the deed restriction.[48] The Department of Buildings took the position that in order for a building to qualify as a dormitory, it must be operated by or on behalf of at least one college or school. Accordingly, the Department of Buildings asked petitioner to provide it with evidence to substantiate its claim that the building would be used as a dormitory by proving a connection with an educational institution.[49] Petitioner could not establish that it had a relationship with a qualified educational institution and the Department of Buildings refused to issue petitioner a building permit.[50]

Petitioner appealed to the New York City Board of Standards and Appeals (the "BSA"), but petitioner's appeal was denied. Petitioner then commenced an Article 78 proceeding to have the BSA's determination annulled. The Supreme Court upheld the decision of the BSA, but a divided Appellate Division reversed, finding that the Department of Buildings' denial was '"an impermissible administrative anticipatory punishment."'[51] In so holding, the Appellate Division relied on *Di Milia v. Bennett*[52] and *Baskin v. Zoning Board of Appeals of the Town of Ramapo*[53] for the proposition that "a building permit could not be denied on the basis of 'a possible future illegal use.'"[54] The BSA appealed as of right and the Court of Appeals reversed.

The Court of Appeals held that the Appellate Division's and Petitioner's reliance on *Di Milia* and *Baskin* was misplaced. In those cases, the municipal zoning authorities denied permits for one-family dwellings on the grounds that the houses could be converted to two-family dwellings in violation of the municipal zoning ordinances. However, in those cases, the facts did not establish that the use of the property for a permitted use, a one-family dwelling, was unlikely or impractical. Rather, there was just a generalized suspicion that the dwellings would not be so used. In both of those cases the court held that the mere suspicion a building may be used for an illegal use is not grounds enough to deny a permit. In this case, the Court reasoned that unlike in *Di Milia* and *Baskin*, where the proposed building could have been used for a use permitted under local zoning, petitioners could not (in the absence of an affiliation with an educational institution) reasonably show that the proposed building could be used for *any* lawful purpose, since all possible uses of the building, given its height and location, were precluded either by the City's Zoning Resolution or the deed restriction limiting the uses of the property. Accordingly, the Department of Buildings was not required to issue a permit which would create the problem of a 19-story building that could be used for no lawful purpose.[55]

II. County Planning Board Referrals Under General Municipal Law Section 239-m

In *Annabi v. City Council of the City of Yonkers*,[56] the Appellate Division, Second Department held that a procedural amendment to a city's zoning ordinance governing the city's obligations with regard to referrals to the county planning board under General Municipal Law Section 239-m ("GML § 239-m") requires referral to the county planning board for review pursuant to that section.

On November 22, 2005, the City Council of the City of Yonkers adopted an amendment to the Yonkers Zoning Ordinance which changed the vote required to overcome the County Planning Board's negative recommendation on a project referred to it pursuant to GML § 239-m from a majority plus one vote to a simple majority vote ("Local Law 12-2005"), thus bringing Yonkers into line with all other Westchester municipalities.[57] The City Council did not refer Local Law 12-2005 to the Westchester County Planning Board pursuant to GML § 239-m before its adoption. Dissenting members of the City Council ("Plaintiffs") filed an action against the City Council of the City of Yonkers, the City of Yonkers, and the City's Mayor and Clerk ("Defendants"), arguing that Local Law 12-2005 should be invalidated since it was adopted without referral to the Westchester County Planning Board pursuant to GML § 239-m.

GML § 239-m provides, in pertinent part, as follows:

> Proposed actions subject to referral. (a) The following proposed actions shall

> be subject to the referral requirements of this section [referral to a county planning board], if they apply to real property set forth in paragraph (b) of this subdivision: *** (ii) adoption or amendment of a zoning ordinance or local law; *** (b) The proposed actions set forth in paragraph (a) of this subdivision shall be subject to the referral requirements of this section if they apply to real property within five hundred feet of the following: (i) the boundary of any city, village or town; or (ii) the boundary of any existing or proposed county or state park or any other recreation area; or (iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or (iv) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or (v) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or (vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, except this subparagraph shall not apply to the granting of area variances.[58]

Defendants argued that Local Law 12-2005 did not apply to any property in the City in that it did not change either the permitted uses or the dimensional limitations applicable to any property and thus did not reach any of the threshold referral requirements of GML § 239-m.[59]

The Supreme Court, Westchester County granted Summary Judgment to Plaintiffs and invalidated Local Law 12-2005, and the Appellate Division, Second Department affirmed. The Second Department reasoned that

> General Municipal Law § 239-m essentially requires that all zoning actions and amendments affecting real property within 500 feet from the boundary of any city, village, town or existing or proposed county or state park or road, be referred to the County Planning Board for review. Contrary to the defendants' contention, there is no difficulty in determining whether the challenged law is the type of enactment subject to review under General Municipal Law § 239-m. By its very terms, the challenged law affects a change in regulations applying to all real property within the City of Yonkers, and necessarily includes that real property which is situated within 500 feet of the boundaries . . . set forth in the statute.[60]

Accordingly, the Second Department upheld the Supreme Court's decision to invalidate Local Law 12-2005, citing the well-established rule that failure to make a required referral under GML § 239-m is a jurisdictional defect which renders the law adopted pursuant to the defective procedure invalid.[61]

The most instructive, and the most well-reasoned, aspect of the *Annabi* case is found in the learned dissent by Justice Lifson who (in the opinion of your authors) clearly got it right. Justice Lifson reasoned that

> The problem is that in each case cited by the majority, and indeed in all such cases, the change at issue was substantive, i.e., it had a direct and an immediate bearing upon the use of the land in question. The change at issue here is merely procedural and does not require both review by the County Planning Board and the invocation of a super majority to override that recommendation by the County Planning Board.[62]

Under the holding in *Annabi*, any procedural amendment to a municipal code which affects the zoning chapter of that code would have to be referred to a county planning board. As with the amendment at issue in the *Annabi* case, the County Planning Board has no basis on which to evaluate a procedural amendment since, manifestly, such amendment does not (in a planning sense) affect the use of land. Indeed, the majority's reading of GML § 239-m so broadens the application of that section as to entirely defeat its purpose, which is to include the county when land is so located that legislative or administrative action affecting its use is likely to have impacts beyond a municipal border. One is hard-pressed to understand how the county-wide or inter-municipal concerns relate to the manner in which a particular municipality chooses to enact its own legislation, so long as the relevant State-enabling statutes and the State Constitution are adhered to.

III. Regulatory Takings

In *Noghrey v. Town of Brookhaven*,[63] the Appellate Division, Second Department reviewed the standard that courts must apply when considering a regulatory takings claim under the *Penn Central Transportation Co.*

v. City of New York[64] balancing test. In rejecting a poorly phrased jury charge in which the trial court attempted to articulate the applicable regulatory takings standard for the jury, the Appellate Division, adopting language from *Lucas v. South Carolina Coastal Council*,[65] set the bar for a regulatory taking in New York so high as to be well nigh insurmountable. While the Appellate Division's articulation of the rule is not new, and the adopted language is from federal post-*Penn Central* cases, the language is stark and unyielding, and it is difficult to imagine where *any* rezoning of a parcel of land in New York, so long as it permits any use which can yield any value, will rise to a regulatory taking, at least in the Second Department.

In *Noghrey*, plaintiff purchased two parcels of property in the Town of Brookhaven with the intent of developing a shopping center, which was a permitted use in the zoning district in which the properties were located (the J-2 Business District). The Town of Brookhaven subsequently enacted a moratorium on commercial development in the Town so that it could update the Town's master plan. After the review, the Town rezoned several parcels, including plaintiff's, from the J-2 Business District to a residence district. Plaintiff brought an action alleging that the rezoning effectuated a taking of his property.[66]

During the trial, the court instructed the jury as follows with regard to whether the rezoning of plaintiff's property amounted to a taking:

> With respect to the first factor; that is, the economic impact of the regulation, [the plaintiff] claims that the values of his properties were reduced substantially. You may consider the values of the properties immediately before and immediately after the rezoning, and whether or not this reduction in value was a *substantial reduction* relative to the value before the properties were rezoned. [The plaintiff] must prove by a preponderance of the evidence that the rezoning deprived him of any use permitted by the residential zoning classification and this resulted in . . . a near total or *substantial decrease or significant reduction in value*.[67]

Relying on, among other things, the above-quoted instruction, the jury found that the rezoning of plaintiff's property amounted to a partial regulatory taking under *Penn Central*.[68]

The Second Department reversed the jury's finding and remitted the case to the Supreme Court, Suffolk County for a new trial, reasoning that the above-quoted jury instruction did not accurately reflect the showing required under *Penn Central* to constitute a regulatory taking. The Second Department instructed the lower court as follows:

> Upon the retrial, the Supreme Court should instruct the jury that the economic impact factor of the *Penn Central* analysis requires a loss in value which is "one step short of complete." . . . The court should make clear that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking" . . . , and that a land use restriction "is not rendered unconstitutional merely because it causes the property's value to be 'substantially reduced.'" . . . It should instruct the jury that the proper inquiry is whether the regulation left only a "bare residue" of value, or use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking. . . .[69]

It is difficult to imagine any zone change (excepting, perhaps, the creation of a zone permitting no uses at all, or permitting only uses that are manifestly impossible as, for example, an "Ocean-front Recreation" zone in the Adirondacks) that will not leave a "bare residue" of value in a property.

IV. Vested Rights

In *Exeter Building Corp. v. Town of Newburgh*,[70] the Appellate Division, Second Department held that a property owner who obtained an approval for a lot line change in November 2005 was shielded from the impact of a rezoning of its property pursuant to Town Law § 265-a, which grants owners of property for which subdivision approval has been granted a vested rights period during which the property owner is permitted to develop the property in a manner consistent with the zoning of the property at the time of the approval, notwithstanding subsequent rezoning.[71]

Petitioner-plaintiff owned property in the Town of Newburgh, Orange County for which it obtained a lot line change from the Town of Newburgh Planning Board in November 2005 (the "Property"). In March 2006, the Town of Newburgh Town Board adopted Local Law 3, which rezoned several properties in the Town, including the Property. The zoning applicable to the Property pursuant to Local Law 3 would have prohibited Petitioner from developing the Property for its intended use. Petitioner commenced a hybrid Article 78 proceeding/declaratory judgment action asking the Court to, among other things, declare that it had a statutory and common law right to develop the Property under the prior zoning. The Appellate Division, Second Department held that although the petitioner failed to establish a common law vested right since it

could not show "substantial improvements or expenditures[,]" it did have a statutory vested right to develop the Property under the terms of the zoning that applied at the time the lot line change approval was granted.[72] In so holding, the Court reasoned that the lot line change approval was a "subdivision" under Town Law § 276(4)(a) and Town of Newburgh Code § 163-2. Town Law § 276(4)(a) allows a town to define the term subdivision by local law, ordinance, rule or regulation, and permits, but does not require, a lot line change to be included in the definition of subdivision.[73] Pursuant to that authority, the Town of Newburgh has included a lot line change in the definition of subdivision in its Subdivision Ordinance.[74] Because the Town of Newburgh Code includes a lot line change in the definition of subdivision, the Court did not have occasion to reach the question of whether statutory vested rights would attach to a lot line change approval granted in a municipality that does not expressly include a lot line change in the definition of subdivision, but permits such changes by abbreviated procedures short of subdivision.

V. Zoning Boards of Appeal

A. Conditional Variances

In *Voetsch v. Craven*,[75] the Second Department demonstrated that courts will not hesitate to annul conditions to an area variance where such conditions are unreasonable or improper.[76] In that case, the Town of Harrison Zoning Board of Appeals granted in part petitioners' application for area variance for, among other things, a parking lot on their property on the condition that they prohibit overnight parking in the parking lot and install a chain across the entrance of the parking lot at night to prevent overnight parking. Petitioners appealed, among other things, the conditions to the variance.[77] The Second Department upheld the condition that petitioners prohibit overnight parking in the lot, but invalidated the condition they install a chain across the parking lot entrance to prevent overnight parking as unreasonable, since overnight parking was already prohibited by the affirmed condition.[78]

B. Failure to Exhaust Administrative Remedies

In *Charest v. Morrison*,[79] the Fourth Department held that a party who wishes to challenge the issuance of a building permit to another must appeal to the municipal zoning board of appeals before challenging the issuance of the permit in court.[80] Therein, the petitioners asked the Court to direct the zoning enforcement officer of the Town of Ellery to revoke a building permit issued to respondent. The building permit allowed respondent to develop a single-family home on a lot created as a part of a residential subdivision.[81] Petitioners challenged the issuance of the permit on the grounds that it allowed construction to proceed in violation of the Town's front-yard setback requirements. The Supreme Court dismissed the petition, apparently on the grounds that the proposed house did not violate the Town's front-yard setback requirements. The Fourth Department affirmed the Supreme Court's dismissal, but on the grounds that petitioners failed to exhaust their administrative remedies before bringing a proceeding in court, citing the principle that it has no discretion to review the merits of the petitioners' claim since petitioners failed to exhaust their administrative remedies.[82]

Endnotes

1. 9 N.Y.3d 219 (2007).
2. *Id.* at 229.
3. *Id.*
4. *Id.* at 229–30.
5. *Id.* at 230.
6. *Id.*
7. *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 32 A.D.3d 431, 820 N.Y.S.2d 113 (2d Dep't 2006).
8. *Riverkeeper, Inc.*, 9 N.Y.3d at 230.
9. 36 A.D.3d 911, 828 N.Y.S.2d 568 (2d Dep't 2007).
10. *Riverkeeper, Inc.*, 9 N.Y.3d at 231.
11. *Id.* at 230–31.
12. *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 230 (2007) (quoting *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 32 A.D.3d 431 (2d Dep't 2006)).
13. *Riverkeeper, Inc.*, 9 N.Y.3d at 230.
14. *Id.* at 235.
15. *Riverkeeper, Inc.*, 9 N.Y.3d at 231 (quoting 6 N.Y.C.R.R. 617.9[a](7)(i)) (emphasis provided by the Court).
16. *Id.* at 231–323.
17. *Id.* at 232.
18. *Id.* at 234.
19. *Id.* at 234–35; *see also Basha Kill Area Association v. Planning Board of the Town of Mamakating*, 46 A.D.3d 1309, 849 N.Y.S.2d 112 (3d Dep't 2007) ("acknowledgement that state and federal permits are required 'does not rise to the level of an improper referral,'" citing *Riverkeeper, Inc.*, *supra*).
20. *Riverkeeper, Inc.*, 9 N.Y.3d at 235 (quoting 6 N.Y.C.R.R. 617.3[h]).
21. *Riverkeeper, Inc.*, 9 N.Y.3d at 235.
22. 10 N.Y.3d 128 (2008).
23. *City of Utica*, 10 N.Y.3d at 134.
24. *Id.* at 132. Municipal Annexation Law, General Municipal Law Article 17.
25. *City of Utica*, 10 N.Y.3d at 132.
26. *Id.*
27. *City of Utica*, 10 N.Y.3d at 133.
28. *Id.*
29. *City of Utica*, 10 N.Y.3d at 133–34.
30. 9 N.Y.3d 269 (2007).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

35. *Haberman*, 9 N.Y.3d at 273–74.
36. *Id.* at 274.
37. *Id.*
38. *Id.* at 274–75.
39. *Id.* at 275.
40. *Id.*
41. *Haberman*, 9 N.Y.3d at 275.
42. 35 N.Y.2d 52 (1974).
43. *Haberman*, 9 N.Y.3d at 275.
44. *Id.* at 275–76.
45. 10 N.Y. 3d 264 (2008).
46. *Id.*
47. *Baskin v. Zoning Board of Appeals of Town of Ramapo*, 40 N.Y.2d 942 (1976), *rev'g on dissenting mem. of Shapiro, J.*, 48 A.D.2d 667, 367 N.Y.S.2d 829 (2d Dep't 1975); *Di Milia v. Bennett*, 149 A.D.2d 592, 540 N.Y.S.2d 274 (2d Dep't 1989).
48. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 2008 WL 762290 (New York Court of Appeals March 25, 2008).
49. *Id.*
50. *Id.*
51. *Id.*
52. 149 A.D.2d 592, 540 N.Y.S.2d 274 (2d Dep't 1989).
53. 40 N.Y.2d 942 (1976), *rev'g on dissenting mem. of Shapiro, J.*, 48 A.D.2d 667, 367 N.Y.S.2d 829 (2d Dep't 1975).
54. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 10 N.Y. 3d 264 (2008).
55. *Id.*
56. 47 A.D.3d 856, 850 N.Y.S.2d 625 (2d Dep't 2008).
57. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 626. Although GML § 239-m[5] provides that if a county planning board "recommends modification or disapproval of a proposed action, the referring body shall not act contrary to such recommendation except by a vote of a majority plus one of all the members thereof[,]" Westchester County Administrative Code § 277.61 requires only that a municipal agency adopt a resolution by a simple majority vote to override a negative recommendation or a suggested modification from the County Planning Board. Since Westchester County Administrative Code § 277.61 is a special law and GML § 239-m[5] is a general law, and where a special law and a general law conflict the special law controls (*see 208 East 30th Street Corp. v. Town of North Salem*, 88 A.D.2d 281 (2d Dep't 1982)), municipalities in Westchester County may override a negative recommendation from the Westchester County Planning Board by a simple majority vote.
58. General Municipal Law § 239-m[3].
59. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 626–27.
60. *Id.* at 627.
61. *Id.* (citing *Burchetta v. Town Bd. of Town of Carmel*, 167 A.D.2d 339, 340-341, 561 N.Y.S.2d 305; *Old Dock Assoc. v. Sullivan*, 150 A.D.2d 695, 697 (2d Dep't 1989); *Asma v. Curcione*, 31 A.D.2d 883, 884 (4th Dep't 1969)).
62. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 628.
63. 48 A.D.3d 529, 852 N.Y.S.2d 220 (2d Dep't 2008).
64. 438 U.S. 104 (1978) (holding that a court, when considering whether a law effects a regulatory taking of property, must consider several factors, including the economic impact of the law on the claimant, the extent to which the law interferes with the claimant's investment-backed expectations, and the character of the government's action).
65. 505 U.S. 1003 (1992).
66. *Noghrey*, 48 A.D.3d 529, 852 N.Y.S.2d at 221.
67. *Id*. (emphasis original).
68. *Id.*
69. *Noghrey*, 48 A.D.3d 529, 852 N.Y.S.2d at 222.
70. 2008 WL 740561 (2d Dep't March 18, 2008).
71. *Id.*
72. *Id.*
73. "Subdivision" means the division of any parcel of land into a number of lots, blocks or sites as specified in a local ordinance, law, rule or regulation, with or without streets or highways, for the purpose of sale, transfer of ownership, or development. The term "subdivision" may include any alteration of lot lines or dimensions of any lots or sites shown on a plat previously approved and filed in the office of the county clerk or register of the county in which such plat is located. Subdivisions may be defined and delineated by local regulation, as either "major" or "minor," with the review procedures and criteria for each set forth in such local regulations.

    Town Law § 276[4](a).
74. Town of Newburgh Code § 163-2 defines "subdivision" as "[t]he division of any parcel of land or structure into two (2) or more lots, blocks, sites or units, with or without streets or highways. Such divisions shall include *resubdivision* of parcels of land for which an approved plat has already been filed in the office of the Orange County Clerk and which is entirely or partially undeveloped. . . . (emphasis added)." Section 163-2 defines "resubdivision" as "[a]ny change of an approved or recorded subdivision plat if such change affects any street layout shown on such plat or area reserved thereon for public use *or any change of a lot line* or if it affects any map or plan legally recorded. (emphasis added)"
75. 48 A.D.3d 585, 852 N.Y.S.2d 225 (2d Dep't 2008).
76. *Id.* at 227.
77. *Id.* at 226–27.
78. *Id.* at 227.
79. 852 N.Y.S.2d 503 (4th Dep't 2008).
80. *Id.* at 504.
81. *Id.*
82. *Id.*

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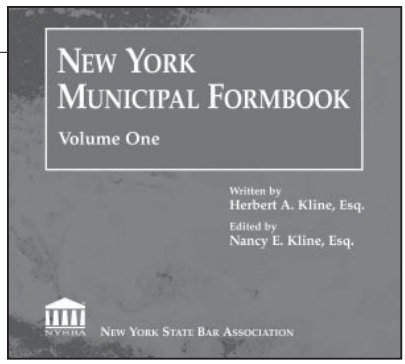

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