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Municipal Lawyer

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A Message from the Chair

Recently I have been spending a great deal of time trying to decipher statutory language in an effort to properly advise clients. This is nothing new and I am sure that I am not alone in the frustration that poorly drafted legislation creates for those affected thereby. What I am noticing though is that more and more often legislation fails to properly accomplish the legislative intent. Take for example, The Public Authorities Accountability Act of 2005 signed into law on January 13, 2006, as Chapter 766 of the Laws of 2005. As one of the speakers at our Annual Meeting pointed out, this new law contains a number of inconsistencies, ambiguities and terms used but not defined, leaving many state and local authorities awaiting further clarification and guidance on a clearly important State oversight role.

Unfortunately, statutory interpretation is becoming a more time consuming and risky proposition and bill jackets are often needed to try and determine the drafter's intent. Several years ago, a school district client attempted to refinance outstanding debt (something most homeowners at the time were doing with relative ease). Due to the lack of specific State legislative guidance on how to handle State aid in the context of a refinancing, meetings were set up with the State Education Department and other State officials to try and resolve the issue. Needless to say, this win-win proposition for the school and the State was not timely resolved and what the school had hoped for, which was simply to replace the existing higher annual debt with the new lower annual debt, was deemed unacceptable by the State. This began one of my first forays into legislative bill drafting which, at first, appeared promising as there were hundreds of schools in the State lining up to save money this way. After several years of inaction and failed attempts to pass what appeared to be a fairly straightforward and simple legislative solution, the bill that was introduced was rewritten at the last hour and enacted into law. Unfortunately, due to the delay in getting this act, rates rose and the opportu-

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nity for savings passed. This was just as well since the legislation was incomprehensible and required corrective amendments to eventually render it useful.

Realizing this is not an uncommon occurrence, our Section is stepping up its efforts to closely monitor legislation that may be of interest to our members such as those bills currently proposed to curtail eminent domain powers. We will be updating you periodically via our website on such legislative developments, and I would encourage those who have a favorite statutory conundrum to share it with us. The Municipal Law Section is attempting to follow the New York State Bar Association's lead in taking a more active role, when possible, in commenting on such legislation and efforts to correct deficiencies in existing laws.

Thomas Myers

From the Editor

In a recent *Municipal Lawyer* article,[1] Patricia Salkin, Associate Dean of the Albany Law School, examined the U.S. Supreme Court's decision in *Kelo v. City of New London*[2] rejecting a challenge to the constitutional authority of state and local governments to exercise eminent domain powers for economic development purposes absent a finding of blight. Rather, the Court held that in the context of a "carefully considered development plan" taking property for the purposes of economic development can satisfy the "public use" requirement of the Fifth Amendment.

As documented by Dean Salkin, the *Kelo* decision precipitated a firestorm of legislative activity in Congress and the states to limit the exercise of eminent domain authority for economic development. On the federal level, Congress has enacted, and the President has signed into law, an appropriations bill for the Departments of Transportation and Housing and Urban Development which prohibits those funds from being used to support federal, state and local projects that use eminent domain for other than "a public use."[3] Under the bill, "public use" does not include "economic development that primarily benefits private entities." The legislation also directs the General Accounting Office to undertake a study of the use of eminent domain nationwide and to report back to Congress within one year.

In New York State, the Senate and Assembly have held hearings around the state and numerous bills have been introduced into the State legislature to protect individual property rights. In sum, these bills contain provisions (1) restricting the use of eminent domain to specified "public projects"; (2) limiting condemnation for economic development to blighted properties; (3) requiring local governments to approve all takings within their jurisdiction; (4) mandating a comprehensive economic development plan and homeowner impact assessment for economic development takings; (5) providing enhanced compensation to persons whose property is taken for economic development purposes; and (6) establishing a temporary state commission to review the eminent domain process in New York.

"To shed public light on the real issues while removing some of the hysteria from the debate process," New York State Bar Association President A. Vincent Buzard has selected Dean Salkin to chair a task force "to review existing and proposed legislation regarding eminent domain in New York and make recommendations regarding appropriate legislative and regulatory considerations." Other members of the task force are:

- John M. Armentano of Uniondale (Farrell Fritz, P.C.)
- Vicki L. Been of New York (New York University)
- Lisa Bova-Hiatt of New York (New York City Corporation Counsel's Office)
- A. Kevin Crawford of Albany (Association of Towns)
- Hon. John D. Doyle of Rochester
- Robert A. Feldman of Rochester (Ward, Norris, Heller and Reidy LLP)
- M. Robert Goldstein of New York (Goldstein, Goldstein, Rikon and Gottlieb, P.C.)
- Charlene M. Indelicato of White Plains (Westchester County Attorney)
- Linda S. Kingsley of Rochester
- Robert B. Koegel of Rochester (Remington, Gifford, Williams & Colicchio, LLP)
- Harry G. Meyer of Buffalo (Hodgson Russ LLP)
- Prof. John R. Nolon of White Plains (Pace University School of Law)
- Richard L. O'Rourke of White Plains (Keane & Beane P.C.)
- James T. Potter of Albany (Hinman Straub P.C.)
- Carl Rosenblum of Albany (Bond Schoeneck & King)
- Joel H. Sachs of White Plains (Keane & Beane, P.C.)
- John N. Santemma of Garden City (Jaspen Schlesinger & Hoffman LLP)
- William L. Sharp of Glenmont (New York State Department of State)
- Lester D. Steinman of White Plains (Municipal Law Resource Center of Pace University)
- Prof. Phillip Weinberg of Jamaica (St. John's University School of Law)
- David C. Wilkes of Tarrytown (Huff Wilkes, LLP)

I am honored to have been appointed to this task force. I welcome your thoughts on the need for and the means to implement reform in the eminent domain process in New York.

Inside

In this issue of the *Municipal Lawyer*, Mark Davies, Executive Director of the New York City Conflicts of Interest Board, has assembled a compendium of conflicts of interest provisions governing counties, cities, towns and villages contained in New York State law outside of Article 18 of the General Municipal Law. These enactments focus primarily on the dual holding of public offices and the compatibility of public offices.

Henry M. Hocherman, a partner in the firm of Hocherman Tortorella and Wekstein, LLP, and Noelle V. Crisalli, a law student intern for that firm, have prepared a "Land Use Case Law Update: A Discussion of Significant Recent Land Use Cases from *Bower Associates* to *Lingle*." This article examines court decisions in the areas of federal civil rights and zoning, regulatory takings, cellular towers, decision-making authority of land use boards and religious land uses.

New York's recently enacted Information Security Breach and Notification Act is examined by Jennifer L. Reinke, a third-year law student at Pace University Law School. Ms. Reinke describes the obligations imposed on state government, the private sector and local governments to timely disclose any breach of the security of its computerized data systems to any resident in New York State whose private information was or is reasonably believed to have been acquired without authorization.

Finally, in "Municipal Briefs," I have reviewed recent case law relating to the evidentiary standard applicable to Article 78 proceedings reviewing administrative determinations of land use boards; whether mass property owned by utility companies is subject to town improvement special ad valorem levies; quorum requirements imposed upon the Office of Real Property Services in adjudicating a challenge to a tentative equalization rate; and the application of the supermajority voting provisions of Town Law § 265 in connection with the approval of rezoning petitions.

Lester D. Steinman

Endnotes

1. *Municipal Lawyer*, Summer 2005.
2. 125 S. Ct. 2655 (2005).
3. HR 3058. In November, 2005 the House also passed HR 4128, the Private Property Rights Protection Act, which would freeze for two years all federal economic development funds to state and local governments that condemn property for "economic development" projects. To date, there has been no Senate action on this legislation.

Request for Articles

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

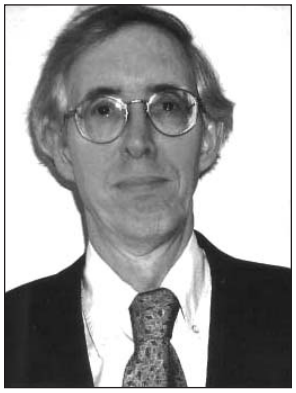
Lester D. Steinman, Esq.,
Director
Edwin G. Michaelian Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, NY 10606
E-mail: Lsteinman@pace.edu

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

Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages Under New York State Law

By Mark Davies

Introduction



As most municipal attorneys know, the primary state law governing conflicts of interest in municipalities in New York State is set forth in Article 18 of the General Municipal Law. That law applies to all officers and employees, whether paid or unpaid, of every municipality in the state, except New York City.[1] Thus, Article 18 applies not only to political subdivisions—counties, cities, towns, and villages—but also to, for example, school districts, fire districts, county improvement districts, BOCES, urban renewal agencies, and public libraries.

Article 18 has been the subject of many Municipal Law Section seminars and articles, a number of which are reproduced on the Section's website.[2] Characterized by the Temporary State Commission as "disgracefully inadequate," Article 18 provides little guidance to municipal officials; it contains huge gaps; and in the one area that it does regulate (prohibited interests in contracts), it over-regulates to such an extent that it can turn well-meaning public servants into convicted criminals. For these reasons, the Section's Ethics Committee has often advised that municipalities should adopt their own comprehensive, comprehensible, and sensible local ethics law. Materials on that topic may also be found on the Section's website.

One of the Legislature's primary purposes in adopting Article 18, over 40 years ago, was to replace a multitude of conflicts provisions scattered throughout the consolidated laws with a "generic law in relation to conflicts of interest in municipal transactions. . . ."[3] For all of its defects, Article 18 accomplished that purpose, significantly reducing the proliferation of conflicts of interest provisions. Nonetheless, scattered throughout the consolidated laws, some conflicts of interest legislation still exists, some of it rather hidden, waiting to leap out and bite the unwary municipal lawyer.

Accordingly, this article takes a first stab at compiling, in some comprehensive fashion, a compendium of conflicts of interest provisions regulating municipal officers and employees, as set forth in the chart (see pp.7-11). One must, however, emphasize two caveats. First, this chart is intended to be dynamic. The Section will post it on the Section's website and will add new entries and correct existing entries as they are received. Attorneys are thus encouraged to e-mail to the author any such additions or corrections (davies@coib.nyc.gov). Second, the chart includes only provisions for counties, cities, towns, and villages; but the Committee wishes to expand it to other political subdivisions as well, including, in particular, school districts and public authorities. Attorneys are thus particularly encouraged to e-mail provisions regulating those political subdivisions.

"Characterized by the Temporary State Commission as 'disgracefully inadequate,' Article 18 provides little guidance to municipal officials; it contains huge gaps; and in the one area that it does regulate, . . . it over-regulates to such an extent that it can turn well-meaning public servants into convicted criminals."

Review of the Provisions

Of the 72 provisions cited in the chart, almost half of them (34) regulate the holding of dual public offices or employment or the compatibility of public offices. Article 18 does not expressly address this issue, which is, instead, governed largely by common law. The New York State Attorney General's Office has issued dozens of opinions over the years about compatibility of office. The author of many of those opinions has written an article on the topic, which is posted on the Section's website.[4]

But the compatibility of some public offices is expressly governed by provisions in the consolidated laws, in particular restrictions on holding both an elective and appointive office in the same municipality. For example, a member of a county board of supervisors may not serve as a county administrator (only the chair may do so) or county manager;[5] and an elected or appointed county executive may not hold another elective office, with certain exceptions.[6] Similarly, a common council member may not hold any office paid for with city funds.[7] Nor may a member of a town board serve on the town's zoning or planning board;[8] the same rule applies to a member of a village board of trustees.[9]

Sometimes the restriction on the dual offices proceeds from the inherently incompatible nature of the positions. For example, not surprisingly, an assessor, or a member of the assessor's staff, may not serve on the board of assessment review;[10] and a town justice may not be employed as a police officer or peace officer (and not just in the same town).[11]

Some statutory provisions expressly permit dual office holding. For example, members of county, town, and village planning boards may serve on one another's planning boards.[12] So, too, a member of a municipal urban renewal agency may be an official or employee of the municipality.[13]

None of the foregoing provisions duplicates the provisions of Article 18. Indeed, none of the conflicts of interest restrictions set forth in the chart duplicates Article 18 restrictions. Thus, unlike Article 18, some non-Article 18 provisions address the use of one's municipal office for political purposes.[14] A handful of restrictions on moonlighting also exist, for example, on outside employment by members of a police force or by city engineers in certain cities and on the practice of law by certain law enforcement officers, such as constables and sheriffs. [15] And most readers are familiar with the constitutional prohibition on using government resources for a non-government purpose.[16] Of course, the Penal Law contains official misconduct and bribery provisions.[17]

A handful of provisions set forth in the chart require recusal by a municipal official in certain circumstances, for example, by a member of a county planning board or a regional planning council when a matter comes before it that is or was before another municipal board of which he or she is a member.[18] Since an action by a municipal body, as a general rule, requires the affirmative vote of a majority of the total membership of the body, [19] a recusal, whether mandated by statute or common law, effectively acts as a negative vote, and may even paralyze the board. To address that problem, county, city, town, and village legislative bodies may, by law, appoint alternate members to their planning boards and, in the case of cities, town, and villages, to their zoning boards as well.[20]

This author located only two provisions regulating disclosure, one relating to transactional disclosure by members of boards of assessment review and the other to financial disclosure by assessors.[21] As an aside, one should note two recent session laws mandating disclosure. Chapter 499 of the Laws of 2005, which became effective on August 16, amended General Municipal Law § 803 in regard to transactional disclosure. Also, Chapter 766, effective January 13, 2006, imposes a financial disclosure requirement on board members, officers, and employees of municipal-related public authorities, public benefit corporations, not-for-profit corporations, industrial development authorities and agencies, and their affiliates. Finally, the chart lists some miscellaneous provisions on penalties, enforcement (including taxpayer suits), and removal from office. [22]

Political Subdivisions[23] Affected	Subject	Restrictions/Prohibitions on (or Provisions Governing)	Citation
All	Use of gov't resources	Gift or loan of municipal funds or property for non-government purposes	Const., Art. 8, § 1
All	Removal from office	(Removal of officers for misconduct or malversation in office)	Const., Art. 13, § 5
Counties	Dual offices	Member of board of supervisors (except chair) serving as county administrator (but county administrator may serve, without additional compensation, as head of department not administered by elective official)	Alt. County Gov't Law § 50
Counties	Dual offices	Member of board of supervisors serving as county manager (but county manager may serve, without additional compensation, as head of department not administered by elective official)	Alt. County Gov't Law § 51
Counties	Dual offices	(County director or president may serve, without additional compensation, as head of department not administered by elective official)	Alt. County Gov't Law §§ 52, 53
Counties	Dual offices	Elected or appointed county executive holding other elective office (except as provided in § 50)	Alt. County Gov't Law § 152
Counties	Removal from office	(Removal of county president pursuant to Pub. Off. Law §§ 33-35; removal of county manager or other appointive county executive by board of supervisors)	Alt. County Gov't Law § 154
Counties	Dual offices	(Department head may serve as deputy county executive without additional compensation)	Alt. County Gov't Law § 156(5)
All	Political activities; promise of influence	Personnel actions based on political affiliation, activities, or contributions; compelling or inducement of political contributions; solicitation or receipt of political contributions in government offices; promise of influence	Civ. Serv. Law § 107
Counties	Dual offices	District attorney, sheriff, county clerk, or any elective county officer holding any other elective county or town office or city supervisor office	County Law § 411
Counties	Recusal	(In lawsuit where sheriff is a party, county clerk executes all mandates)	County Law § 661
All	Political activities	Police commissioner or officer or member of police force (1) using power for political purposes or (2) taking personnel action in regard to officer or member of police force for political reasons or (3) soliciting or receiving money for political organizations	Election Law § 17-110
All	Political activities	Promise of (or deprivation of) government employment or benefit funded by work relief funds in return for or on account of political activity; solicitation or receipt of political contributions from anyone receiving work relief funds; disclosure to political committee of names of persons receiving work relief funds	Election Law § 17-154

Political Subdivisions Affected	Subject	Restrictions/Prohibitions on (or Provisions Governing)	Citation
All	Political activities	Compelling or inducing officer or employee to make political assessment	Election Law § 17-156
Cities	Dual offices	Common council member holding any office paid for with city funds	Gen. City Law § 3
Cities	Removal from office	(Officer appointed or nominated by mayor of city of third class may be removed only with approval of mayor)	Gen. City Law § 4
Cities	Dual offices	Volunteer membership in more than one fire company at same time	Gen. City Law § 16-a(10)
Cities	Dual offices	More than minority of members of planning board holding other public office or position in city; member of legislative body of city serving on planning board; appointment of municipal officer or employee to planning board where he or she cannot carry out duties without conflict with duties as planning board member (but otherwise municipal officers or employees may serve on planning board and perform other municipal duties); (county planning board member may serve on city planning board)	Gen. City Law § 27(1), (3), (10), (12)
Cities	Recusal	(Legislative body may establish alternate planning board members to serve when regular member must recuse because of conflict of interest)	Gen. City Law § 27(16)
Cities	Dual offices	Member of legislative body of city serving on zoning board; appointment of municipal officer or employee to zoning board where he or she cannot carry out duties without conflict with duties as zoning board member (but otherwise municipal officers or employees may serve on zoning board and perform other municipal duties)	Gen. City Law § 81(2), (9)
Cities	Recusal	(Legislative body may establish alternate zoning board members to serve when regular member must recuse because of conflict of interest)	Gen. City Law § 81(11)
All	Enforcement	(Property taxpayers may bring action seeking injunction or damages against municipal officers and agents for illegal official acts)	Gen. Mun. Law § 51
Cities	Moonlighting	Outside work for another employer by member of police force	Gen. Mun. Law § 208-d[24]
Counties	Dual offices	(Elected and appointed officials of county or municipality may serve on county planning board)	Gen. Mun. Law § 239-c(2)(c)
Counties	Recusal	County planning board member deliberating or voting on matter before planning board where matter is or was before municipal board of which he or she is a member	Gen. Mun. Law § 239-c(2)(c)
Counties	Recusal	(County legislative body may establish alternate county planning board members to serve when regular member must recuse because of conflict of interest)	Gen. Mun. Law § 239-c(1-a)

Political Subdivisions Affected	Subject	Restrictions/Prohibitions on (or Provisions Governing)	Citation
All	Dual offices	(Elected and appointed officials of a municipality may be appointed by the municipality to a regional planning council)	Gen. Mun. Law § 239-h(3)(c)
All	Recusal	Regional planning council member deliberating or voting on matter before council where matter is or was before municipal board of which he or she is a member	Gen. Mun. Law § 239-h(3)(c)
City, town, village	Dual offices	(Member of municipal urban renewal agency may be official or employee of the municipality)	Gen. Mun. Law § 553(4)
All	Dual offices	(Members of industrial development agency may include representatives of local government; member of the agency may be an official or employee of the municipality)	Gen. Mun. Law § 856(2), (4)
All	Applicable ethics law	(All members, officers, and employees of industrial development agencies are subject to Gen. Mun. Law Art. 18)	Gen. Mun. Law § 883
All	Moonlighting	Constable, coroner, crier, attendant of a court practicing law in any court; sheriff, under sheriff, deputy sheriff, or sheriff's clerk practicing law in county in which he or she is elected or appointed	Jud. Law § 473
All	Political activities	Employer's personnel decisions based on employee's off-hour, off-site political activities not using employer's equipment or other property, unless a conflict of interest exists	Labor Law § 201-d(2)(a), (3)(a), (3)(c), (3)(d)
All	Official misconduct	Official misconduct; obstructing governmental administration; defrauding the government	Penal Law Art. 195
All	Bribery	Bribery and bribe receiving; rewarding and receiving reward for official misconduct; giving and receiving unlawful gratuities; bribe giving and receiving for public office	Penal Law Art. 200
Counties	Applicable ethics law	(County legislative body must establish a code of ethics for members of board of visitors in county-owned residential health care facility)	Pub. Health Law § 2803-g(11)
Counties, cities	Removal from office	(Governor may remove county treasurer, county superintendent of the poor, county register, county coroner, chief executive officer of a city, chief executive officer of city police force)	Pub. Off. Law § 33; *see also* §§ 34, 35
Towns, villages	Removal from office	(Supreme court may remove town or village officer, except justice of peace)	Pub. Off. Law § 36
All	Financial disclosure	(Assessors must file a short form annual financial disclosure statement)	RPTL § 336
All	Dual offices	Assessor or member of his or her staff serving on board of assessment review; majority of members of board of assessment review being officers or employees or the municipality	RPTL § 523(1)(b)

Political Subdivisions Affected	Subject	Restrictions/Prohibitions on (or Provisions Governing)	Citation
All	Transactional disclosure	(Members of board of assessment review must disclose in writing direct or indirect interest in property for which complaint has been filed)	RPTL § 523(3)
Towns, villages	Dual offices	(In certain counties, town receiver of taxes may be appointed as village receiver of taxes)	RPTL § 1431
Second Class Cities[25]	Additional compensation	Officers (with certain exceptions) receiving compensation or fees in addition to salary	Second Class Cities Law § 17
Second Class Cities	Dual offices	Holding more than one city office	Second Class Cities Law § 19
Second Class Cities	Enforcement; removal from office	(Common council may punish or expel members for official misconduct)	Second Class Cities Law § 34
Second Class Cities	Penalties; enforcement	(Unlawful action by common council member is misdemeanor; common council members may be sued by taxpayer for unlawful actions)	Second Class Cities Law § 44
Second Class Cities	Moonlighting	City engineer having any outside work	Second Class Cities Law § 98
Second Class Cities	Dual offices	Members of police or fire department holding any other office or being employed in any other city department	Second Class Cities Law § 135
Second Class Cities	Political activities; enforcement	(Dismissal of officer or member of police department for violating Election Law § 17-110)	Second Class Cities Law § 144
Second Class Cities	Additional compensation	Officers and employees receiving allowances or compensation in addition to regular salary or compensation	Second Class Cities Law § 240
Towns	Dual offices	Holding more than one elective town office; member of town board serving as comptroller	Town Law § 20(4)
Towns	Dual offices	Town justice employed as police officer or peace officer	Town Law § 31(4)
Towns	Dual offices	Town justice serving as town board member	Town Law § 60(2)
Towns[26]	Dual offices	Fire district commissioner serving as chief or assistant chief of the fire district fire department	Town Law § 174(1)(a)
Towns	Dual offices	Volunteer membership in more than one fire company	Town Law § 176-b(10)
Towns	Dual offices	Town board member serving on zoning board of appeals	Town Law § 267(3)
Towns	Recusal	(Town board may establish alternate zoning board members to serve when regular member must recuse because of conflict of interest)	Town Law § 267(11)
Towns	Dual offices	Town board member serving on planning board	Town Law § 271(3)

Political Subdivisions Affected	Subject	Restrictions/Prohibitions on (or Provisions Governing)	Citation
Towns	Dual offices	(Member of village or county planning board may serve on town planning board)	Town Law § 271(12)
Towns	Recusal	(Town board may establish alternate planning board members to serve when regular member must recuse because of conflict of interest)	Town Law § 271(15)
Villages	Dual offices	Simultaneously holding elective and appointive village office (with certain exceptions)	Village Law § 3-300(3)
Villages	Dual offices	(Except as provided by law, one may hold a village office and another public office, unless one cannot fully discharge the village office while carrying out the duties of the other office)	Village Law § 3-300(4)
Villages	Penalties	(Village officer who unlawfully appropriates village money or property or assets thereto is personally liable)	Village Law § 4-412(12)
Villages	Dual offices	Village trustee serving on zoning board of appeals	Village Law § 7-712(3)
Villages	Recusal	(Village board of trustees may establish alternate zoning board members to serve when regular member must recuse because of conflict of interest)	Village Law § 7-712(11)
Villages	Dual offices	Village trustee serving on planning board	Village Law § 7-718(3)
Villages	Dual offices	(Member of town or county planning board may serve on village planning board)	Village Law § 7-718(12)
Villages	Recusal	(Village board of trustees may establish alternate planning board members to serve when regular member must recuse because of conflict of interest)	Village Law § 7-718(16)
Villages	Use of gov't resources	(Village may appropriate funds for annual firemen's inspection dinner for each fire company in village)	Village Law § 10-1000(11)
Villages	Dual offices	Volunteer membership in more than one fire company	Village Law § 10-1006(10)
Villages	Dual offices	Village mayor or trustee holding office of chief or assistant chief of village fire department, unless trustee does not, either as individual or member of a board, appoint or approve appointment of chief or assistant chief	Village Law § 10-1012
Village	Dual offices	(In village that encompasses a town, holder of town office may also hold a village office)	Village Law § 17-1730

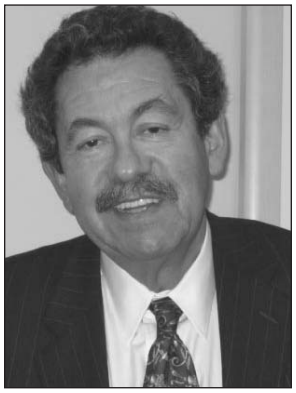
Endnotes

1. *See* Gen. Mun. Law § 800(4) (defining "municipality"). The financial disclosure provisions of Article 18 also apply to New York City. *See* Gen. Mun. Law §§ 810(1), 811(1)(a).
2. The Section's URL is: http://www.nysba.org/municipal.
3. 1964 N.Y. Laws ch. 946, § 1.
4. *See* James D. Cole, *Compatibility of Office*, *Municipal Lawyer*, Summer 2004, at 19.
5. Alt. County Gov't Law §§ 50, 51.
6. Alt. County Gov't Law § 152.
7. Gen. City Law § 3.
8. Town Law §§ 267(3), 271(3).
9. Village Law §§ 7-712(3), 7-718(3).
10. RPTL § 523(1)(b).
11. Town Law § 31(4).
12. *See* Gen. Mun. Law § 239-c(2)(c); Town Law § 271(12); Village Law § 7-718(12).
13. Gen. Mun. Law § 553(4).
14. *See* Civ. Serv. Law § 107; Election Law §§ 17-110, 17-154, 17-156; Labor Law § 201-d(2)(a), (3)(a), (3)(c), (3)(d); Second Class Cities Law § 144.
15. Gen. Mun. Law § 208-d; Second Class Cities Law § 98; Jud. Law § 473.
16. Const., Art. 8, § 1.
17. Penal Law Art. 195, 200.
18. Gen. Mun. Law §§ 239-c(2)(c), 239-h(3)(c).
19. *See* Gen. Const. Law § 41.
20. Gen. City Law §§ 27(16), 81(11); Gen. Mun. Law § 239-c(1-a); Town Law §§ 267(11), 271(15); Village Law §§ 7-712(11), 7-718(16).
21. RPTL §§ 336, 523(3).
22. Const., Art. 13, § 5; Alt. County Gov't Law § 154; Gen. City Law § 4; Gen. Mun. Law § 51; Penal Law § 60.27(5), as amended by 2005 N.Y. Laws ch. 499, § 2; Pub. Off. Law §§ 33-36; Second Class Cities Law §§ 34, 44, 144; Village Law § 4-412(12).
23. This chart thus does not include, for example, public authorities or school districts, except as noted.
24. Similar provisions exist for members of police force of housing authority of any municipality (Gen. Mun. Law § 208-d (sic)) and members of police force of transit authority (Gen. Mun. Law § 208-e).
25. The provisions of the Second Class Cities Law apply, according to their terms, only to a city of the state which, on December 31, 1923, was a city of the second class, until such provision is superseded pursuant to the Municipal Home Rule Law, was superseded pursuant to the former city home rule law, or is or was otherwise changed, repealed, or superseded pursuant to law. Second Class Cities Law § 4. A city of the second class was one having a population of 50,000 to 175,000. Const., Art. 12, § 2 (1894, as amended in 1907).
26. A fire district under Town Law "is a political subdivision of the state and a district corporation . . . The officers and employees of a fire district, including the paid and volunteer members thereof, are officers and employees of such fire district and not officers or employees of any other political subdivision." Town Law § 174(7).

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

Land Use Case Law Update: A Discussion of Significant Recent Land Use Cases from *Bower Associates* to *Lingle*

By Henry M. Hocherman and Noelle V. Crisalli



Recently, the United States Supreme Court, the New York Court of Appeals, and the lower courts in New York handed down several significant land use decisions addressing various issues. In *Bower Associates v. Town of Pleasant Valley*,[1] the New York Court of Appeals set the standard of review for substantive due process and equal protection actions with regard to land use matters under the United States Constitution. In *Lingle v. Chevron U.S.A. Inc.*,[2] the United States Supreme Court changed the regulatory takings analysis, eliminating the *Agins* "substantially advances" test.[3] The Court of Appeals, in *Crown Communications New York, Inc. v. Department of Transportation of the State of New York*,[4] held that local zoning regulations do not apply to commercial telecommunication providers that are installing private antennae on state-owned telecommunications towers. *Metro Enviro Transfer, LLC v. Village of Croton-On-Hudson*[5] reminded the lower courts that they are not permitted to substitute their judgment for the judgment of local boards. Finally, in the field of religious land use, the Court of Appeals applied the *Cornell University v. Bagnardi*[6] balancing test to religious land uses in *Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*.[7] Additionally, in *Town of Mount Pleasant v. Legion of Christ, Inc.*,[8] the Second Department held that the special permit approval process does not, without more, constitute a substantial burden to religious exercise under the federal Religious Land Use and Institutionalized Persons Act.

Federal Civil Rights and Zoning

In *Bower Associates v. Town of Pleasant Valley* and *Home Depot U.S.A., Inc. v. City of Rye*,[9] the appellants alleged civil rights violations under 42 U.S.C. § 1983 when the municipal defendants wrongfully refused to grant them land use permits.

In *Bower Associates*, the Pleasant Valley Planning Board denied the plaintiff's application to create a three-lot subdivision and an access road connecting this three-lot subdivision to a large subdivision being developed by the plaintiff in the neighboring Town of Poughkeepsie, citing environmental concerns as its reason for denial. The denial of approval for the access road prevented development of the large subdivision across the municipal boundary in Poughkeepsie. Bower challenged the determination of the Planning Board under CPLR article 78 and the Supreme Court "directed approval of the subdivision plan, concluding that the Planning Board's actions were arbitrary in that its determination was not based on environmental concerns unique to the Bower Associates subdivision." The Appellate Division affirmed, stating that Bower met all the conditions necessary for subdivision approval. With "its article 78 relief in hand," Bower, in March 2001, then instituted a federal civil rights action against the Town of Pleasant Valley and its Planning Board.[10] Bower's claim alleged a denial of procedural and substantive due process, equal protection, and just compensation.

In *Home Depot U.S.A., Inc. v. City of Rye*, the home improvement retailer Home Depot "obtained site plan approval from the Village of Port Chester to develop an 8.33 acre site for a retail establishment of approximately 101,467 square feet, with an 18,000 square foot outdoor garden center and 537 parking spaces in Port Chester, at the border between Port Chester and the City of Rye."[11] During the SEQRA review of the project, the neighboring City of Rye demanded that several traffic-mitigation measures be imposed upon Home Depot, one of which was the widening of Midland Avenue in the City of Rye. Accordingly, the Village of Port Chester made the widening of Midland Avenue a condition for project approval. However, in order to widen Midland Avenue, Home Depot needed the approval of the City of Rye, which Rye refused to grant.

After failed settlement negotiations, Home Depot commenced an article 78 proceeding against Rye to compel the City to sign a county permit which

would allow Home Depot to widen Midland Avenue. Additionally, Home Depot instituted a civil rights suit under 42 U.S.C. § 1983 against the City of Rye. In the article 78 proceeding, the court annulled Rye's decision not to sign the county permit to allow the widening of Midland Avenue and held that Rye's action of mandating mitigation measures and then refusing to approve the permit that would allow Home Depot to complete the mitigation measures was arbitrary and capricious.

In both cases, the Court of Appeals held that the appellants did not state a valid civil rights claim under 42 U.S.C. § 1983 and therefore were not entitled to damages, notwithstanding the prior judicial determinations in both article 78 proceedings that the defendants' actions had been arbitrary and capricious. In so holding, the Court of Appeals emphasized that, "42 U.S.C. § 1983 is not simply an additional vehicle for judicial review of land-use determinations."[12] Therefore, "—even an arbitrary denial redressable by an article 78 or other state law proceeding—is not tantamount to a constitutional violation under 42 U.S.C. § 1983; significantly more is required."[13]

The Court of Appeals articulated a two-part test for the lower courts to apply when analyzing a substantive due process claim with regard to land use matters. In order to state a successful substantive due process claim, "[f]irst, claimants must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue . . . improvements.'"[14] When analyzing the first prong of the test, the court should consider whether the petitioner has a "vested property right arising from substantial expenditures pursuant to a lawful permit," whether there is a "certainty or very strong likelihood that an application or approval would have been granted," and whether an "issuing authority has discretion in approving or denying a permit."[15] After establishing a cognizable property interest, the claimant must show that the governmental action was wholly without legal justification. Only the most egregious official conduct will be considered arbitrary in the constitutional sense. Community opposition that is based on a legitimate state interest (e.g., crime, traffic, noise) does not rise to this prohibited level.

The Court of Appeals also articulated an equal protection analysis in the land use context. This analysis is based on a selective enforcement theory. In order to state a valid equal protection claim based on a selective enforcement theory the party asserting the claim must prove that the party, when compared with others similarly situated, is selectively treated and that such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or on a malicious or bad faith intent to injure the party. In order to make a successful assertion under this test, the party putting forth the argument must show that the municipal body treated it differently from other similarly situated parties with an impermissible motive—i.e., with an intent to injure the party.

Regulatory Takings

The issue in *Lingle v. Chevron U.S.A. Inc.*[16] was "whether the 'substantially advances' formula announced in *Agins* [*v. City of Tiburon*][17] is an appropriate test for determining whether a regulation effects a Fifth Amendment taking."[18]

In June 1997 the Hawaii Legislature enacted Act 257 which "impos[ed] certain restrictions on the ownership and leasing of service stations by oil companies."[19] This Act was "in response to concerns about the effects of market concentration on retail gasoline prices."[20] The provision of this Act important in *Lingle* was the section that "limit[ed] the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline."[21] After the enactment of Act 257, Chevron brought suit in federal district court alleging that the rent cap provision effected a taking under the Fifth and Fourteenth Amendments.

"The District Court granted summary judgment to Chevron, holding that 'Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments.'"[22] The Ninth Circuit held that the District Court applied the correct standard of analysis but further held that there was an issue of material fact as to whether the provision would benefit consumers and therefore remanded the case to the District Court for further findings of fact. On remand the District Court held that the rent cap would not benefit the public and therefore held the Act to be a takings because it failed to advance a legitimate state interest. The Ninth Circuit affirmed, and the United States Supreme Court granted certiorari to consider whether the *Agins* substantially advances formula was the correct standard to apply.

The Supreme Court, in a unanimous opinion, struck down the *Agins* substantially advances test concluding that the *Agins* test "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."[23] Furthermore, the Court reaffirmed "that a plaintiff seeking to challenge a government regula-

tion as an uncompensated taking of private property may proceed" by alleging a per se taking such as a physical invasion of property or a total regulatory taking, a land use exaction, or a regulatory taking.[24]

The Court identified two categories of per se takings. "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[25] "A second categorical rule apples to regulations that completely deprive an owner of 'all economically beneficial use' of her property."[26]

Land use exactions are another category of takings identified by the *Lingle* court. In the context of land use exaction, the *Nollan/Dolan* test applies. The issue in *Nollan v. California Coastal Commission*[27] and *Dolan v. City of Tigard*[28] was essentially "whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand [an] easement as a condition for granting a development permit the government was entitled to deny."[29] In *Nollan*, the Court held that this type of exaction was permissible "provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit."[30] This standard is different from the substantially advances formula in *Agins* because in that case the question was whether a regulation, not an exaction, substantially advances *some* legitimate state interest and in *Nollan* the issue was whether an exaction substantially advances *the same* interests that would entitle the government to deny the permit. *Dolan* further clarified the test for land use exactions "holding that an adjudicative exaction requiring the dedication of private property must be 'roughly proportional . . . both in nature and extent to the impact of the proposed development.'"[31]

Takings claims outside of per se takings and land use exactions are governed by the test first set forth in *Penn Central Transp. Co. v. New York City*.[32] The *Penn Central* test requires the court to balance several factors to determine whether a government regulation effects a takings. "Primary among those factors are 'the economic impact of the regulations on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations.'"[33] Other factors include the degree of the invasion and the character of the regulation, among others.

Cellular Towers

In *Crown Communications New York, Inc. v. Department of Transportation of the State of New York*,[34] the New York State Police, the Department of Transportation (DOT), and other state agencies entered into an agreement in 1997 with Castle Tower Holding Corporation, Crown Communications' predecessor in interest, which provided Castle "with an exclusive license to construct and operate telecommunications towers on state-owned lands and rights-of-way." "Under the terms of the state contract, Crown was permitted to license space on the towers to localities and commercial wireless providers, and the State retained the right to co-locate its own communication equipment on the towers."[35]

Crown found two sites for telecommunication towers in the City of New Rochelle along the Hutchinson River Parkway. In 2000 the State informed New Rochelle of Crown's telecommunication plans and Crown and New York State presented the project to the Mayor and City Council. At the time of the presentation neither the Mayor nor the City Council objected to the project. The DOT served as lead agency for SEQRA review of the project and issued a negative declaration for each site. "Crown proceeded with the construction of the towers and entered into license agreements with a number of commercial wireless telecommunication providers to lease space on the towers for their equipment."[36] During construction, New Rochelle issued a stop work order arguing that the project was subject to the City's zoning ordinance and that Crown must apply for a special use permit from the City's Planning Board.

"In 2001, Crown commenced separate hybrid declaratory judgment and CPLR article 78 proceedings seeking a judgment prohibiting the City from enforcing its zoning regulations to halt construction of the towers and a declaration that the towers were exempt from local zoning regulations."[37] Applying the balancing of interest test articulated in *In re County of Monroe*,[38] the Supreme Court held that Crown's construction of the towers was immune from local zoning regulations, but "the private telecommunications providers licensed to install their equipment on the towers were subject to local zoning regulations."[39] The Appellate Division affirmed the Supreme Court's determination that Crown was exempt from local zoning, however the Appellate Division modified the judgment of the Supreme Court and held that the private wireless telecommunication providers were also exempt from local zoning.

The Court of Appeals was asked "whether the installation of private antennae on two state-owned telecommunications towers is exempt from local zoning regulation."[40] The Court held that commercial telecommunication providers are not required to comply with local zoning ordinances. In reaching

this conclusion, the Court applied the *County of Monroe* balancing of interest test. The State put forth evidence to show that the towers would afford the public a number of benefits such as the infrastructure to establish a statewide wireless network to facilitate improved interagency communication and the infrastructure to create the Intelligent Transportation System which monitors traffic flow, road conditions, and weather conditions. The Court also held that the private antennae on the towers "will improve the availability of 911 emergency cellular calls made by the public."[41] Additionally, the Highway Emergency Local Patrol (HELP) relies on wireless communication, provided by the private antennae, to provide assistance to stranded drivers. The fact that the private wireless providers derive a profit from this activity "does not undermine the public interest served."[42]

Furthermore, the Court held that the extension of immunity from local zoning regulations to private telecommunications providers does not conflict with the Telecommunications Act of 1996.[43] The Telecommunications Act (TCA) provides that the terms of the Act shall not limit the authority of the state and local governments with regard to, *inter alia*, the placement of telecommunication towers. However, the TCA "does not dictate that a locality's regulations trump state interests where competing interests exist."[44]

Decision-Making Authority of Land Use Boards[45]

In 1998, Croton-on-Hudson's Village Board of Trustees granted a three-year special use permit to Metro Enviro Transfer, LLC so that Metro Enviro Transfer could operate a solid waste transfer facility in the Village. "The permit contained 42 special conditions, including capacity limitations. Other conditions included delineating types of waste that were not allowed in the facility and specifying training required of facility personnel."[46]

The Village alleged that over the three-year term of the special use permit, Metro Enviro Transfer violated the conditions of the permit several times. Violations included exceeding capacity limitations and falsifying records to cover up the violations, accepting prohibited types of waste at the facility, failing to properly train employees, and several other violations. These violations were not in dispute. Metro Enviro Transfer had admitted to and paid fines for several of the violations.

"In March 2001, Metro applied to renew the permit, due to expire in May 2001. The Board granted more than 10 temporary extensions and held extensive hearings in which it heard evidence and opinion testimony for and against renewal. Metro presented extensive sworn expert testimony and submitted additional written evidence and legal arguments. On January 27, 2003, the Board voted not to renew the permit."[47]

In response to the Village Board's decision not to renew the permit, Metro Enviro Transfer brought an article 78 proceeding to challenge the Board's decision. The Supreme Court granted Metro Enviro Transfer's petition, reasoning that the Village Board impermissibly based its decision on community opposition to the permit. The Second Department reversed and held that the Supreme Court impermissibly substituted its judgment for that of the Village.

The issue presented to the Court of Appeals was whether the Village Board's decision to deny renewal of the special use permit was supported by substantial evidence. The Court held that the decision of the Village Board was supported by substantial evidence. Metro Enviro Transfer argued that the Board was wrong to deny the permit because Metro Enviro Transfer had admitted and paid fines for past violations and had taken steps to conform with the terms of the permit going forward. The Court disagreed with this argument and held that Metro Enviro Transfer's willful violations of the permit in the past constituted sufficient evidence to deny the permit.

The Court of Appeals also took this opportunity to reaffirm the authority of local boards in land use decisions, reminding the lower courts of their limited role in the review of a local board's decisions. The Court recognized that local boards are not without discretion when granting or renewing special use permits. A local board does not need to show substantial evidence of actual harm to deny a permit. Rather the standard of review in renewal should be whether "an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious."[48]

Religious Land Uses

The petitioner in *Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*[49] had operated a church at its current location in the Town of Moreau since 1974. In 2002 the petitioner acquired 14.3 acres of additional property and submitted an application to the Moreau Zoning Board of Appeals (ZBA) for a modification of its existing special use permit to implement an expansion plan. As a part of this plan, the petitioner sought to build a second access road about 500 feet to the north of the existing driveway that would assist the flow of traffic through the parking lot to the road.

After review of the plan by traffic engineers, the town planning board, and the Saratoga County Planning Board, and after a public hearing on the application, the ZBA approved every aspect of the proposed plan with the exception of the new driveway. In so deciding, "[t]he ZBA noted that the new driveway was unnecessary because the Church's traffic needs could be met through minor upgrades to the existing entrance road."[50] The minor upgrades included, among other things, widening the existing driveway and eliminating parking along the driveway.

"The Church commenced [a] CPLR article 78 proceeding challenging [the portion of the ZBA's decision] that denied permission to construct the secondary roadway. The Church argued that the ZBA had impermissibly imposed a requirement that the Church establish a 'need' for the access road contrary to the [Court of Appeals] decision in *Cornell University* and the determination was therefore arbitrary and capricious."[51]

In *Cornell University v. Bagnardi*,[52] the Court of Appeals stated that, "[h]istorically, schools and churches have enjoyed special treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would not have been allowed." This presumption can be rebutted by evidence of significant impacts on the community. This procedure "affords zoning boards an opportunity to weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate them."[53] In *Cornell University*, the Court of Appeals "struck down two zoning decisions involving colleges because zoning officials in both cases had required that the educational institutions seeking special permits prove their need to expand as a condition precedent to granting the application. . . . [[T]he Court of Appeals reasoned] '[a] requirement of a showing of a need to expand . . . , or even more stringently, a need to expand in the particular location chosen, . . . has no bearing whatsoever upon the public's health, safety, welfare or morals' and, as such, was impermissible."[54]

In this case the petitioner "argue[d] that the ZBA's reference to the need for the secondary driveway [was] indistinguishable from the 'need to expand' analysis disapproved in *Cornell University.*"[55] The Court of Appeals rejected this argument because the ZBA never questioned the Church's need to expand. "Read in context, the discussion of need did not involve an impermissible interference with the internal affairs of the Church but arose out of an appropriate balancing of interest well within the scope of the powers of the ZBA."[56] The court held that the decision by the ZBA not to permit the new roadway but to approve the plan with the mitigation measures suggested was permissible under the *Cornell University* balancing test and reasoned that, "[t]he requirement that petitioner widen its existing driveway (in lieu of constructing a new one) is neither so costly or extreme that it undermines the efficacy of the expansion plan, nor does it prohibit the Church's religious use of its newly acquired parcel. It therefore met the test articulated in *Cornell University*."[57]

Town of Mount Pleasant v. Legion of Christ, Inc.[58] involved the interpretation of the federal Religious Land Use and Institutionalized Persons Act.[59] That statute states that, "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." In *Town of Mount Pleasant v. Legion of Christ, Inc.*, the Appellate Division Second Department held that, "[r]equiring a religious organization to go through the same special permit application process as a secular organization cannot be considered a substantial burden on the exercise of religious freedom."[60] Because the court held that the special permit application process did not impose a substantial burden on the exercise of religious freedom, RLUIPA and its heightened scrutiny was not implicated.

Endnotes

1. 2 N.Y.3d 617 (2004). For an in-depth discussion of *Bower Associates v. Town of Pleasant Valley, see* Henry M. Hocherman, *Through The Looking Glass: Bower Associates v. Town of Mount Pleasant Valley and Home Depot U.S.A., Inc. v. Dunn*, 18 *Municipal Lawyer* 22 (Fall 2004).
2. 125 S. Ct. 2074 (2005).
3. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
4. 4 N.Y.3d 159 (2005).
5. 5 N.Y.3d 236 (2005).
6. 68 N.Y.2d 583 (1986).
7. 5 N.Y.3d 407 (2005).
8. 21 A.D.3d 368 (2d Dep't 2005).
9. 2 N.Y.3d 617 (2004).
10. *Id.* at 624.
11. *Id.*
12. *Bower Associates*, 2 N.Y.3d at 627.
13. *Id.*
14. *Id.*

15. *Id.* at 628.
16. 125 S. Ct. 2074 (2005).
17. 447 U.S. 255 (1980).
18. 125 S. Ct. at 2078.
19. *Id.* at 2078.
20. *Id.*
21. *Id.*
22. *Id.* at 2079.
23. *Id.* at 2083.
24. *Id.* at 2087.
25. *Id.* at 2081 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).
26. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).
27. 483 U.S. 825 (1987).
28. 512 U.S. 374 (1994).
29. 125 S. Ct. at 2086.
30. *Id.*
31. *Id.* at 2086 (quoting Dolan, 512 U.S. at 391) (internal quotations omitted).
32. 438 U.S. 104 (1978).
33. 125 S. Ct. at 2081-82 (quoting *Penn Central Transp. Co.*, 438 U.S. at 124).
34. 4 N.Y.3d 159, 163 (2005).
35. *Id.*
36. *Id.* at 164.
37. *Id.*
38. *In re County of Monroe*, 72 N.Y.2d 338 (1988). The County of Monroe balance of interest test requires the court to balance a number of factors when considering the applicability of zoning ordinances when a conflict arises between two governmental entities. The factors include, "'the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulations would have upon the enterprise concerned and the impact upon legitimate local interests."' *Crown Communications New York, Inc.*, 4 N.Y.3d at 166 (quoting *County of Monroe*).
39. *Crown Communications New York, Inc.*, 4 N.Y.3d at 164-65.
40. *Id.* at 163.
41. *Id.* at 167.
42. *Id.*
43. 47 U.S.C. §§ 151 *et seq*.
44. *Crown Communications New York, Inc.*, 4 N.Y.3d at 169.
45. *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 N.Y.3d at 236 (2005).
46. *Id.* at 239.
47. *Id.*
48. *Id.* at 241.
49. 5 N.Y.3d at 407 (2005).
50. *Id.*
51. *Id.*
52. 68 N.Y.2d 583, 593 (1986).
53. *Pine Knolls* (quoting *Cornell University*, 68 N.Y.2d at 596).
54. *Id.* (quoting *Cornell University*, 68 N.Y.2d at 597).
55. *Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*, 5 N.Y.3d at 414 (2005).
56. *Id.* at 414.
57. *Id.* at 414.
58. 21 A.D.3d at 368 (2d Dep't 2005).
59. 42 U.S.C. § 2000.
60. 21 A.D.3d at 369.

Henry M. Hocherman is a member of the Executive Committee of the Municipal Law Section of the New York State Bar Association and is a partner in the law firm of Hocherman Tortorella & Wekstein, LLP of White Plains, New York.

Noelle V. Crisalli is a legal intern in the law firm of Hocherman Tortorella & Wekstein, LLP. She is a third-year law student at Pace Law School, an editor of the Pace Environmental Law Review, and an Honors Fellow with Pace Law School's Land Use Law Center.

New York's Information Security Breach and Notification Act

By Jennifer L. Reinke

This article summarizes New York's recently enacted Information Security Breach and Notification Act ("ISBNA")[1] and examines the backdrop for its enactment. The Act amends the State's Technology Law and General Business Law to impose specific restrictions, responsibilities and requirements on state agencies and private persons or businesses. The legislation also mandates that local governments adopt a policy or local law regarding notification procedures consistent with those contained in the Technology Law amendments set forth in the ISBNA.

California Leads the Way in Security Breach Notification Legislation

In 2003, California became the first state to enact legislation requiring any business or state agency that owns, licenses, or maintains computerized data of personal information to notify affected residents in the event of a security breach which results in, or reasonably may result in, the unauthorized acquisition of unencrypted personal information.[2] The California statute does not, however, apply to local agencies as defined by California Civil Code § 6252(a).[3]

As of 2005, 25 other states have followed California's lead by enacting similar legislation.[4] The sudden emergence of security breach notification laws was spurred by the recent breach against ChoicePoint, a large personal information aggregating firm, resulting in the exposure of over 6 million Americans' personally identifying information.[5] Initially, only 30,000 of the 6 million Americans were notified.[6] These 30,000 Americans were residents of California, the only state to have a security breach notification law at the time of ChoicePoint's breach.[7] Consequently, many states have enacted security breach notification laws to provide their citizens with notice of any breach that may affect their personal information.

Despite the protection it afforded its residents following ChoicePoint's breach, the California statute has come under fire due to the vagueness and ambiguity of the terms and procedures conveyed.[8] Since similar terms are utilized in New York's version of the California statute, the ISBNA may be scrutinized under the same lens.

Information Security Breach and Notification Act (New York)

The Information Security Breach and Notification Act was enacted by the New York State Legislature on August 9, 2005, and took effect on December 7, 2005, 120 days after its enactment.[9] By amending the Technology Law and the General Business Law, the Act's purpose is to provide New York residents with notice that their private information was, or may have been, acquired due to a breach of security involving a state entity or private business. Such notification will allow state residents to take the necessary steps to protect themselves against any damage that has or may occur as a result of the breach.

A. Amendments to the Technology Law

The Technology Law now requires state entities that own, license or merely maintain computerized data containing private information to "disclose any breach of the security of the system following discovery or notification of the breach in the security of the system to any resident of New York state whose private information was, or is reasonably believed to have been, acquired by a person without valid authorization."[10] "Breach of the security system" has been defined as:

> Unauthorized acquisition or acquisition without valid authorization of computerized data which compromises the security, confidentiality, or integrity of personal information maintained by a state entity. Good faith acquisition of personal information by an employee or agent of a state entity for the purposes of the agency is not a breach of the security system, provided that the private information is not used or subject to unauthorized disclosure.[11]

"Private information" has been defined as:

> Personal information in combination with any one or more of the following data elements, when either the personal information or the data element is not encrypted or encrypted with an encryption key that has also been acquired:
>
> (1) Social Security number;
>
> (2) driver's license number or non-driver identification card number; or
>
> (3) account number, credit or debit card number, in combination with any required security code, access code, or password which would permit access to an individual's financial account.
>
> Private information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.[12]

The Legislature has also provided further clarification for determining whether there has in fact been a breach of the security system. In determining whether a breach has occurred, the following factors, among others, may be considered by the business or state entity:

> (1) Indications that the information is in the physical possession and control of an unauthorized person, such as a lost or stolen computer or other device containing information; or
>
> (2) Indications that the information has been downloaded or copied; or
>
> (3) Indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported.[13]

Notification by the state to the affected individual may take any of a number of statutorily prescribed forms including written notice, electronic notice, or substitute notice when the cost of providing notice will exceed $250,000 or the affected class includes more than 500,000 people.[14] The content of the notice must include "contact information for the person or business making the notification and a description of the categories of information that were, or are reasonably believed to have been, acquired by a person without valid authorization, including specification of which of the elements of personal information and private information were, or are reasonably believed to have been, so acquired."[15] State entities are also required to notify the Attorney General, Consumer Protection Board, and the State Office of Cyber Security and Critical Infrastructure Coordination ("OCSCIC") regarding the details of the security breach.[16] Available on the website of the Office of Cyber Security and Critical Infrastructure Coordination is a Reporting Form that is currently being used for businesses, individuals or state entities reporting a "breach of the security system."[17]

The aforementioned amendments to the Technology Law are applicable to state entities as defined to exclude "all cities, counties, municipalities, villages, towns, and other local agencies."[18] However, the excluded entities "shall adopt a notification policy no more than one hundred twenty days after the effective date of this section."[19] "Such entity may develop a notification policy which is consistent with this section or alternatively shall adopt a local law which is consistent with this section."[20] As no guidance for local government compliance with ISBNA is currently expected to be released, it is the intention of OCSCIC that local governments will merely adopt the same form for use in reporting breaches of information security occurring at the local level.

Additionally, it is worthwhile to note that the application of ISBNA on the local level is not inconsistent with the Freedom of Information Law ("FOIL"). While it is true that most documents and records held by local governments are subject to a FOIL request, the fact that these documents are accessible to the public does not render ISBNA inoperative. The distinction lies in whether the release of the electronic document or record to the public has been authorized.

ISBNA is triggered when there has been a breach of the security system which has or may result in the unauthorized acquisition of private information.[21] The definition of private information does not, however, include publicly available information that has lawfully been made available to the general public from government records.[22] The release of electronic documents and records as a result of a FOIL request have been authorized for release and thus have lawfully been made available to the public. On the other hand, electronic documents or records that have been obtained by the public without authorization may be the product of a breach of the security system requiring notification to the affected individual.

B. Amendments to the General Business Law

The General Business Law was amended in a substantially similar way as the Technology Law. As such, the General Business Law now requires that "any person or business which conducts business in New York State" and owns, licenses or merely maintains computerized data which includes private information shall provide notice of a breach of the security system in the same manner as provided in the Technology Law.[23] One significant difference between the amendments to the Technology Law and the GBL is that under the GBL, when a person or business fails to provide notice of a security breach to affected residents, the Attorney General may bring an action to enjoin and restrain the continuation of such violation. Damages for "actual costs or losses incurred by a person entitled to notice pursuant to this article, if notification was not provided to such person pursuant to this article, including consequential financial losses" may be awarded in such action.[24] Additionally, a civil penalty of the greater of $5,000 or up to $10 per instance of failed notification (not exceeding a total of $150,000) may be imposed if the court finds that the violation is knowing or reckless.[25]

Unlike the amendments to the Technology Law, the provisions of the General Business Law "shall be exclusive and shall preempt any provisions of local law, ordinance or code, and no locality shall impose requirements that are inconsistent with or more restrictive than those set forth in this section."[26] Indeed, ISBNA's Bill Summary states that, "This bill . . . recognizes the importance of only a State law overseeing businesses whose data has been breached."[27]

Endnotes

1. 2005 N.Y. Laws 442; 2005 N.Y. Laws 491.
2. California Civil Code § 1798.29.
3. California Civil Code §§ 1798.29, 1798.3, 6252(a).
4. 50 State Surveys, Security Breach Legislation (West 2005).
5. 2005 N.Y. Assembly, Bill Summary—A.04254.
6. *Id.*
7. *Id.*
8. *See*, Tyler Paetkau and Roxanne Torabian-Bashardoust, *California Deals with ID Theft*, Business Law Today (May/June 2004).
9. ISBNA was first enacted at L. 2005, ch. 442 with technical amendments following at L. 2005, ch. 491. These amendments clarify the definition of "breach of the security system" by adding factors to be considered when determining whether there has been a breach. The amendments also provide for telephone notification to affected persons.
10. Technology Law § 208(2), (3).
11. Technology Law § 208(1)(b).
12. Technology Law § 208(1)(a).
13. Technology Law § 208(1)(b); General Business Law § 899-aa(1)(c).
14. Technology Law § 208(5).
15. Technology Law § 208(6).
16. Technology Law § 208(7)(a).
17. Office of Cyber Security and Critical Infrastructure Coordination, *available at* http://www.cscic.state.ny.us.
18. Technology Law § 208(1)(c)(2).
19. Technology Law § 208(8); while the Bill Summary states the deadline for municipal action is "no more than 120 days after [the bill's] enactment," a telephone conversation with Susan Rabinowitz of the Office of Cyber Security and Critical Infrastructure Coordination on January 10, 2006, confirmed the deadline for municipal action is that quoted in the statute—120 days from the effective date of the Act. The effective date of the act was December 7, 2005, thus the deadline for municipal action is April 6, 2006.
20. *Id.*
21. Technology Law § 208(1)(b).
22. Technology Law § 208(1)(a).
23. GBL § 899-aa(2), (5).
24. GBL § 899-aa(6)(a).
25. *Id.*
26. GBL § 899-aa(9).
27. 2005 N.Y. Assembly, Bill Summary—A.04254.

Jennifer L. Reinke is a third-year student at Pace Law School and a research assistant for the Municipal Law Resource Center.

Municipal Briefs

By Lester Steinman

Article 78

Pursuant to CPLR § 7804(g), an Article 78 proceeding shall be transferred from the Supreme Court to the Appellate Division when "the substantial evidence issue specified in question four of section 7803" is raised in the petition and must be decided in order to dispose of the proceeding. Typically, however, the determinations of zoning boards of appeal and other municipal land use agencies are not subject to review under the "substantial evidence" standard set forth in CPLR § 7803(4) and should not be transferred to the Appellate Division.[1]

In delineating the questions that may be raised in an Article 78 proceeding, CPLR § 7803 provides in relevant part:

* * *

> (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .
>
> (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

According to the Court, the inquiry to be made under CPLR § 7804(3) is whether there is a rational basis to support the determination under review. In other words, the agency determination should be sustained unless its action was "arbitrary, unreasonable, irrational or indicative of bad faith." In comparison, substantial evidence "is related to the charge or controversy and involves a weighing of the quality and quantity of proof. . . . More than seeming or imaginary, it is less than a preponderance of the evidence . . ."

However, a "'substantial evidence' question is presented only when a quasi-judicial evidentiary hearing has been held." Proceedings before zoning boards and other municipal land use boards generally do not fall within this category:

> Municipal land use agencies, like the Zoning Board, are "quasi-legislative, quasi-administrative" bodies (*Matter of Cowan v. Kern, supra* at 599), and the public hearings they conduct are "informational in nature and [do] not involve the receipt of sworn testimony, or taking of evidence" within the meaning of CPLR § 7803 (4). (*Matter of Wal-Mart Stores v. Planning Bd. of Town of N. Elba,* 238 A.D.2d 93, 96) While parties have a right to be heard by such agencies and to present facts in support of their position, the forum in which they do so is not "a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803 (4)." (*Seaview Assn. of Fire Is. v. Department of Envtl. Conservation of State of N.Y.* 12 A.D. 2d 619). Accordingly, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803 (3), and not the "substantial evidence" standard of CPLR 7803 (4) (citations omitted).

Land Use

Chapter 658 of the Laws of 2005 adds § 239-nn to the General Municipal Law requiring a host municipality to give ten days prior notice to an adjacent municipality of a hearing relating to the issuance of a special permit, use variance, site plan or subdivision approval by the host municipality on property within 500 feet of that adjacent municipality. The adjacent municipality may appear and be heard on the application. This amendment does not apply to New York City. The legislation is effective July 1, 2006.

Real Property Tax Law

In *New York Telephone Company v. Supervisor of the Town of Oyster Bay,*[2] the Court of Appeals ruled that the Town of Oyster Bay may not impose special ad valorem tax levies for garbage collection on mass property (telephone lines, wires, cables, poles, supports and enclosures for electrical conductors), owned by New York Telephone Company and situated on public and private land not owned by the telephone company within the Town's refuse district, because those properties did not and could not directly benefit from that municipal service.[3] By contrast, in litigations brought by the Niagara Mohawk Power Corporation against the Towns of Bethlehem and Tonawanda,[4] the Court holds that mass property owned by Niagara Mohawk

(poles, wires, insulators and pipelines for transporting and delivering natural gas and electricity to its customers) do benefit from the special districts in which their property is located and thus are subject to those districts' special ad valorem levies.

In Bethlehem, Niagara Mohawk transmission and distribution facilities located within the Town's water district were deemed to be benefited by the district's system of pipes, hydrants and mains available for fire-fighting purposes. Evidence in the record documented that the fire department had responded on numerous occasions to fires at the company's transmission and distribution facilities.

Similarly, in the Town of Tonawanda, Niagara Mohawk's "otherwise vacant or undeveloped lands improved by electric and gas transmission fixtures and appurtenances" were held to be benefited by the Town's garbage district. As the Appellate Division observed, not only is there "sufficient theoretical potential of the properties to be developed in a manner that will result in the generation of garbage," these properties already produce "landscaping debris (grass clippings, tree clippings and brush)."

Finally, the Court deemed the record before it insufficient to determine whether Niagara Mohawk's properties benefit from the Town of Watertown's sewer district within the meaning of the *New York Telephone* case. Thus, the Court remanded the matter to the Supreme Court for further proceedings to determine *inter alia* "whether Niagara Mohawk owns the land on or under which the transmission and distribution facilities are situated, and as to whether, even if Niagara Mohawk does not own the land, the sewer district encompasses storm sewers that actually or might potentially safeguard Niagara Mohawk's transmission and distribution facilities from flooding."[5]

Quorum Requirements

To discharge its duty to establish a final equalization rate in response to an administrative challenge to a tentative equalization rate established for the City of White Plains, applicable provisions of the General Construction Law[6] and the Open Meetings Law[7] require that at least three of the five members of the New York State Board of Real Property Services must be "gathered together in the presence of each other or through the use of videoconferencing . . . and assent to a proposed resolution." Where, as here, the Board established a final equalization rate after a hearing at which two board members were physically present and one member participated by telephone, that determination must be annulled and the matter remitted for a new determination based upon the absence of the required quorum. The Court expressly rejected the claim that recent amendments to the General Construction Law and Open Meetings Law authorizing public officials to participate in meetings by videoconferencing extends to permitting participating by teleconferencing.[8]

Zoning

Pursuant to Town Law § 265, approval of a proposed zoning change requires a three-fourths vote of the Town Board when a protest petition against the change is signed and filed by "the owners of twenty percent or more of the area of the land immediately adjacent to that land included in such proposed change, extending 100 feet therefrom." Here, neighboring property owners filed a petition protesting the proposed rezoning of a residential parcel of land for "big box" commercial retail development. The Town Board rejected the petition and approved the rezoning by a three-two vote.

Overturning the Town Board's decision, the Supreme Court found that for purposes of circumventing Town Law § 265's "supermajority provision," the applicant for the zone change impermissibly manipulated the boundaries of the property to be rezoned to create an artificial buffer zone of residentially zoned property, owned by the applicant, extending 100 feet beyond the boundary of the property proposed to be rezoned. Reversing the Supreme Court, the Appellate Division found the statutory provisions to clearly and unambiguously require "that the class of owners necessary to force a 'supermajority' must live '*immediately* adjacent' to the rezoned property, that is within 100 feet (Town Law § 265[1][b] [emphasis added])." Finding that the petitioners did not satisfy this requirement, the Court reinstated the Town Board's rezoning determination.[9]

Endnotes

1. *Halperin v. City of New Rochelle*, 4 A.D.3d 768 (2d Dep't 2005).
2. 4 N.Y.3d 387 (2005).
3. *See Municipal Lawyer*, Spring 2005.
4. *Niagara Mohawk Power Corporation v. Town of Bethlehem; Niagara Mohawk Power Corporation v. Town of Tonawanda* 6 N.Y.3d 744 (2005).
5. *Niagara Mohawk Power Corporation v. Town of Watertown,* 6 N.Y.3d 744 (2005).
6. General Construction Law § 41.
7. Public Officers Law §§ 102(1), 103(c) and 104(4).
8. *In re City of White Plains v. New York State Board of Real Property Services,* 18 A.D.3d 549 (2d Dep't 2005).
9. *Eadie v. Town Board of the Town of North Greenbush*, 22 A.D. 22 A.D.3d 1025 (3d Dep't 2005).

Lester Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and Editor of the *Municipal Lawyer*.

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Bylaws
Owen B. Walsh
34 Audrey Avenue, P.O. Box 102
Oyster Bay, NY 11771
Tel.: (516) 922-7300
Fax: (516) 922-2212
E-mail: obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky, LLP
534 Broadhollow Road, P.O. Box 9034
Melville, NY 11747
Tel.: (631) 694-2300
Fax: (631) 694-2309
E-mail: snb@lambbarnosky.com

Ethics and Professionalism
Mark L. Davies
11 East Franklin Street
Tarrytown, NY 10591
Tel.: (212) 442-1424
Fax: (212) 442-1410
E-mail: mldavies@aol.com

Land Use and Environmental
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, 7th Floor
White Plains, NY 10601
Tel.: (914) 421-1800
Fax: (914) 421-1856
E-mail: h.hocherman@htwlegal.com

Legislation
M. Cornelia Cahill
Girvin & Ferlazzo, P.C.
20 Corporate Woods Boulevard
Albany, NY 12211
Tel.: (518) 462-0300
Fax: (518) 462-5037
E-mail: mcc@girvinlaw.com

Membership
Prof. Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
Tel.: (518) 445-2351
Fax: (518) 445-2303
E-mail: psalk@mail.als.edu

Municipal Finance and Economic Development
Kenneth W. Bond
Squire, Sanders & Dempsey, L.L.P.
350 Park Avenue, 15th Floor
New York, NY 10022
Tel.: (212) 872-9817
Fax: (212) 872-9815
E-mail: kbond@ssd.com

Website
Howard Protter
Jacobowitz and Gubits, LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586
Tel.: (845) 778-2121
Fax: (845) 778-5173
E-mail:hp@jacobowitz.com

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Lester D. Steinman
Editor-in-Chief

Municipal Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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