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Municipal Lawyer

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

A Message from the Chair

I joined the Municipal Law Section in 1990 at the urging of my employer/judge and soon-to-be Municipal Law Section Chair, John D. Doyle. I voluntarily left the safety of a state court clerkship to open my own law practice—a solo practice. He was sure I would enjoy the camaraderie of fellow attorneys on the "front lines," but more importantly, the Section members I would meet and network with would become invaluable resources. That became abundantly clear when, shortly after hanging out my shingle, I became counsel to my hometown village zoning and planning boards. I learned much from the Section's fall and annual programs, solicited models of various ordinances from around the state from fellow members, and was comforted by the sharing of experiences in our quest to provide the best representation possible for our clients.

The practice of law has changed remarkably since then and the Section has changed with it under each chair since I signed on. Each chair inevitably ponders the issue of "How do we remain relevant to our members?" What was relevant in 1990 may not be relevant today.

Our hardworking Executive Committee met May 15–16, 2003, near Albany for a planning workshop and developed policy which impacts our mission, committee structure, programs, membership, this publication, and our budget. Let me highlight a few of the policy changes.

Mission

The Section has a new Mission Statement:

> The purpose of the Municipal Law Section shall be to serve, educate and provide a common meeting ground and impartial forum for those attorneys engaged in dealing in any capacity with issues in municipal law.

Our Section members are full-time government lawyers, private practitioners representing local government and developers, law school professors and administrators, judges, lobbyists, and municipal financiers. The former mission statement was too detailed and too lengthy to accommodate the ever-changing needs of today's municipal lawyer. Technological advances bring new challenges to our practices and our clients. This new Mission Statement gives us the flexibility to deliberate issues not even imagined ten years ago.

Committees

Our committee structure allows members with similar interests to meet and exchange ideas and

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information and inform the general Section membership of issues specific to their practices. The following five committees will remain intact:

Employment Relations

Ethics and Professionalism

Land Use and Environmental Law

Municipal Finance and Economic Development (f/k/a Real Property Tax and Finance)

Membership

The Section has always had a Legislation Committee but it has been dormant for the last two years. It will be reconstituted, hoping to forge new ties with NYCOM, NYSAC, and the Association of Towns. Anyone interested in tracking legislation and working with these groups should contact me. Two new opportunities to get involved were created—the Government Operations Committee, designed to handle telecommunications and other technological advances and their impact on local governments, and a committee that will be created to assist with the expansion of the Section's Web site. Check <www.nysba.org/municipal> for our Section site if you have not done so already. In addition to providing a forum for those with a specific interest in the subject matter, each committee will give members an opportunity to author articles for the *Municipal Lawyer*, identify topics and speakers for the Fall and Annual Meetings and for CLE programs, identify important legislation and case law developments, and initiate legislation for discussion and adoption by the Section and the NYSBA. Anyone interested in serving can contact me at rminarik@courts.state.ny.us. I welcome questions and suggestions.

Education

The Section's goal with the Fall and Annual Meetings is to provide our members with 6 credits of MCLE at each, including at least 1 credit of Ethics. If you attend both meetings each year, you will fully satisfy your MCLE requirements. Start by attending the upcoming Fall program in Albany October 23–26, 2003. This program will mark the first time we have sponsored a meeting jointly with the ABA's State and Local Government Law Section. Our experience indicates that members find joint meetings with other groups and NYSBA Sections beneficial. We will endeavor to arrange more joint programming as soon as practicable.

As with any endeavor over the last two years, the Section has experienced the financial impact wrought by the devastation on September 11, 2001. After taking a hard look at how we can cut expenses, preserve important membership services, and implement desired initiatives, we decided that a modest increase in our Section dues from $20 to $30 was in order. Regrettably, we will ask NYSBA to approve the increase, but hope that you will notice the expansion in our membership services long before the dues increase becomes a reality.

Finally, a word of thanks to outgoing Chair Linda Kingsley. Her leadership for the past two years will make my time at the helm easier. The change you see in the *Municipal Lawyer* was only one of her many initiatives. I hope to meet you in Albany in October.

Renee Forgensi Minarik

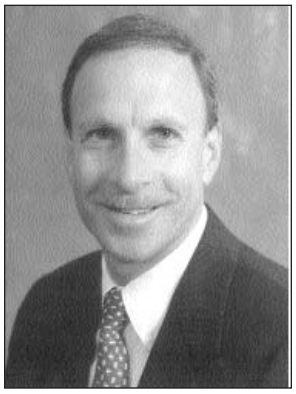
Request for Articles

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.

From the Editor



The Municipal Law Section takes great pride in the ascension of former Executive Committee member A. Thomas Levin to the Presidency of the New York State Bar Association. A recognized leader, premier consensus builder and brilliant lawyer, Tom is the perfect choice to lead the Association as it confronts such challenges as making legal services more accessible to the poor and more affordable to the middle class and educating the public about the operations of the law and the legal system. We wish Tom well and look forward to working with him to accomplish these objectives.

It is also a pleasure to welcome the Honorable Renee Forgensi Minarik of the New York State Court of Claims as the new Chair of the Municipal Law Section. During her distinguished tenure on the Executive Committee, Judge Minarik has been a strong advocate for expanding the services that the Section delivers to its members. Together with immediate past Chair Linda Kingsley, she organized a two-day retreat which enabled the Executive Committee to plan and implement policies to strengthen our committee structure, develop our Web site, increase membership, enhance our CLE programs and the *Municipal Lawyer*, and provide a sound financial foundation for the Section. These initiatives are described in greater detail in her cover page article, "A Message from the Chair."

In this issue, Carol Van Scoyoc, Chief Deputy Corporation Counsel of the city of White Plains, New York, reviews the legal battle between subsidiaries of AT&T Corporation and the city of White Plains regarding the city's authority under section 253 of the Telecommunications Act of 1996 to impose an annual franchise fee in return for granting permission to a telecommunications service provider to install fiber optic cable and conduit within the city's right-of-way. As discussed by Ms. Van Scoyoc, the Second Circuit's decision in *TCG New York, Inc. v. City of White Plains, New York*[1] calls into question the authority of municipalities in New York to regulate a telecommunication provider's installation of a fiber optic cable network and to receive fair compensation for the provider's use of municipal property to provide telecommunication services to the public.

Municipal regulatory powers over recreational uses is the subject of an article by Daniel Spitzer. Addressing an array of land uses from skate ramps and basketball poles in residential backyards to commercial operations such as racetracks and amusement parks, Mr. Spitzer discusses the problem presented by recreational uses, reviews the powers available to municipalities to control those uses and recommends various strategies for regulating recreational uses.

"Municipal Briefs" digests a recent Court of Appeals decision on the obscure, and often misunderstood, doctrine that prohibits municipal entities from taking actions in their governmental capacity that bind future boards. Also highlighted is a significant decision from the Appellate Division, Second Department construing the provisions of the Open Meetings Law to provide members of the public with a right to unobtrusively videotape public meetings. A third note discusses the Legislature's response to the Court of Appeals' decision in *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*[2] regarding voting requirements for planning boards, zoning boards of appeals, regional planning councils and county planning boards.

Finally, please make plans to attend the Section's Fall Meeting on October 23–26, 2003, in Albany. Under the leadership of Program Co-Chair Patricia Salkin, the Section has joined together with the American Bar Association and numerous other co-sponsors to assemble an extraordinary array of legal talent from across the nation to address a multiplicity of issues from contract procurement to zoning. The details on this program can be found on page 21.

Lester D. Steinman

Endnotes

1. 305 F.3d 67 (2d Cir. 2002), *cert. denied* 123 S. Ct. 1582 (2003).
2. 97 N.Y.2d 86, 735 N.Y.S.2d 873 (2001).

Second Circuit Invalidates City Franchise Fee on Telecommunications Provider

By Carol L. Van Scoyoc

In a long-awaited opinion, the United States Court of Appeals for the Second Circuit delivered a devastating message to municipalities in telecommunications law by invalidating, as a violation of section 253 of the Telecommunications Act of 1996 (TCA)[1], the city of White Plains' ("City") requirement of an annual franchise fee of five percent (5%) of gross revenues to be derived from the operation of the telecommunications facilities located within the City limits, in *TCG New York, Inc., et al. v. City of White Plains, New York*.[2] The Second Circuit ruling reversed a determination by then Justice Barrington D. Parker, Jr. of the United States District Court for the Southern District of New York[3] (now a Second Circuit Judge) who had ruled favorably on the City's authority to impose an annual franchise fee on telecommunications providers (see article in the May/June 2001 issue of the *Municipal Lawyer*).

The following article will delve into the history and background of how the tenacious efforts of one municipality to respond to the challenges created by the TCA eventually resulted in litigation by a telecommunications Goliath, and ultimately, led to the Second Circuit's ruling. This article will discuss the City's pre-TCA franchise agreement requirement, the enactment of the TCA and the City's adoption of a local telecommunications ordinance, the circumstances surrounding the application submitted by TCG which led to the instant lawsuit, the District's Court's decision, the role and influence of the Federal Communications Commission (FCC) in the appeal to the Second Circuit, and an analysis of the key issues presented by the parties and addressed by the Second Circuit in reaching its determination.

City of White Plains' Pre-TCA Franchise Requirement

For several years prior to the enactment of the TCA, the city of White Plains, based on authority set forth in section 33 of the City's charter governing use of City property and fair compensation therefor, section 27 of the New York Transportation Corporations Law, and case law interpreting such law,[4] required that providers of telecommunications services seeking to construct telecommunications facilities and place other equipment in the City's rights-of-way (i.e., fiber optic network of cables running through new and preexisting conduits), obtain permission from the City's legislative body, the Common Council, and negotiate and enter into a franchise agreement with the City. The franchise agreement, similar to a standard contract, had included, *inter alia*, provisions describing the grant of the franchise and the type of services, a map of the proposed location of conduit, the term of the franchise, the City's right to exercise its police powers, defense and indemnification, representations, warranties, remedies for breaches, rights of termination, assignments and transfers, and the right of compensation to the City. The usual compensation to the City under these agreements had been in the form of an annual franchise fee equal to 5% of the gross revenues derived by the provider, or its affiliates, in connection with the operation of the telecommunications facilities located within the City's boundaries.

Enactment of the TCA and Adoption by the City of White Plains of a Local Ordinance Governing Telecommunications

In 1996, the TCA was signed into law by President Clinton. Among the numerous provisions contained in the TCA is section 253, which generally preempts barriers to entry to telecommunications markets. That law also explicitly declares, however, that nothing in section 253 affects "the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunication providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way, on a nondiscriminatory basis, if the compensation is publicly disclosed by such government."

As a mechanism of confronting section 253 of the TCA, on December 1, 1997, the Common Council of the city of White Plains adopted an ordinance (essentially codifying the City's pre-TCA policy and procedures) by which new telecommunication providers could obtain approval to use and place equipment in the City's rights-of-way.[5] The City's ordinance sets forth that a telecommunications provider[6] first submit an application for either a franchise or revocable license to the Commissioner of Public Works and the

Corporation Counsel. The application is to contain, *inter alia*, information concerning the applicant and its affiliates; a description of the telecommunications services proposed to be provided, including a description of the facilities and equipment; a description of the proposed franchise area; or, in the case of a revocable license, the specifically identified streets and/or portions of streets proposed to be used; the applicant's construction plans; the applicant's legal, financial, technical and other appropriate qualifications; and the financing for the proposed construction.[7]

After the application has been deemed to be complete, the City is obligated to enter into negotiations with the applicant to determine whether such applicant and the City are able to reach agreement on the terms and conditions of the franchise or revocable license. Such terms and conditions include, but are not limited to, length of the franchise or revocable license; compensation to the City; insurance; performance bonds; indemnification requirements; the City's right of inspection of facilities and records; non-assignment clauses; and other provisions.[8]

If the telecommunications provider and the City reach an agreement, the application is forwarded to the Common Council for approval by adoption of a separate ordinance or denial. During the aforementioned process, the Common Council may require additional information from the applicant, and seek advice from other City officials and agencies, in the form of reports, which may include recommendations as to the application.[9] In its review, the Common Council may consider a number of factors, including, *inter alia*, the applicant's ability to meet construction and physical requirements and maintain the property of the City in good condition throughout the term of the franchise or revocable license; the adequacy of the terms and conditions of the proposed compensation to be paid to the City; the adequacy of the terms and conditions of the proposed franchise or revocable license; the legal, technical, financial and other appropriate qualifications of the applicant; and any other public interest factors or considerations pertinent for safeguarding the interests of the City and the public.[10]

TCG's Application Before the City

In April of 1998,[11] after the adoption of the City's ordinance, TCG New York, Inc., TCG Systems, Inc., and Teleport Communications d/b/a TCNY, subsidiaries of the AT&T Corporation (collectively referred to as "TCG") originally submitted an application to the City for a revocable license to install a small amount of fiber optic cable and about 240 feet of underground conduit. After a series of meetings and discussions, TCG subsequently decided to request a franchise and submitted an application to the City in February 1999. Since the initial submission of the application, the parties had been engaged in intense negotiations over a draft May 1999 proposed franchise agreement, substantially similar to the agreement executed by other telecommunications providers with the City, prior to and after the enactment of the TCA and the adoption of the City's ordinance.

"After the application has been deemed to be complete, the City is obligated to enter into negotiations with the applicant to determine whether such applicant and the City are able to reach agreement on the terms and conditions of the franchise or revocable license."

Lawsuit Commenced by TCG Against the City of White Plains in Federal District Court

When it was apparent that an agreement could not be achieved by the parties, TCG filed a lawsuit in federal District Court for the Southern District of New York on June 18, 1999, alleging violations of federal and state law. After commencement of the lawsuit, the parties attempted to resolve their differences. As a result of the negotiations, the City offered TCG a new proposed franchise agreement which sought to address some of TCG's concerns and objections. After further negotiations, the City offered additional modifications to the draft agreement which were deemed unsatisfactory to TCG (the "August Proposal"). The August Proposal provided, *inter alia*, that TCG pay an annual franchise fee to the City equal to 5% of gross revenues; guarantee payment from its parent corporation; build a limited amount of additional conduit without charge at the City's request; reserve the right of the City to examine TCG's records; impose a most favored vendee status on behalf of the City; and require that upon termination of the agreement, TCG remove its facilities from public property at its own expense.

In its legal action, TCG claimed under the TCA that the City's ordinance and the August Proposal effectively prohibited TCG from providing telecommunications services, and regulated beyond the City's public rights-of-way, violating section 253(a), (b) and (c) of the TCA. TCG also alleged that Verizon's (formerly known as Bell Atlantic, NYNEX, and

New York Telephone) *de facto* exemption from the City's ordinance by not having to enter into a franchisee agreement,[12] was both non-competitive and discriminatory against TCG, in violation of section 253(c) of the TCA. TCG also contended that the City's ordinance and the August Proposal violated the New York State Transportation Corporations Law, the New York Public Service Law and denied TCG's due process rights under the Fourteenth Amendment.

The District Court's Decision

The District Court embarked upon a two-pronged inquiry to determine whether the city of White Plains' actions violated section 253 of the TCA: (1) whether the City's regulations "prohibit or have the effect of prohibiting" the ability of TCG to provide telecommunications services under section 253(a); and (2) if so, whether the regulations are "saved" under section 253(c) of the TCA, which preserves the authority of local municipalities to manage the public rights-of-way.[13]

City's Violation of Section 253(a) of the TCA

As to the first prong of the test, the District Court determined that TCG fulfilled its burden of establishing that the City's regulations and actions violate section 253(a) of the TCA, since when considered as a whole and in context, they have the effect of prohibiting the ability of TCG to provide telecommunications services. The District Court observed that the City's ordinance prohibits a provider from using the City's rights-of-way without first applying for and then securing a franchise. The court further noted that the process of obtaining a franchise has evolved into a lengthy and complex negotiation between the parties. While recognizing that the City's requirements do not impose an explicit prohibition upon TCG, the court reasoned that the City's ordinance, coupled with the City's delay in proceeding forward on the application, have effectively prohibited TCG from providing telecommunications services in the city of White Plains.

City's Satisfaction of Section 253(c) of the TCA

The District Court found, however, that portions of the city of White Plains' ordinance and August Proposal were saved by the safe harbor provisions of section 253(c) of the TCA. In reaching that determination, the District Court addressed three questions: (1) Do the City's regulations "manage the public rights-of-way"? (2) Are the required fees "fair and reasonable compensation" for the use of the public rights-of-way? and (3) Is the exemption of the incumbent provider Verizon from the City's regulations "competitively neutral and non-discriminatory"?

Management of Public Rights-of-Way

After examining both the ordinance and the August Proposal, the District Court sustained a number of the City's requirements, including, *inter alia,* those pertaining to the pre-franchise application seeking contact information of the applicant; a description of the proposed franchise area; term, cancellation and termination, performance bonds; insurance and indemnification provisions; a proposed construction schedule; a map of the proposed location of the applicant's telecommunications system; and ownership of the applicant and identification of affiliates, as comporting with and directly related to the management of the public rights-of-way. The District Court rejected, however, those items such as a description of the telecommunications services; information concerning the provider's proposed financing for the operation and construction of the services to be provided; a description of the applicant's legal, financial, technical and other appropriate qualifications to hold the franchise; as not being directly related to the management of the public rights-of-way and preempted by the TCA. The District Court also struck down as overly vague and broad a section of the ordinance enabling the White Plains Common Council to consider other factors "which it determines are necessary or appropriate in furtherance of the public interest."[14]

Proposed Franchise Fees as "Fair and Reasonable Compensation" Under Section 253(c) of the TCA

In addressing this critical and highly disputed issue, the court proceeded to examine the four categories of fees and costs to be paid by TCG to the City under the August Proposal. Paramount was the requirement by the City of an annual franchise fee equal to 5% of all revenue derived by TCG or its affiliates in connection with the proposed telecommunications facilities within the City. The District Court observed that some courts have concluded that to be "fair and reasonable," fees must be directly related to the provider's use of and/or the municipality's costs of maintaining the public rights-of-way. This approach essentially limits municipalities to the recovery of reasonable costs and does not allow them to profit from the use of their rights-of-way by others.[15] However, the District Court acknowledged that other courts have taken a contrary approach, recognizing that calculating the impact or costs of telecommunications providers' use of the public rights-of-way would not be a simple undertaking.

Accordingly, the courts have been willing to permit fees based upon general revenues and other considerations not directly related to a municipality's expenses in maintaining the rights-of-way, such as charging "rent" for the use of municipally owned property for private purposes. The "rent" assessed must be "fair and reasonable" based upon a totality of the facts and circumstances in the particular case.[16]

The District Court then applied the four factors set forth in the *City of Dearborn* case (in which fees substantially similar to those sought by the city of White Plains were upheld) for determining "fair and reasonable" and found that the city of White Plains had satisfied its burden in proving the fees sought to be imposed were "fair and reasonable."[17]

Treatment of Verizon as Competitively Neutral and Non-Discriminatory

The final factor, and the one the Second Circuit would ultimately find dispositive (see discussion, *infra*), in determining whether section 253(c) of the TCA was satisfied by the City was whether the City proved that the regulations and compensation sought to be imposed were done so on a "competitively neutral and nondiscriminatory basis."[18] TCG contended that Verizon's exemption from having to enter into a franchise or from having to pay a fee is non-competitive and discriminatory, and therefore the City was in violation of section 253(c).

In addressing TCG's protestation, the District Court first determined that the City is not required by law to treat Verizon and TCG identically in order to meet section 253(c). Looking to the *Congressional Record* for support, the District Court noted that Congress explicitly rejected a "parity" provision that would have prohibited local governments from imposing a fee that distinguished among different providers.[19] The District Court emphasized the City's powerful reasons for asserting why Verizon should be treated differently, including the fact that for nearly a century, Verizon has been installing equipment and facilities under the City's streets. For all these years, Verizon has, in fact, been paying a fee to the City in the form of having provided the City with free use of its conduit, a valuable asset, in exchange for using the rights-of-way, and has supplied additional conduit at no cost for the City to construct a communications system involving the City's police and fire facilities, traffic control system, schools, libraries, and other governmental buildings. Furthermore, Verizon must offer universal service and affordable rates to the residents of the City, while new providers such as TCG may limit their offerings to the most profitable business centers.[20]

As to these non-compensation provisions, the District Court remarked that since TCG had not proffered sufficient evidence that demonstrated Verizon has newly constructed conduits or is engaged in any activity that may otherwise impact the physical rights-of-way of the City since the adoption of the ordinance in December 1997, it cannot be said that exempting Verizon from those particular regulations has had a discriminatory or non-competitive effect.[21]

The District Court placed significant emphasis upon Verizon's large capital expenditure and compensation-in-kind to the city of White Plains, particularly, the extensive underground conduit network throughout the City, housing 11 miles of the City's cable network, free municipal use of conduit for certain governmental agencies, and universal service to all City residents as sufficient evidence to support the City's burden that the fees charged TCG and the fees paid by Verizon are competitively neutral and nondiscriminatory. In the District Court's eyes, TCG offered no proof that the fee "charged" to Verizon, as opposed to that which would be imposed on TCG, would have a non-competitive or discriminatory effect and thus be in violation of section 253(c).[22]

Second Circuit's Reversal of District Court

TCG appealed the District Court's decision and the city of White Plains cross-appealed. At the outset, it is interesting to note that while choosing not to participate in the District Court, the Federal Communications Commission (FCC) and the United States Department of Justice, Antitrust Department, filed an *amici curiae* brief with the Second Circuit in support of TCG. The FCC's position was accorded noticeable deference by the Second Circuit as will be apparent in the discussion, *infra*.

Jurisdiction

Before reaching the heart of the issues on appeal, the Second Circuit considered two jurisdictional matters. The first involved whether the court has jurisdiction to resolve TCG's claims. The Second Circuit pointedly disagreed with the Sixth Circuit's view in *TCG Detroit v. City of Dearborn* that, in the context of TCA litigation, if no private cause of action is created by a statute, the federal courts lack subject matter jurisdiction. In any event, the appeals court noted, since the city of White Plains did not raise the question of whether a private cause of action exists, the court need not reach the issue.

The second matter revolved around whether the appeal should be dismissed under the doctrine of primary jurisdiction, a judge-made doctrine intended to promote proper relationships between the courts

and administrative agencies. According to the court, that doctrine serves two principal interests: "consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." The Second Circuit Court observed, as a preliminary matter, that the FCC filed an *amicus* brief, and at the court's request, provided supplemental briefing on both the issue of where jurisdiction lies and on the substantive issues to be determined. The court remarked that while the FCC did not definitively state an opinion on whether it has concurrent jurisdiction with the district court over section 253, the FCC did outline several reasons to think that jurisdiction should be concurrent, including, *inter alia*, the fact that section 253 does not use language, stated elsewhere in the TCA, that confers exclusive jurisdiction in the FCC. While the absence of such language does not foreclose primary jurisdiction because that doctrine concerns when, not whether, courts should entertain issues, it does counsel against the conclusion that the FCC should decide these issues in the first instance.

The Second Circuit then proceeded to laud the *amicus* briefs from agencies, such as the FCC, in providing insight to the court, but commented that while the FCC's response was not exhaustive, it was informative on some issues.[23] The court stressed that in considering primary jurisdiction, it is significant that the parties in this case stipulated to the facts, since under such circumstances, it will rarely be appropriate to dismiss on the basis of primary jurisdiction. Additionally, from the court's perspective, disputes over whether a local ordinance violates section 253 will often be factually straightforward—the difficult questions are normally the legal ones—which means that the important concern for determining issues of primary jurisdiction is "consistency and uniformity in . . . regulation." Considering the "relatively narrow scope of the doctrine of primary jurisdiction," the fact that all of the issues are questions of law, and having received input from the FCC on some of the issues, the court declined to dismiss on the basis of primary jurisdiction.

Standard of Review

The Second Circuit noted that since the parties stipulated to all of the facts, the District Court's conclusions are exclusively conclusions of law that are reviewed *de novo* and that some deference should be accorded to the FCC. In so ruling, the court emphatically rejected the City's arguments that under *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*,[24] the FCC should not be accorded deference in this appeal based on the language and legislative history of section 253(d),[25] and that in any event, the statute is sufficiently clear under *Chevron* that there is no basis for deference and that the relevant FCC decisions do not control in this area. The court, while specifically declining to reach the issue of whether the statute is sufficiently clear to eliminate the need for deference, did agree with the position that the relevant FCC decisions are not controlling in this case.

City's Violation of Section 253(a) of the TCA

Agreeing with precedents set forth in a Tenth Circuit case and by an FCC decision,[26] the Second Circuit expressed that a prohibition of telecommunications services under section 253(a) does not need to be complete or "insurmountable" to run afoul of section 253(a). Taking into account this view, the court declared that certain portions of the City's ordinance clearly have the effect of prohibiting TCG from providing telecommunications service, particularly the provision that gives the Common Council the right to reject any application based on any "public interest factors . . . that are deemed pertinent by the City." This provision amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. The court also deemed that the extensive delays in processing TCG's application for a franchise have prohibited TCG from providing service for the duration of the delays. In light of these two obstacles, the ordinance restricts TCG's ability to compete in White Plains on a fair basis. Thus, the court concluded that the ordinance violates section 253(a) of the TCA.

City Not Saved by Section 253(c) of the TCA

In marked disagreement with the District Court's analysis and reasoning, the Second Circuit opined that the City's ordinance and August Proposal were not "saved" by the safe harbor provisions of section 253(c) and invalidated the most significant provision of the August Proposal, the 5% gross revenue fee as to TCG. In reaching its conclusion, the court examined as separate, the issues of whether the fee constitutes "fair and reasonable compensation" and whether the fee is applied "on a nondiscriminatory basis."

Fair and Reasonable Compensation

First, the Second Circuit Court stated that the statute does not define the scope of "fair and reasonable compensation." Is it limited to cost recovery, as TCG argued, or does it also extend to a reasonable rent as the city of White Plains contended?

In wrestling with this issue, the court declared that the statutory language is not dispositive. "Compensation" often extends to more than costs. Similarly, discussing the payment of rent as "compensation" for the use of property does not "strain the ordinary meaning of the words" and commercial rental agreements commonly use gross revenue fees as part of the price term. Conversely, the court noted that "compensation" is also sometimes used as a synonym for costs. Terms like compensation are flexible, taking on different meanings depending on the contexts in which they are used. Even "costs" can either refer to the actual out-of-pocket expenses incurred or more broadly to the costs of capital and the "opportunity cost" of forgone alternative uses of resources. The court then declared that although Congress's choice of the term "compensation" may suggest that gross revenue fees are permissible, this hardly decides the issue.

The Second Circuit then observed that the two other circuits that have confronted the question, the Sixth and the Ninth Circuits, have split. The Sixth Circuit in *TCG Detroit v. City of Dearborn*[27] utilized a "totality of circumstances" test and reasoned that the fee was "fair and reasonable" in light of the amount of use contemplated, the amount other providers were willing to pay, and the fact that TCG agreed in prior negotiations to an almost identical fee. By contrast, the Ninth Circuit in *City of Auburn v. Qwest Corp*.[28] articulated, *in dicta*, that non-cost based "fees" are "objectionable," but only after concluding that other, non-severable aspects of the local ordinances at issue required preemption under a state statute.

The Second Circuit appeared to find as unpersuasive TCG's argument that "fair and reasonable" should be limited to costs and should exclude gross revenue fees premised upon a series of dormant Commerce Clauses cases overruled by the United States Supreme Court in 1977.[29] TCG relied upon the Supreme Court decision in *Northwest Airlines, Inc. v. County of Kent, Mich.*[30] for the principle that Commerce Clause precedent that has been overruled nevertheless can be used to determine whether a fee is "reasonable." The Second Circuit acknowledged, however, that the circumstances of *Northwest Airlines* were dramatically different from the present case, since *Northwest Airlines* interpreted the statute, which had been enacted to displace prior case law, in light of the way that terms were used in the case law it displaced. Here, TCG argued that this court interpret the TCA in light of the way terms were used in a series of cases that were overruled by the Supreme Court in 1977. "Expecting Congress to be aware of how courts interpreted words in an area of law at the time that a statute was enacted to modify that law is different from assuming that Congress intended words to be interpreted in the same way they were interpreted in unrelated case law that had become obsolete nearly twenty years earlier."

The Second Circuit also observed that the policies underlying section 253's safe harbor for "fair and reasonable compensation" are significantly different from the reasons that the dormant Commerce Clause was held to restrict fees to reasonable, cost-based exactions:

> Section 253(c) requires compensation to be reasonable to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates. In contrast, the dormant Commerce Clause cases relied on by TCG required that rates be reasonable to ensure that they were not disguised taxes. Section 253 is not targeted as disguised taxes.[31]

Despite the Second Circuit's devotion to examining the "reasonable compensation" enigma, the court, nevertheless, declined to rule whether "reasonable compensation" can include gross revenue fees, and, if so, what percentage of gross revenue may be exacted. These matters were determined by the court not to be necessary to resolve this appeal.

"Competitively Neutral and Nondiscriminatory"

In the Second Circuit's decision, the competitively neutral and non-discriminatory prong of section 253(c) became the linchpin for invalidating a key provision of the City's ordinance and franchise agreements since the City has not required Verizon to comply with all of the terms of the ordinance, and has not required Verizon to enter into a franchise agreement such as the August Proposal. The Second Circuit, apparently influenced by the position espoused by the FCC in its *amicus* brief, disagreed with the District Court's holding that the differential treatment is "competitively neutral and nondiscriminatory" as section 253(c) requires, because of the long history of services provided to the city of White Plains by Verizon and because Verizon provides in-kind compensations to the City, such as free conduit.

From the Second Circuit's perspective, and contrary to the lower court's holding and that of the Sixth Circuit in *TCG Detroit v. City of Dearborn*, the disparate treatment is plainly not "competitively neutral and nondiscriminatory." From an economic

point of view, the court noted that whether fees are competitively neutral should be determined on future costs of providing services, not just costs incurred in the past, because, in the court's view, that is the playing field on which the competition will take place. According to the Second Circuit, Verizon's costs in providing conduits to White Plains are sunk costs; they do not affect the cost to Verizon of offering services in the future. Further, Verizon was compensated for those sunk costs by receiving a monopoly on phone service within White Plains and, under the old system, would normally be expected to have included those costs in its rate basis. If TCG is required to pay 5% of its gross revenue to the City and Verizon is not, competitive neutrality is undermined. Verizon will have the choice of either undercutting TCG's prices or improving its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would, in the court's opinion, run directly contrary to the pro-competitive goals of the TCA.

The Second Circuit did concede that the Sixth Circuit reached a different conclusion in *TCG Detroit v. City of Dearborn*. The Second Circuit rationalized, however, that the *TCG Detroit* situation is not "precisely analogous to the White Plains plan" because there the city of Dearborn attempted to require Ameritech, the incumbent service provider, to pay the same fee that it charged to TCG. The attempt to charge Ameritech a franchise fee was invalidated on state law grounds. The city of White Plains, by contrast, has not attempted to charge Verizon the fee that it seeks to charge TCG. Thus, to the extent that *TCG Detroit* turned on Dearborn's attempt to treat both service providers equivalently, it is simply not applicable here. The Second Circuit added that, in any event, because the Sixth Circuit permitted Dearborn to give the advantage to the incumbent after those attempts failed, *TCG Detroit* was wrongly decided.

The Second Circuit reasoned that the Sixth Circuit was wrong in *TCG Detroit* because section 253 does not limit municipalities to charging fees that are "competitively neutral" to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent. Where state laws and local ordinances combine to create a fee that is not "competitively neutral," section 253 preempts the local ordinance, even if it would have been permissible absent the state law. Moreover, the Sixth Circuit's position that TCG failed to show that Ameritech was undercutting its competitors and creating a barrier to entry misses the point. Fees that exempt one competitor are inherently not "competitively neutral," regardless of how that competitor uses its resulting market advantage.

By the same token, the Second Circuit then proceeded to enunciate that the requirements of section 253 are not inflexible and that the statute does not mandate precise parity of treatment. Turning to the legislative history of section 253, the court noted that an earlier version of the bill that ultimately became section 253, included a provision that would have forbidden local governments from imposing any fee that "distinguished between or among providers of telecommunications services." Both the elimination of that provision and the language of the enacted version of section 253 of the TCA strongly support the conclusion that franchise fees need not be equal. Municipalities can take into account different costs incurred by different uses of the rights-of-way, can consider the scale of the use of the rights-of-way, can retain the flexibility to adopt mutually beneficial agreements for in-kind compensation, and can negotiate different agreements with different service providers. For example, the court declared that a municipality could enter into competitively neutral agreements where one service provider would provide the municipality with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided that the effect is a "rough parity" between competitors.

The Second Circuit admonished, however, that a municipality may not, as the city of White Plains sought to do, impose a host of compensatory provisions on one service provider without placing any on another. The City tried to exact a variety of forms of compensation from TCG, while not exacting any compensation from Verizon on a forward-looking basis. According to the court, the only compensation that Verizon provided White Plains was the use of free conduit space, provided in the past in exchange for a complete monopoly at that time. Verizon has already reaped the benefit of those bargains. Moreover, TCG is required to provide the city with conduit space in conduits it builds. In order for the City to demand fees, most favored vendee status, or similar benefits from TCG, it must demand comparable benefits from Verizon, taking into account relevant differences in scale of operations and costs incurred. While municipalities may be flexible, the compensation they exact must be "competitively neutral and nondiscriminatory."

The bottom line is that the Second Circuit invalidated the 5% gross revenue fee provisions of the August Proposal, holding that they are not saved by section 253(c) of the TCA, and in so doing, reversed the District Court.

Non-Fee Related Provisions

Insofar as those portions of the City's ordinance and August Proposal that do not concern fees, the Second Circuit affirmed all of the District Court's findings which had invalidated a variety of provisions as not directly related to the management of the rights-of-way. The provisions struck down in the ordinance included the following: (1) the requirement of disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise; (2) consideration by the City of the information required by the aforementioned requirements; and (3) the discretion allotted to the White Plains Common Council for consideration of other factors it determines necessary or appropriate in furtherance of the public interest. The provisions deemed as invalid in the August Proposal included the following: (1) sections of the franchise agreement requiring prior approval of the locations of TCG's network; (2) record-keeping provisions; and (3) the requirement of waiver of TCG's right to challenge illegal provisions of the franchise in court.

Finally, the Second Circuit analyzed the franchise transfer restrictions contained in the ordinance and the August Proposal which had been upheld by the District Court. The Second Circuit disagreed with the lower court, and, relying upon the Ninth Circuit case in *City of Auburn*, found that such a restriction went "far beyond" regulating the use of rights-of-way. The Second Circuit went on to state that a more limited franchise transfer provision, permitting rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed fees for use of rights-of-way, could be reasonably related to regulating the use of the rights-of-way, if applied neutrally to all franchisees. However, in the court's view, because White Plains cannot legitimately turn away "any" provider of telecommunications services, a provision of sweeping breadth whose main purpose is to force each new telecommunications provider to receive White Plains' blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee—is invalid.[32]

Conclusion

The Second Circuit's stark pro-business-oriented decision in *TCG New York, Inc. v. City of White Plains* and the United States Supreme Court's refusal to hear the City's petition for *certiorari* in that case, have for the time being at least, cast doubt over the ability of New York municipalities to meaningfully regulate the installation of a telecommunication provider's fiber optic cable network and the right to receive compensation from the provider for using municipal property to provide services to the public.

The Second Circuit made crystal clear that because the city of White Plains has not required Verizon to enter into a franchise agreement such as the August Proposal, such differential treatment could not be "competitively neutral and nondiscriminatory" as section 253(c) requires, notwithstanding the long history of services provided to the city of White Plains by Verizon and the provision of in-kind compensations to the City, such as free conduit. Quite tellingly apparent in the Second Circuit's analysis, is the court's presumption that there is either no difference between the historical positions and legal rights of Verizon and telecommunications provider entrants like TCG or that section 253(c) mandates that all past factual distinctions and past circumstances are to be totally erased from memory. From a practical standpoint, however, the positions of Verizon and TCG are facts distinct and not comparable. The agreement that was struck between Verizon's predecessors and the city of White Plains a century ago consisted of a prominent universal service component, including the extension of service to previously unserved consumers.

One of Congress's overriding goals in enacting the Communications Act was "to make available, so far as possible, to all the people of the United States . . . a Nation-wide . . . communication service . . ."[33] In exchange for access to the City's rights-of-way, the telephone company undertook an obligation to provide telephone service to the residents of White Plains, at a significant capital expense over several years, an obligation Verizon continues to be burdened to provide today. By contrast, telecommunications companies like TCG do not provide a universal service and are under no requirement to embark upon the kinds of capital investments to benefit the public that Verizon's predecessors did, and have no ongoing commitment to maintain an extensive residential network to continue to supply such service.

Indeed, section 253(c) of the TCA does not mandate comparability between universal providers like Verizon and telecommunications providers such as TCG. The Second Circuit recognized that the language does not exact identical treatment. However, the court refused to follow its own holding by failing to take into account the value to the City of its current use of the eleven miles of conduit gratuitously supplied by Verizon. The fact that the value has not been determined is of no moment since it does not mean the continuing right to use the conduit has no value. Even, assuming *arguendo*, Verizon's past expenditures were properly disregarded, the court

should have remanded the case to the District Court for a valuation of the right to use the conduit.

While the Second Circuit did not find that a municipality is solely limited to "costs-based" compensation from telecommunications providers (the argument advanced by TCG), the court explicitly declined to rule whether "reasonable compensation" can include gross revenue fees, and, if so, what percentage of gross revenue may be exacted. The court's reluctance to at least consider this issue is puzzling since in these times of fiscal uncertainty for local governments and rising deficits, the need for viable, reasonable and practical means of revenue sources cannot be gainsaid.

"The proper and definitive interpretation of section 253 of the TCA by the United States Supreme Court is essential to both the local and national economy as well as for the federal government."

The city of White Plains is not alone in this battle. Local municipalities throughout the country have been striving to balance their duties and obligations as guardians and keepers of the construction, maintenance and use of the public rights-of-ways with the mandates of section 253 of the TCA. The attempts by municipalities to reconcile their responsibilities with the requirements of section 253 have culminated in a significant amount of litigation and debate over the ambiguity of section 253. At least nine Circuit Courts of Appeals have issued opinions in lawsuits concerning the interpretation of section 253.[34] The current litigation indicates the lack of consistency and uniformity among the federal courts over the meaning of section 253, particularly the complexity and perplexity of the interplay between section 253(a) and section 253(c).

The proper and definitive interpretation of section 253 of the TCA by the United States Supreme Court is essential to both the local and national economy as well as for the federal government. Telecommunications providers heavily depend upon local rights-of-way as a means of providing their services and municipal governments manage the use of these public rights-of-way. Local governments in recent years have had to deal with the cold reality that several telecommunications providers have been experiencing financial difficulties, and takeovers and bankruptcy proceedings are rampant. The combination of these factors has led to the dilemma of local governments being faced with identifying which entities are accountable for safety violations in the public rights-of-way and for maintaining or removing facilities located in the public rights-of-way, and the difficulty for municipalities in collecting payment of compensation for the use of the public rights-of-way. Ultimately, these are the basic and traditional responsibilities which fall upon the shoulders of local governments, as Congress acknowledged, when it drafted and enacted section 253(c) of the TCA.

Endnotes

1. 47 U.S.C. §§ 151 *et. seq.*
2. 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1582 (2003).
3. *TCG New York, Inc. v. City of White Plains, New York*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000).
4. Section 27 of the Transportation Corporations Law requires, in pertinent part, that telegraph and telephone companies "obtain permission of the city . . . authorities to use local streets for the construction of its lines" and that this requirement has resulted in "companies having to obtain local franchises when they sought to construct . . . either above or below the public highways." *See, e.g., Staminski v. Romeo*, 62 Misc. 2d 1051, 1053, 310 N.Y.S.2d 169, 171 (Sup. Ct., Suffolk. Co. 1970).
5. *See* chapter 4-23 of the White Plains Municipal Code, entitled, "Telecommunications Franchising and Licensing." In addition to franchises, a revocable license is intended to be a limited grant of authority to use and occupy specifically identified streets to provide telecommunications services and shall be granted only if (1) the use or occupation of such streets, together with all revocable licenses previously granted to such persons or affiliated persons, shall not exceed 2,500 linear feet; or (2) the use or occupation of such streets does not involve the offering or provision of telecommunications services to any person within the city. *See* White Plains Municipal Code § 4-23-2(g) ("WPMC").
6. Telecommunications provider means any person who: (1) owns, constructs, operates or maintains equipment in the streets used to provide telecommunications services regardless of whether such telecommunications services originate or terminate in the city; or (2) provides telecommunications services that originate or terminate in the city by means of: (i) specifically identifiable equipment in the streets, which equipment is owned by such person or made available to such person under a lease or any other arrangement for a period longer than one hundred twenty (120) days; or (ii) equipment in the streets if the use of such equipment is continuing and substantial, and the city has determined that it is necessary and appropriate to impose the requirements of this chapter in order to preserve the application of this chapter on a competitively neutral and nondiscriminatory basis consistent with the applicable law. *See* WPMC § 4-23-1.
7. *See* WPMC § 4-23-4.
8. *See* WPMC §§ 4-23-7, 4-23-10 & 4-23-11.
9. *See* WPMC § 4-23-9.
10. *See* WPMC § 4-23-8.
11. TCG had previous discussions with the city of White Plains in 1992 and 1994 pertaining to the possible use of the City's rights-of-way in connection with TCG's plan to construct telecommunications facilities. No agreement had been reached between the parties.
12. Verizon is the City's current incumbent local exchange telephone carrier (successor-in-interest to Bell Atlantic, NYNEX

and New York Telephone). Since at least 1919, the City has had an arrangement with Verizon in which it agreed to provide the City with free conduit for certain municipal uses. Further, throughout the years, Verizon has provided the City free conduit space in exchange for permission to use the City's rights-of-way. Since 1954, Verizon has constructed an extensive conduit network in the City's downtown area, consisting of over 34 miles of fiber optic cable and copper wire that make up the City's own network; 20 miles are in conduit owned by the City on aerial poles owned by Verizon and Consolidated Edison; the other 11 are run through underground conduit provided by Verizon to the City at no cost. Verizon does not presently have a franchise agreement with the city of White Plains.

13. The District Court dismissed TCG's claims brought under section 253(b), agreeing with other court decisions holding that section 253(b) applies only to state, not local regulation. 125 F. Supp. 2d at 85.

14. The District Court also noted that a provision dealing with the City's right to inspect records and require the provider to maintain complete and accurate books must be limited to information necessary to enforce its rights-of-way regulations and ensure that it has received accurate fee information. In addition, the District Court determined as beyond the purview of rights-of-way management, and thus, invalid: (a) the City's use of a "most favored vendee" clause which required TCG—if the City, or an elementary or secondary educational institution in the City should request TCG for any of its services—to offer them rates and terms no less favorable than those offered to any other governmental or non-profit agency in Westchester County; (b) the requirement that TCG waive its legal rights, including those under the TCA, to challenge the terms and conditions of the franchise agreement; and (c) the City's right to audit all accounting and financial records of TCG related to the fiber optic network. *Id*. at 91–95.

15. *Id*. at 96.

16. *Id.*, citing *Omnipoint Communications, Inc. v. The Port Auth. of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y. 1999), at 6; *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff'd*, 206 F.2d 618, 625 (6th Cir. 2000); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893).

17. *TCG New York Inc. v. City of White Plains*, 125 F. Supp. 2d at 96–97. The four factors set forth in the *Dearborn* case for determining "fair and reasonable" are the following: (1) the extent of the use of the public rights-of-way; (2) whether other providers have agreed to comparable compensation (or comparable uses of public rights-of-way); (3) the course of dealings among the parties; and (4) whether the compensation sought is "so excessive that it is likely to render doing business unprofitable."

18. *Id*. at 99–99.

19. *Id*.

20. *Id.*

21. *Id* at 99.

22. *Id*.

23. The Second Circuit noted that the FCC declined to make definitive statements as to the questions of whether a gross revenue fee could be "fair and reasonable compensation," or if compensation should be limited to a local government's costs, or if some other formula is appropriate.

24. 467 U.S. 837 (1984).

25. Section 253(d) of the TCA omits reference to section 253(c) and provides that: "[i]f, after notice and an opportunity for public comment, the [FCC] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the [FCC] shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

26. *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) and *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 1997 WL 400726, at ¶ 31 (1997).

27. 206 F.3d 618, 624–625 (6th Cir. 2000).

28. 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

29. *See, e.g., Atlantic & Pacific Tel. Co. v. City of Philadelphia*, 190 U.S. 160, 162 (1903).

30. 510 U.S. 355 (1994).

31. *TCG New York, Inc. v. City of White Plains, New York*, 305 F.3d at 79.

32. *Id.* at 82.

33. 47 U.S.C. § 151 (Purposes of the Act, Creation of Federal Communications Commission). 47 U.S.C. § 254 (Universal Service), added in 1996, expounds on the principle declared in sec. 151.

34. *Cablevision of Boston Inc. v. Public Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1582 (2003); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235 (3d. Cir. 2002); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *Missouri Mun. League v. FCC*, 299 F.3d 949 (8th Cir. 2002); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

Carol L. Van Scoyoc is Chief Deputy Corporation Counsel for the city of White Plains and has been involved in the negotiation and drafting of a number of franchise and cable agreements for the City. She is also the present Chair of the Municipal Law Section of the Westchester County Bar Association and serves as a CLE Committee Liaison for the Municipal Law Section of the New York State Bar Association.

Regulation of Recreational Land Uses

By Daniel A. Spitzer

I. Introduction

New York municipalities are presented with a variety of problems by recreational land uses. These land uses range from backyard skate ramps and basketball poles to large-scale commercial operations such as racetracks, amusement parks, and golf domes. Some disputes are no greater than neighborhood problems with late-night activities. Others pose significant impacts on the community. As suburban areas of the state become increasingly dense, harmony between recreational uses and other uses, particularly near residential areas, is harder to find. Moreover, the problems change with trends in the community. Ten to twenty years ago the major recreational use raising concerns was the placement of game arcades near schools and parks. Today, the arcades have largely disappeared, because of their inability to compete with home video games. Meanwhile, skateboarding and similar activities have grown exponentially, with concerns changing from prohibiting use of public property by skateboarders to deciding where to place private skate parks. The purpose of this article is to discuss some of the problems presented by recreational uses, review the general powers available to control them, and outline various tactics for regulating recreational uses.

II. Municipal Regulatory Powers

Municipal control over recreational uses, as with all land uses, is largely a matter of zoning, employed with its traditional ally, the State Environmental Quality Review Act (SEQRA). A key initial question for a community is how much control to enact, remembering that failure to place potential control on recreation uses—at least through the requirement of a special use permit—may leave the regulatory power on the sidelines when undesirable uses arise.

A. Zoning

Zoning is the division of a community into districts, with use and bulk regulations specified in each district, in accordance with a comprehensive master plan. In reality, most zoning dilemmas arise from proposed new uses and the public reaction to them, with "comprehensive planning" playing a minor role at best. Thus, many regulatory enactments are a response to changes rather than a forward-looking plan. Nevertheless, communities can be proactive in regulating recreational uses.

One of the most important but overlooked areas is the definitional section of a municipal code, starting with the presence or absence of the term "recreational uses." If a community specifically allows recreational uses in a district, it may want to put some definitional limitations in the code to avoid unexpected surprises.

Without a definition, how broadly can the term "recreational uses" be construed? It can include an airport, according to the Town of New Baltimore Zoning Board of Appeals.[1] That Town Code allowed recreational uses in the particular zone upon issuance of a special use permit. Since the Town Code did not define the term "recreational," it was up to the ZBA to determine if an airport was a recreational use. Noting that a use would be classified as recreational if it provides diversion or amusement, as well as the limits on the number of flights that the Town Board had placed on the use of the airstrip, the court found the ZBA's determination was rational, and therefore upheld it.

The most important limitation for most communities is on the commercial operation of recreational uses. Thus, while a community may support a private horse stable, they rarely want full stables and riding schools in residential neighborhoods. Additionally, limitations on public use are sometimes required to avoid, for example, traffic congestion issues. Thus, allowing only private, non-commercial recreational uses may be a better way to legalize those "diversions or amusements" without unpleasant surprises.

Another important definition in regard to recreational uses is that of "accessory" uses or structures. Virtually all private, non-commercial recreational uses will be accessory uses in residential neighborhoods. Examples include swimming pools, skate ramps, swing sets, and tennis and basketball courts. Some can be quite intrusive uses, such as private riding stables, mentioned above. An accessory use, according to virtually every code, is one that is customarily incidental and subordinate to the principal use of the property.

A key element of the definition is "customary." When terms like customary are used, the code becomes open to interpretation. That interpretation may change over time. Consider, for example, an eleven-year old case concerning a skateboard ramp.[2] The zoning board granted a permit for a skateboard ramp, finding it was a permitted accessory structure. The court focused on the "customarily incidental" portion of the accessory use. Since the skate ramp was the first in the community, and there were only a couple of other ramps in adjoining communities, the court found it was not a customary use. To be a customary use, the applicant was required to show that such uses were indeed customarily found at similar residential structures, or that the structure was the "kind which might commonly be expected by neighboring property owners."[3] Because it was, literally, the first one on the block, it could not meet that test.

It is interesting to consider how this case would be decided today. The ZBA in *Collins* relied in part on the growing popularity of skateboarding, and the belief that such uses would become customary. The proliferation of such backyard ramps means that the law may well have changed in any particular community. Thus, the danger of words like *customarily incidental* may produce unwelcome changes. Kennels are another potentially troublesome use that authorities in other jurisdictions have occasionally permitted as accessory uses.[4]

An important aspect of local control raised by the *Haas Hill* and *Collins* cases is the ability of the impacted towns to have some measure of control over the recreational uses. In *Haas Hill*, the local code held that recreational uses required a special use permit. Therefore, the ZBA could review the application and impose reasonable conditions on the use. Other code provisions typically require site plan approvals for special uses, thus gaining control over site layout, traffic access, and other related issues. As a general rule, recreational uses—or any use that could be considered a nuisance—should not be an as-of-right use, but rather subject to some local approval authority.

But the *Collins* case demonstrates the more difficult issues arising with private residential-type recreational uses. The town building inspector asserted the skate ramp was a structure in need of a building permit. He then denied the permit on the grounds it was not a customary incidental use. On appeal, the ZBA ruled it was a customary incidental use, and therefore entitled to a permit. The ZBA added a number of conditions related to hours of operation, building a fence around it, altering construction to reduce noise, prohibiting additional lighting, and requiring adult supervision. But note that since the ZBA had ruled the building permit was available because the use was customarily incidental to the residential use, it really had no right to add conditions to the ministerial building permit. The lesson from this case is clear—if your community wants to limit noise or hours of operation or require a fence around any use, say so in the code, or else create a non-ministerial approval process whereby reasonable conditions can be created. Even with special use and other permits, specific authority must be placed in the code if hours of operation or similar restrictions are to be mandated.

"One of the best methods to encourage creation of open recreational space is through cluster development rules."

In another instance, a court noted that the scope of a recreational accessory use might be more than what is customary permissible.[5] The case involved a proposed 1,080-square-foot structure to house a speedboat. Noting the large size made it more of a boathouse than a permitted garage, the court found there was no evidence of existing similar structures in the neighborhood. Here again, the lesson is that absent a code-imposed size restriction, it becomes a matter for the ZBA and the courts to permit or prohibit, not the governing board.

Returning to airports, a Third Department case dealt with the intersection of recreational use and accessory use definitions.[6] The property owners sought to build an airstrip as an accessory use to their farm. But the ZBA found the airstrip was a recreational use, not an accessory use to a farm or residence, particularly since the code did not allow airstrips in residential districts.

Zoning powers can be particularly useful in addressing the problem of open space. Communities are given a number of tools to mandate open space in all new developments. These can be as simple as maximum lot coverage and minimum open space requirements in bulk schedules. Other methods can be more productive.

One of the best methods to encourage creation of open recreational space is through cluster development rules. Cluster development permits concentration of dwellings closer together than normally permitted, allowing the aggregation of space into larger, more usable lots.

But more preservation of open space is not necessarily a recreational use. Communities should consider greater use of zoning incentives to encourage

dedications of property to recreational use. Zoning incentive laws allow communities to grant zoning "bonuses" to developers such as greater density or higher building heights, in return for a benefit received by the public. Thus, the developer who allows a public boat launch on his waterfront development might be allowed to build at a greater density per lot, or a developer who dedicates open space for use as a bicycle path, might be allowed to add an extra story to her project. But the community must first act to add that flexibility to the code by adopting zoning incentive provisions.

"The results of a SEQRA investigation will not, by themselves, demand any specific decision in favor or against an application."

As always with enacting legislative determinations, the governing body should not act impulsively on citizen complaints, but should base its actions on a valid record. For example, in the takings context, the Court of Appeals, relying on United States Supreme Court rulings, has held regulatory actions precluding development are valid if they "substantially advance a legitimate public purpose," and that test is satisfied if the action taken bears a reasonable relationship with the goal sought.[7] Thus, where a town, based on years of studies on flood control and open space preservation, rezoned a golf course from Residential Zone to Recreational Zone (to prevent houses from being built on part of the course), the Court of Appeals found the constitutional requirements had been met to preserve the property as open space.[8]

Staying with takings context for a moment, communities must be careful not to improperly demand that private recreational facilities be open to the public. This is particularly essential in regard to the dedication of open space. Requiring open space in any development is not the same as requiring public access, with the latter going much further than may be appropriate. Communities cannot convert private property to public parks, depriving the owners of any economic benefit.[9] Nor can they demand dedication of open space to public recreational use, unless there is an "essential nexus" between the exaction and the underlying public interest.[10] Such a nexus would exist if property normally open and used by the public would be lost as part of the project, but in truth, such direct relationships between the exaction and the government goal are rare. The better course of action then is to negotiate with project applicants on matters concerning open space and public use of that open space.

Finally, zoning powers can be employed to deal with special types of large-scale recreational uses like race tracks, golf courses, and amusement parks. Some communities have created Commercial Recreation zones where these types of uses are specifically permitted, accompanied by their own set of regulations. For example, one community with a large amusement park set a height limit of 100 feet in its Commercial Recreation zone, to accommodate the taller type of rides the park needed to stay competitive.

B. SEQRA

SEQRA offers municipalities an opportunity to fully explore the impacts of recreational uses, as well as providing a mechanism for imposing conditions. SEQRA was created to insert environmental concerns into traditional government decision-making over "actions." Virtually all approvals of recreational uses—rezonings, site plans, special uses, and variances—are actions subject to SEQRA.[11] The main power of SEQRA is found in its command to mitigate potential environmental harms to the maximum extent practicable.

SEQRA will not, of course, have any impact on the small private recreational uses found at most homes. But on the opposite end of the scale, SEQRA review should play a major role in any significant commercial recreational use. Any large-scale use is likely to have significant impacts, particularly in the areas of traffic and impact on the character of the neighborhood. For example, ask any resident near a racetrack and you will hear complaints about noise. SEQRA can be used to investigate and impose conditions to mitigate potential harms.

Where SEQRA offers its greatest power is the ability to potentially deny what is otherwise allowed. The results of a SEQRA investigation will not, by themselves, demand any specific decision in favor or against an application. But if, even after maximum mitigation, the record reflects significant negative impacts on a community, the power exists under SEQRA and properly-constituted zoning laws to deny the requested use.

C. Restrictive Covenants

Restrictive covenants are private contractual arrangements creating limits on the use of private property. Generally, municipalities are best off not getting involved in restrictive covenant enforcement or other private disputes. But the presence of restric-

tive covenants can be an aid to a community, particularly to a Zoning Board. For example, in regard to the issue of customary uses in the arena of accessory uses, where a basketball pole in the front yard, or a skate ramp, are prohibited by restrictive covenants, that provides evidence that those uses are not acceptable accessory uses. Similarly, where a permit or variance is needed to allow a recreational use, denials can be based (in part) on whether restrictive covenants would be violated, as evidence of conflict with the community character, or whether the use creates impacts on the neighborhood outweighing the benefits to the applicant.

III. Conclusion

Recreational uses can add to the rich fabric of our local communities. But taking the steps to properly regulate them avoids unwanted and unplanned-for uses which are contradictory to the community's goals. Zoning codes should accordingly be reviewed for ways to potentially tighten control over these uses.

Endnotes

1. *Haas Hill Property Owners' Ass'n v. Zoning Board of Appeals of the Town of New Baltimore*, 202 A.D.2d 895, 609 N.Y.S.2d 416 (3d Dep't 1994).
2. *Collins v. Lonergan*, 151 Misc. 2d 994, 574 N.Y.S.2d 495 (Sup. Ct., Westchester Co. 1991), *rev'd*, 198 A.D.2d 349, 603 N.Y.S.2d 330 (2d Dep't 1993).
3. 151 Misc. 2d at 999, 574 N.Y.S.2d at 499.
4. *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 557 S.E.2d 631 (N.C. Ct. App. 2001), *aff'd in part*, 356 N.C. 658, 576 S.E.2d 324 (2003).
5. *Porianda v. Amelkin*, 115 A.D.2d 650, 496 N.Y.S.2d 487 (2d Dep't 1985).
6. *Iwan v. Zoning Bd. of Appeals of the Town of Amsterdam*, 252 A.D.2d 913, 677 N.Y.S.2d 190 (3d Dep't 1998).
7. *City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687, 701 (1998).
8. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999).
9. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976).
10. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
11. About the only exceptions are ministerial permits which, like building permits, are another reason to be careful about what can be built without specific local authorization.

Mr. Spitzer is a partner in the law firm of Hodgson Russ, LLP in Buffalo, New York, where he concentrates his practice in municipal, environmental and telecommunications law.

Municipal Law Handbook—Authors Still Needed

The Municipal Law Section is planning to develop a handbook on a variety of topics of interest to municipal lawyers. The *Municipal Law Handbook* will be available to new Section members and available for purchase by others. Initially, it is not intended to be a comprehensive review of topics, but a primer to familiarize new municipal attorneys with the basic information they need to know.

Authors are still needed for the following topics:

- Municipal Finance
- Real Property Assessment and Taxation
- Municipal Liability
- Streets and Sidewalks

If you would like to author a short article on any of these topics, please contact Barbara Samel at (518) 475-9367 or bsamel@localnet.com.

Municipal Briefs

By Lester D. Steinman

Binding Future Boards

Under the "term limits rule," a municipal body, unless expressly authorized by statute or charter provision, is prohibited from contractually binding its successors in governmental matters. By contrast, where proprietary functions are involved, such as a contract for the management and operation of a municipal golf course, the rule does not apply and the municipality is empowered, as are other private businesses under similar circumstances, to enter into a long-term agreement for such services.[1]

Here, since 1964, the village of Endicott ("Village") has owned and operated for profit the En-Joie Golf Club, a facility originally built in the 1920s and operated by the Endicott Johnson Corp. In March 1996, the Village entered into a one-year contract with petitioner, John L. Karedes, to manage the facility. In 1997, the Village renewed this agreement for an additional three-year term, expiring in March 2000.

In January 2000, a new Mayor, Michael Colella, took office. Shortly thereafter, Karedes initiated negotiations to renew his contract. Subsequently, the Village Board voted 4-3 to extend Karedes' contract for four years, providing him with significant increases in compensation, including a percentage of the facility's profits over a threshold amount. Mayor Colella opposed renewal on the grounds that the contract was not in the best interests of the Village and its taxpayers.

Notwithstanding repeated demands from Karedes and the Village Board over the next several months, Colella refused to sign Karedes' contract. This issue, crystallized by the golf club's operating losses of over one million dollars, became the focal point of the November 2000 election, at which one-half of the seats of the trustees were contested. Ultimately, the reelection bids of two board members who voted in favor of the extension of Karedes' contract were defeated.

Prior to the new board members assuming office, Karedes commenced an Article 78 proceeding and declaratory judgment action to compel the Mayor to execute the contract and to validate the four-year management agreement. The Supreme Court dismissed the Article 78 proceeding on statute of limitation grounds, but granted declaratory relief holding the contract to be valid and enforceable.[2] The Appellate Division affirmed the lower court's dismissal of the mandamus aspect of the proceeding. Although agreeing with the Supreme Court that the declaratory judgment action was not time-barred, the appeals court ruled that, in the absence of specific enabling legislation, the term limits rule applied to Karedes' professional service contract and that the Village had invalidly curtailed the exercise of discretionary powers by successor boards.[3]

Reversing the Appellate Division, the Court of Appeals accepted Karedes' contention that the Village operated the golf club in its proprietary capacity and ruled that "the Board could properly bind its successors to his four-year employment contract."[4] Emphasizing that the controlling distinction is whether the activity in question is governmental or proprietary, the Court opined:

> Elected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary rights of their successors to exercise those powers. Classification of a particular municipal activity as governmental depends on several considerations, including whether the activity was historically performed by government, whether it is best executed by government and whether it is undertaken for profit or revenue (citations omitted). In business or proprietary matters, by contrast, a municipality is not necessarily bound by this standard and may conduct itself as any other private business under similar circumstances (citations omitted). Proprietary functions are those "in which governmental activities essentially substitute for or supplement traditionally private enterprises (citations omitted)."[5]

Based upon the functioning of the golf club as a private facility prior to its purchase by the Village, and the Village's subsequent operation of the golf course for profit, the Court unanimously concluded that the golf club was being operated by the Village as a "business enterprise." Further, since the Village Board's composition changed annually, each of Kare-

des' contracts, even the original one-year term agreement running from March to March, bound future boards. Under those circumstances, the Court concluded that the Village Board acted in its proprietary capacity when it contracted with Karedes for the management of the golf club.

Open Meetings Law

In a 3-1 ruling, the Appellate Division, Second Department has struck down, as violative of the state's Open Meetings Law, a school board resolution precluding attendees at school board meetings from videotaping the proceedings unless permission to do so is granted by the school board.[6]

In 1997, the Board of Education ("Board") of the Shoreham-Wading River Central School District ("District"), adopted a resolution permitting public meetings of the Board to be tape-recorded and video-recorded subject to certain conditions not relevant to this case. On July 11, 2000, petitioners, residents and parents of children attending the District's schools attended a Board meeting and attempted to utilize an unobtrusive palm-sized video camera requiring no additional lights, mounted on a tripod at the back of the room to record Board meetings. However, the Board advised petitioners to turn off their camera. Unaware of the 1997 resolution, the petitioners complied. Subsequently, petitioners learned of this resolution.

Again, at the July 25, 2000, Board meeting, the petitioners set up their camera to record the meeting. When the Board requested them to turn the camera off, petitioners objected, citing advisory opinions of the New York State Committee on Open Government supporting their right to videotape the meeting. After further consideration, the Board acquiesced in petitioner's request to record the meeting. Several other subsequent meeting were also recorded by the petitioners.

In October 2000, the Board adopted a new resolution ("2000 Resolution") which effectively prohibited video recording of Board meetings without Board permission. According to Board members, the 2000 Resolution was adopted to preserve free and open dialogue and to prevent attendees from being intimidated by the presence of a video camera. Pursuant to that resolution, petitioners were prohibited from video recording the Board meetings.

Petitioners then instituted an Article 78 proceeding to annul the Board's 2000 Resolution as being violative of the Open Meetings Law. Dismissing the petition, the Supreme Court (a) ruled that the Open Meetings Law did not confer petitioners with the right to videotape the Board's meetings; and (b) construed the 2000 Resolution as permitting videotaping subject to reasonable conditions rather than a ban on videotaping without Board permission.[7] The Appellate Division reversed the lower court's judgment.

Writing for the majority, Justice Sondra Miller acknowledged that the Open Meetings Law did not explicitly compel the Board to permit its meetings to be videotaped. Nevertheless, she opined:

> An examination of the purpose and history of the law vis-à-vis technological advances in electronic recording, leaves no doubt that a liberal interpretation of the Open Meetings Law permitting citizens to exercise their freedoms by recording the meetings of the Board and other democratic institutions is wholly consonant with the Legislative intent.[8]

Moreover, reviewing the sparse case law on this issue, Justice Miller cited the appeals court's earlier decision in *Mitchell v. Board of Education of Garden City Union Free School District*,[9] striking down a board resolution prohibiting electronic recording of public meetings, as to be virtually indistinguishable from the instant case, although the earlier case involved audio rather than video recording. According to Justice Miller, the *Garden City* decision effectively overruled a pre-Open Meetings Law 1967 decision upholding the right of the White Plains Common Council to prohibit citizens' use of an audio tape recorder at its meetings.[10] Overwhelming authority from other states, as well as the opinion of the Executive Director of the New York Department of State Committee on Open Government that the 2000 Resolution violated the Open Meetings Law, provided further support for the majority's conclusion that the use of cameras at board meetings may not be prohibited outright. In so holding, the majority acknowledged that the Board was authorized to enact reasonable regulations to insure that the public's use of video cameras did not interfere with the Board's work or the conduct of its meetings.

Dissenting, Justice McGinity declared that "the Legislature had not imposed any statutory requirement allowing citizens to video tape Board meetings."[11] Indeed, he noted that legislation of this nature was prepared but not adopted by the legislature. Also, in his view, the *Mitchell* decision was not dispositive, because there is a marked distinction between audio and video taping and the Board was justified in recognizing that distinction. Nor, were "the laudatory goals of the Open Meetings Law . . .

in any way undermined by the Board's Resolution, i.e., the right of citizens to be fully informed of the deliberations and decisions of a public body."[12] Under these circumstances, Justice McGinity would uphold the Board's 2000 Resolution.

Voting Requirements

In *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*,[13] the Court of Appeals held that in connection with the consideration of an application for a variance, where a quorum of the Zoning Board of Appeals is present and voting, a failure to obtain a concurring vote of the majority of the whole number of that Board in favor of the application constitutes a denial of the variance.[14] In reaching this result:

> [T]he Court of Appeals explained that General Construction Law § 41 and Town Law § 267-a, govern the procedures of a Town's zoning board of appeals. Under General Construction Law § 41, a majority of the whole number of the members of a zoning board constitute a quorum and "not less than a majority of the whole number may perform and exercise such powers, authority and duty." According to the Court, however, this language does not specifically address the number of votes necessary for a zoning board or other administrative body to take formal action.[15]

Section 267-a (4) sets forth the voting requirements for zoning boards. Under that statute, "a concurring vote of the majority of the members of the [zoning] board of appeals shall be necessary to *reverse* any . . . determination of any . . . administrative official [charged with the enforcement of any zoning ordinance or local law], or to *grant* a use variance or area variance (emphasis added)." That section does not require the same majority vote concurrence for the denial of an application. Thus, assuming that a majority of the whole number of the zoning board participates and votes, and no concurring vote of the majority exists to grant a variance application, the application is deemed denied.

As pointed out in the earlier *Municipal Lawyer* article, "unlike the uniform statutes governing the operation of zoning boards of appeals in cities, towns and villages, the State enabling legislation governing decision making on special permits, site plans and subdivisions does not include specific provisions as to voting requirements."[16] The Court's decision in *Tall Trees* did not specifically discuss whether a tie vote in these other contexts would also constitute a denial and commence the statute of limitations for an applicant to challenge the determination.

In an apparent attempt to address these issues, the Legislature has adopted amendments to the General City Law, Town Law, Village Law and General Municipal Law requiring an affirmative vote of a majority of all members of a planning board, zoning board of appeals, county planning board or regional planning council in order to take action.[17] Further, the legislation provides for a default denial by the zoning board of appeals where it fails to pass a motion granting a variance or overruling a decision of a zoning enforcement officer.[18] This legislation became effective on July 1, 2003.

Endnotes

1. *Karedes v. Colella*, 100 N.Y.2d 45, 760 N.Y.S.2d 84 (2003).
2. *Karedes v. Colella*, 187 Misc. 2d 656, 722 N.Y.S.2d 714 (Sup. Ct., Broome Co. 2001).
3. *Karedes v. Colella*, 292 A.D.2d 138, 740 N.Y.S.2d 526 (3d Dep't 2002).
4. 100 N.Y.2d at 49.
5. *Id.* at 50.
6. *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, __ A.D.2d __, 759 N.Y.S.2d 513 (2d Dep't 2003).
7. *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, __ Misc. 2d __, __ N.Y.S.2d __ (Sup. Ct., Suffolk Co. 2002).
8. *Id.* at 516.
9. 113 A.D.2d 924, 493 N.Y.S.2d 826 (2d Dep't 1985).
10. *See Davidson v. Common Council of the City of White Plains*, 40 Misc. 2d 1053, 244 N.Y.S.2d 385 (Sup. Ct., Westchester Co. 1963).
11. 759 N.Y.S.2d at 519.
12. *Id.* at 520.
13. 97 N.Y.2d 86, 735 N.Y.S.2d 873 (2001).
14. *See* Lester D. Steinman, *Tall Trees Cast Uncertain Shadows*, Municipal Lawyer, Jan./Feb. 2002.
15. *Id.*
16. *Id.*
17. 2002 N.Y. Laws, ch. 662.
18. *Id.*

The Fall 2003 Section Meeting Should Be on Your "To Do" List

"State and Local Government Leadership: Effective Lawyering in the Public Sector" is the theme of the joint Fall Meeting of the New York State Bar Association's Municipal Law Section and the American Bar Association's State and Local Government Law Section. The meeting is scheduled for October 23–26, 2003, in Albany, New York.

"Please make sure to save the date and join hundreds of your colleagues as we meet in Albany, New York, in the Fall for what promises to be the largest gathering of state and local government lawyers for a CLE in the Northeast!"

On Thursday, October 23, 2003, there will be a special daylong conference entitled "*Monell* at 25: Municipal Liability Past, Present and Future." The proceedings will examine the United States Supreme Court's landmark ruling in *Monell v. New York City Department of Social Services*[1] that municipalities are considered "persons" under 42 U.S.C. § 1983 and could therefore be held liable on a civil rights claim. The far-reaching impact of this case on all facets of municipal liability will be discussed by some of the foremost practitioners and academics in the field. The program will feature a plenary address by New York University Law Professor Oscar Chase, who argued the *Monell* case. Hon. Gregory Serio, Superintendent of Insurance for the State of New York, will be the luncheon speaker. Professor David Gelfand of Tulane Law School will provide a program wrap-up including predicting future trends in the field of municipal liability. The New York State Bar Association's Committee on Attorneys in Public Service will host a reception for all registrants at a wonderful downtown Albany location following the program.

On Friday, October 24, 2003, the Fall Meeting starts off with a keynote address by Columbia Law Professor Richard Briffault on the subject of municipal home rule and state-local relations. This will be followed by three concurrent sessions exploring various cutting-edge First Amendment issues in the fields of land use, public sector labor law and public education. The afternoon also offers three concurrent sessions on environmental justice, public finance and Native American sovereignty and local government. A general reception will follow at the hotel to allow for networking.

The program for Saturday includes an ethics component. The morning will start with an examination of state and local government procurement practices, including an update on the recent revisions to the model procurement code and perspectives from the public and private sectors on doing business with government. This will be followed by a general ethics discussion for lawyers working in or with the public sector. The afternoon will provide a special opportunity for registrants to explore historic Albany with a narrated historic preservation tour of downtown Albany. The evening will feature a reception and dinner at the New York State Museum. The program concludes Sunday with business meetings of the governing bodies of both the American Bar Association State and Local Government Law Section and the New York State Bar Association Municipal Law Section.

Program co-sponsors to date include: Albany Law School and its Government Law Center; the Committee on Attorneys in Public Service of the New York State Bar Association; the American Bar Association Individual Rights and Responsibilities Section; the Association of Towns of the State of New York; the County Attorneys Association of New York State, the Michaelian Municipal Law Resource Center of Pace University; the New York Conference of Mayors; the New York State Association of Counties; the New York State Association of Administrative Law Judges; and the New York Municipal Insurance Reciprocal.

Please make sure to save the date and join hundreds of your colleagues as we meet in Albany, New York, in the Fall for what promises to be the largest gathering of state and local government lawyers for a CLE in the Northeast! Please contact Patricia Salkin at psalk@mail.als.edu for more information. Watch your mail for registration materials.

Endnote

1. 436 U.S. 658 (1978).

Section Committees and Chairs

The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on the back page) or Committee Chairs for information.

Ethics and Professionalism
Prof. Mark L. Davies
11 East Franklin Street
Tarrytown, NY 10591
Tel.: (212) 442-1424
Fax: (914) 442-1410
E-mail: mldavies@aol.com

Land Use and Environmental Law
Henry M. Hocherman
Shamberg Marwell Hocherman Davis & Hollis PC
55 Smith Avenue
Mt. Kisco, NY 10549
Tel.: (914) 666-5600
Fax: (914) 666-6267
E-mail: hmh@smhdh.com

Legislation
To be appointed

Membership
Prof. Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
Tel.: (518) 445-2329
Fax: (518) 445-2303
E-mail: psalk@mail.als.edu

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

Employment Relations
Sharon N. Berlin
Rains & Pogrebin, P.C.
210 Old Country Road
Mineola, NY 11501
Tel.: (516) 742-1470
Fax: (516) 742-1473
E-mail: sberlin@rainslaw.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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