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Municipal Lawyer

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A Message from the Chair

For those of you who joined us at the Sagamore for the Fall Meeting I know you enjoyed not only fantastic weather but one of the best programs we have ever put together. The lively presentation and debate on the impact of the Supreme Court's *Kelo* decision on Saturday morning kicked off a great weekend and exemplifies the quality of speakers and educational content we provide to you at our programs. Again, I want to thank the program chairs and the Environmental Law Section for their help and cooperation with this truly wonderful program. Next Fall we will be teaming up again with another section (Labor) at the Gideon Putnam in what is sure to be another exciting event as well as an opportunity to engage in a variety of social activities.

One of the areas of our Section that I would like to see enhanced is participation in the various subcommittees we have formed. As is often the case with such committees, if there are too few active members or vague tasks and responsibilities they tend to drift. We will be having a luncheon meeting for all existing and prospective subcommittee members during the week of our Annual Meeting in New York City. Our subcommittees include membership, government operations, employment relations, legislation, land use, municipal finance/economic development and ethics. Further information on this luncheon as well as our program for the Annual Meeting will be provided to you directly from the State Bar. Chairs of each subcommittee or other members will be available at the luncheon to discuss that subcommittee's profile as well as next year's agenda. I would strongly encourage all members to become active in one of these committees as this is an excellent way to enhance your membership opportunities and provide all of us with your own unique perspectives.

Our Section is quite fortunate to have a tremendous diversity of practice areas. Please be sure to visit our web page as it has been recently enhanced to better serve you. I hope you will continue to find that the variety of services provided through the efforts of this Section, from the *Municipal Lawyer* to the Fall and Annual Meetings and other CLE sponsored activities to the web page and subcommittees, to be of benefit. Please do not hesitate to reach out to me at tmyers@orrick.com or other members of the Executive Committee if you have any thoughts or suggestions on how to better serve our members.

Thomas Myers

Inside

From the Editor

In Memoriam
Edith I. Spivack

In January of 1995, the Municipal Law Section honored Edith I. Spivack, Executive Assistant New York City Corporation Counsel, for sixty years of dedicated service to the profession. Now, ten years later, the Section mourns her passing. A fitting tribute to the legacy of this remarkable woman, printed in the *State Bar News*, is reproduced below:

A Tribute to Edith I. Spivack

The New York State Bar Association, especially the Committee on Women in the Law, is deeply saddened by the loss of one of the most admired women of our time. Edith I. Spivack, a pioneer for all women who ever considered entering the legal profession, has been held out to be a courageous and outstanding example of the ability and perseverance of women, as well as a role model for anyone who ever doubted that they had the strength and determination to accomplish their goals.

Her Story

Edith was one of the first women graduates of Columbia Law School. She entered the legal profession in the 1930s in the midst of the Depression. It was then difficult for most men, and certainly for Edith, to secure interviews. On one occasion when she was able to arrange an interview, she was simply told that the partners were opposed to hiring women.

Regardless of the obstacles facing her, her tenacity once again gave her the courage to pound the pavement until she found a job with the New York City Department of Law and became a hugely successful and well-known attorney while, at the same time, raising two children.

A Pioneer

With her irrepressible optimism and intelligence, Edith became one of the outstanding leaders of the profession. She has inspired countless attorneys, women and men, with her wonderful work ethic, integrity, expertise and kindness. Her career in the New York City Department of Law, which spanned 70 years, was unmatched. During her remarkable tenure she served 10 mayors and 23 corporation counsel.

In Her Honor

In 2005 the Committee on Women in the Law recognized Edith's outstanding contributions to the practice of law and her efforts to address gender bias and other law-related issues affecting women by re-naming its annual program in her honor.

Edith will be sorely missed, but she will always be remembered for her indomitable spirit, her dedication to the legal profession, and her insistence that women should not have to choose between family and career but could successfully manage both.

Edith is survived by two daughters, Amy Bass and her husband, Geoffrey Bass, of Port Washington, N.Y.; and Rita Christopher Frank and her husband, Dr. David Frank, of Madison, Conn.; and four grandchildren, Susanna Bass, Jonathan Bass, Gordon Christopher, and Sandy Christopher.

Inside

In this issue of the *Municipal Lawyer*, Walter R. Artus, Senior Project Manager with the Chazen Companies, reviews the impact of New York State Department of Environmental Conservation Phase II Stormwater Regulations on municipalities and construction activities in New York State and examines strategies for implementing successful stormwater management programs to meet Phase II requirements.

In her article on "Nepotism," Jessica Hogan, Deputy Counsel of the New York City Conflicts of Interest Board, suggests that a blanket prohibition on family members working for the municipality may not be the best course of action. Rather, using New York City's conflict of interest law as the backdrop, Ms. Hogan argues that local ethics codes should focus on preventing the potential for abuse of office where a public official hires, supervises or promotes family members.

In "Municipal Briefs," the authors review recent legislative amendments to the Freedom of Information Law ("FOIL") and the State Environmental Quality Review Act ("SEQRA") regarding the timeliness of agency responses to FOIL requests and the publication of EISs on the Internet, respectively. Recent decisions rendered by the United States Supreme Court regarding the display of the Ten Commandments on public property and by the New York Court of Appeals relating to the issuance of special permits to religious organizations and the standards for awarding attorney's fees under FOIL are also examined.

Also reproduced in this issue is a recent opinion issued by the New York State Attorney General's Office addressing commonly asked questions regarding the scope of municipal authority to set civil and criminal fines and impose other sanctions for violations of local zoning laws.

Lester D. Steinman

Phase II Stormwater Regulatory Impact on Municipalities and Construction Activities in New York State

By Walter R. Artus

1. History

The New York State Department of Environmental Conservation (NYSDEC) Phase II Stormwater Regulations became effective on March 10, 2003. To effectively understand the intent of these new regulations that have impacted municipalities and construction activities in New York State, it is important to understand the prior history and developments related to the creation of the new regulations.

The Phase II Stormwater Regulations were enacted under the Clean Water Act (CWA). The CWA was enacted with the intent of restoring and maintaining the chemical, physical and biological integrity of the waters of the United States. The Act established a number of requirements, prohibitions and programs to achieve this end. The agency having regulatory authority over the CWA is the Environmental Protection Agency. In New York State, the NYSDEC is the regulatory authority.

"The Clean Water Act was enacted with the intent of restoring and maintaining the chemical, physical and biological integrity of the waters of the United States."

The 1972 amendments to the Federal Water Pollution Control Act established Section 402 of the CWA also known as the National Pollutant Discharge Elimination System (NPDES) permit program to control discharges of pollutants from point sources, which focused on industrial process wastewater and municipal sewage. In New York State, this permit program is known as the State Pollutant Discharge Elimination System (SPDES) Permit.

Amendments to the CWA in 1987 devised a compromise whereby the EPA would issue permits for stormwater discharges, but would focus on the most contaminated stormwater discharges first. The 1987 amendments created a new section in the act devoted to stormwater permitting. Section 402(p) provided that five (5) categories of stormwater discharges, considered to represent the most significant stormwater sources of pollution, were subject to immediate permitting. Those five (5) categories, also known as the Phase I facilities, were:

- Facilities already covered by a NPDES permit for stormwater;
- Facilities that engage in industrial activity (including heavy manufacturing facilities, large construction sites and transportation facilities, etc.);
- Large (>250,000 population) municipal separate storm sewer systems (MS4's);
- Medium (100,000> population <250,000) municipal separate storm sewer systems (MS4's);
- Facilities that the EPA administrator determined to have stormwater discharges contributing to a violation of water quality, or that are "significant contributors" of pollutants to waters of the United States.

In the fall of 1992, the EPA issued two baseline general permits, one for industrial dischargers and one for construction activities which established general permit requirements for facilities in states where the EPA implements the stormwater program. Construction operations that resulted in the disturbance of an area equal to or greater than five (5) acres of land were subject to the Phase I Regulations. These general permits also have been used by states with NPDES permitting authority to establish state permit requirements, which must be at least as stringent as those established by the EPA. This again is the case in New York State, with the NYSDEC being the permitting authority.

The NPDES requirements apply only to discharges of stormwater either directly or through a municipal separate storm sewer system (MS4) to waters of the United States.

As noted above, the Phase I Stormwater Regulations targeted "point source" discharges. As point source discharges were brought increasingly under control, stormwater discharges from "non-point

sources" became the focus of greater attention, thus leading to the Phase II Stormwater Regulations.

In 1995, the EPA issued a final rule for Phase II dischargers. The rule originally stated that all Phase II dischargers must apply for permits by August 7, 2001, if the regulatory program in place at that time requires permits.

However, the Phase II rule did not become effective until March 10, 2003 at which time designated "Small MS4s" in New York State were required to submit a Notice of Intent (NOI) for coverage under a SPDES General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4s), also known as General Permit GP-02-02.

A "Small" MS4 is defined as any MS4s that were not already designated and regulated as large or medium under Phase I, i.e., those less than 100,000 in population. MS4s were also designated by location in an urbanized area based upon population density, or those designated by the NYSDEC due to a discharge into a MS4 or as a known source of contaminants or pollutants.

The objectives and standards of the Phase II municipal requirements are as follows:

- Reduce the discharge of pollutants to the "maximum extent practicable" (MEP), protect water quality and satisfy the water quality requirements of the CWA.
- Provide a comprehensive stormwater management program.
- Address stormwater activities not covered by Phase I
- Watershed Management

The NYSDEC also designated "others" as regulated MS4s such as the New York State Department of Transportation (NYSDOT), the Thruway Authority, County Highway Departments, other state agencies and authorities, airports, state and community colleges, local school districts, etc. Those identified as "others" were also required to submit an NOI to obtain permit coverage under General Permit GP-02-02 by March 10, 2003.

2. Construction Activities

As small construction sites were also determined to be a major source of pollutants into waters of the United States, the Phase II Rule also affects any construction activities that disturb an area equal to or greater than one (1) acre of land, dropping the threshold from the previous five (5) acres of disturbance. In New York State, this permit is known as the NYSDEC SPDES General Construction Permit GP-02-01. Therefore, all construction activities throughout New York State, whether located in a designated MS4 or not, are required to submit a Notice of Intent (NOI) to the NYSDEC to obtain permit coverage under General Construction Permit GP-02-01.

Under this provision, the owner/operator of these types of construction is required to:

- Prepare an effective Erosion and Sediment Control Plan with appropriate details and specifications. The Erosion and Sediment Control Plan is to be prepared in conformance with the "New York State Standards and Specifications for Erosion and Sediment Control." The erosion and sediment control plan at a minimum must include provisions for the locations of temporary and permanent erosion and sediment control measures, an erosion and sediment control sequencing schedule, a construction sequencing schedule and an erosion and sediment control maintenance schedule. In addition to the above plan, a narrative report is required to provide information with regard to the scope of the project, a description of existing on-site soils, measures to control on-site construction and waste materials, a description of all temporary and permanent erosion and sediment control measures including a description of structural practices to divert flows from exposed soils, store flows, or otherwise limit runoff and the discharge of pollutants from exposed areas.
- Prepare a Storm Water Pollution Prevention Plan (SWPPP) with appropriate details, specifications and accompanying report. The SWPPP is to be prepared in conformance with the "New York State Stormwater Design Manual." The SWPPP must include all elements of the Erosion and Sediment Control Plan as well as water quantitative and water qualitative controls (post-construction stormwater control practices). Additionally, the SWPPP must contain a description of each post-construction stormwater control practice including, but not limited to, the specific location of each post-construction stormwater control practice, a hydrologic and hydraulic analysis for all structural components of the stormwater control system for the applicable design storms, a comparison of post-development stormwater runoff conditions with pre-development conditions, the dimensions, material specifications and installation details for each post-construction stormwater control practice and a maintenance schedule to insure continuous and effec-

tive operation of each post-construction stormwater control practice.

- Submit a Notice of Intent (NOI) to the NYSDEC prior to commencement of construction to obtain coverage under this permit from the NYSDEC, the local governing body and any other authorized agency having jurisdiction or regulatory control over the construction project. The NOI must be received by the NYSDEC five (5) business days prior to commencement of construction. A sixty (60) day NOI is required for discharges to a designated New York State impaired water body or watercourse or if the SWPPP does not meet the technical requirements as set forth in the "New York State Stormwater Design Manual." Prior to the submission of a sixty (60) day NOI, the SWPPP must be certified by a licensed professional. The construction site operator/owner is responsible for certification of the NOI.

- Site assessments and inspections are part of the permit requirements of GP-02-01. The owner/operator shall have a "qualified professional" conduct an assessment of the site prior to commencement of construction and certify in an inspection report that the appropriate erosion and sediment control measures described in the SWPPP and this permit have been adequately installed or implemented to insure overall preparedness of the site for commencement of construction. Following commencement of construction, site inspections must be conducted by a "qualified professional" at least every seven (7) calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater. During each inspection, the "qualified professional" must provide and record all information as detailed in Section Part III.D 3 of Permit GP-02-01. A "qualified professional" is defined as a Certified Professional Erosion Sediment Control (CPESC), a Professional Engineer (P.E.) or an experienced and qualified individual under the direction of a P.E. A copy of the NOI, the SWPPP and an inspection log book must be kept on-site at all times during construction and must be available upon request of the NYSDEC and/or the local governing agency.

- Submit a Notice of Termination (NOT) at the time construction is complete and the site has been stabilized. The construction site operator/owner must certify and file the NOT and the permittee must identify all permanent stormwater management structures that have been constructed and provide the owner(s) of such structures with a manual describing the operation and maintenance practices that will be necessary in order for the structure to function as designed. The permittee must also certify that the permanent structure(s) have been constructed as described in the SWPPP. In addition, prior to the filing of the NOT, the construction site operator/owner shall have the "qualified professional" perform a final site inspection certifying that the site has undergone final stabilization and that all temporary erosion and sediment control measures not required for long-term erosion control have been removed.

- The owner/operator responsibility under Permit GP-02-01 states that the owner/operator of the construction site activity is the ultimate responsible party to implement the requirements of Permit GP-02-01. The owner/operator is defined as the person(s) who has operational control of the construction projects plans and specifications, as well as the ability to make modifications to them and the day-to-day operational control activities that provide compliance with the SWPPP or other permit controls. Under Permit GP-02-01, the owner/operator of construction site activities has numerous responsibilities. Besides the certification of the NOI, the owner/operator is responsible for all contractors and subcontractors to certify and sign a subcontractor's agreement which becomes a part of the SWPPP for the construction activity. The owner/operator shall also certify in the SWPPP that all appropriate stormwater control measures will be in place prior to commencement of construction of any segment of the project that requires such measures. Additionally, a copy of the NOI and a brief description of the project shall be posted at the construction site in a prominent place for viewing. A copy of the SWPPP shall also be on-site at all times during construction. The owner/operator shall maintain a record of all inspection reports in a site log book. The site log book shall be maintained on-site and be made available to the permitting authority upon request. The owner/operator shall also post at the site, in a publicly accessible location, a summary of the site inspection activities on a monthly basis. It is imperative that the owner/operator read and understand Permit GP-02-01 to insure his or her compliance with all elements of this permit.

- The NYSDEC has the authority to bring three types of enforcement actions:

1. Administrative Orders,
2. Civil Actions,
3. Criminal Prosecutions.

Any deviation from the SWPPP, as well as any discharge of accumulation of sedimentation from the construction site, is considered a violation. Violations of the SWPPP and of the CWA may receive a penalty of up to $37,500 per violation per day.

3. Municipal Requirements

Effective March 10, 2003, municipalities designated Small MS4s have faced a new objective and are now required to comply with the rule governing use of land and water resources. Hundreds of municipalities and "construction site operators" in the state of New York have come face to face with a facet of the CWA administered by the EPA known as Phase II of the NPDES permit program. Local governments will need to incorporate informational and educational components, as well as construction site erosion and sediment control and post-construction stormwater management into their programs. The Phase II Rule requires controls on stormwater discharges from a broad spectrum of municipalities, industries and "construction site operators." The Phase II Rule will have both a direct and indirect impact on many municipalities in New York State by increasing requirements for allocation of funds, the implementation of new ordinances and staffing.

In New York State, the NYSDEC will act as the permitting authority over the Phase II Rule. There are three dates to keep in mind with regard to the Phase II Rule as follows:

- March 10, 2003: Small MS4s must file a NOI (Notice of Intent) for their municipal programs. Any construction activity disturbing an area of land equal to or greater than one acre must also file a NOI.
- June 1, 2006: Small MS4s must submit their Annual Report and their Municipal Compliance Certification to the NYSDEC.
- January 8, 2008: Designated MS4s must fully implement and have operational a comprehensive six-point Storm Water Management Plan (SWMP).

The objectives and standards of the Phase II municipal requirements are to reduce the discharge of stormwater pollutants to the "maximum extent practicable" (MEP), protect water quality and satisfy the requirements of the CWA.

Designated Small MS4s must apply for a NPDES General Permit, develop a SWMP, implement the SWMP utilizing appropriate Best Management Practices (BMP), develop measurable program goals, evaluate and assess their program's effectiveness and develop a program for recordkeeping and reporting.

Small MS4s must also develop an effective watershed planning and management program. This program should include an overall watershed approach to protect key natural areas, establish stream and resource buffers, reduce impervious area in site design, limit disturbance and erosion during construction activities and treat the quantity and quality of stormwater runoff. Effective watershed planning must include the development of a comprehensive watershed plan, provide for incentives as well as penalties, an understanding of local development issues and the local adoption of urban BMPs. The implementation of a watershed protection approach may include the crafting of model ordinances, strengthening the development review process, clustering development and creating open space. Source control will be a key element in any effective watershed management program. Local Planning Boards and their planning and engineering consultants will play a key role in source control. Additionally, creativity and flexibility within local ordinances to allow for the reduction of impervious areas in new development will be required. Examples may include narrower streets, common driveways, sidewalks on one side, concave versus convex medians/curb cuts, on-site retention, buffers on waterways and vegetated swales in lieu of curbs and gutters.

As part of compliance with the Phase II Rule, municipalities designated as Small MS4s will be required to establish six Minimum Control Measures utilizing appropriate BMPs in their NOI under a NPDES General Permit. The six Minimum Control Measures include:

1. Public Education and Outreach:

   This measure includes distributing educational materials and performing outreach to inform citizens about the impacts polluted stormwater runoff discharges can have on water quality. Municipalities shall describe steps to reduce stormwater pollution and inform households and individuals on proper septic system maintenance, limiting use of runoff and garden chemicals, local stream restoration, etc. Information should also be directed to targeted groups such as commercial, industrial and institutional entities. The municipality should address the viewpoints and concerns of all sub-communities.

2. Public Involvement and Participation:

   This measure includes providing for citizens to participate in program development and implementation, including effectively publicizing public hearings and/or encouraging citizen representatives to participate on a stormwater management panel. The municipality must comply with state and local public notice requirements pursuant to SEQRA. Municipalities should also establish citizen groups and work with volunteers.

3. Illicit Discharge Detection and Elimination:

   This measure includes developing and implementing a plan to detect and eliminate illicit discharges to the storm drain system (including developing a system map and informing the community about hazards associated with illegal discharges and improper waste disposal). Mapping should show the location of major pipelines, outfalls and topography, areas of concentrated activities likely to be sources of stormwater pollutants such as recreational areas and define watershed basins. Municipalities must effectively prohibit illicit discharges into MS4 systems with the use of ordinances, orders, etc., and implement enforcement procedures and actions. They must identify illicit connections such as sanitary connections into the storm sewer system, develop a plan to detect illicit discharges and illicit dumping and must inform public employees, businesses and citizens of hazards arising from illegal discharges.

4. Construction Site Runoff Control:

   This measure includes developing a plan to reduce stormwater pollution from construction activities and developing, implementing and enforcing an Erosion and Sediment Control program or ordinance for construction that meets or exceeds the requirements as set forth in Permit GP-02-01 for construction activities that disturb an area equal to or greater than one acre of land. This measure must include requirements for construction site owners or operators to implement BMPs, a comprehensive pre-construction review of site plans with recommendations, procedures to receive and consider public input, regular inspections of BMPs during construction and penalties to insure compliance.

5. Post-Construction Site Runoff Control:

   This measure includes developing, implementing and enforcing a program to address discharges of post-construction stormwater runoff from new development and redevelopment areas from project sites disturbing land equal to or greater than one acre of land and project sites discharging into MS4s. This program must include site appropriate, cost-effective structural and non-structural BMPs that emphasize management and source controls. This program should be based on local watershed planning and measures to prevent or minimize water quality impacts and to insure the long-term operation, inspection and maintenance of structural BMPs. The EPA recommends BMPs that minimize water quality impacts and that maintain pre-development runoff conditions.

6. Pollution Prevention and Good Housekeeping:

   This measure includes developing and implementing a program of infrastructure and operations and maintenance with the goal of preventing or reducing pollutant runoff from municipal operations. This program must include municipal staff training on pollution prevention measures. Municipalities must provide municipal employee training with regard to park and open space maintenance, fleet maintenance, building management, storm drain system maintenance and the proper disposal of waste removed from the storm drains. Controls should be implemented for reducing pollutants from streets, parking lots, corporation yards and solid waste operations.

As most designated MS4s in New York State have now submitted their NOI based upon the March 10, 2003 deadline for designated Small MS4s in New York State to submit their NOI for General Permit coverage, municipalities have begun to and must continue to work on an outline for their Six Minimum Control Measures and BMPs appropriate to their respective municipality. Every municipality has differing existing conditions and community issues to consider. It will require an overall participation and cooperation effort between all municipal departments, officials and consultants, community groups and individual citizens to effectively address compliance within their municipality under the Phase II Rule.

Throughout the five (5) year implementation program, the designated MS4 should develop measurable program goals, evaluate and assess program effectiveness on an ongoing basis and develop a means for recordkeeping and reporting.

A watershed planning and management program should be the course of action in any municipal SWMP.

- Watershed Approach:
  1. Protect key natural areas.
  2. Establish stream and resource buffers.
  3. Reduce impervious area in site design.
  4. Limit disturbance and erosion during construction.
  5. Treat the quantity and quality of runoff.
  6. Maintain or restore the stream infrastructure.
- Effective Watershed Planning:
  1. Develop a comprehensive watershed plan.
  2. Develop an integrated development review process.
  3. Balanced resource protection objectives.
  4. Understanding of development issues.
  5. Local adoption of urban BMPs.
- Implementing the Watershed Protection Approach:
  1. Crafting of model ordinances.
  2. Strengthening the development review process.
  3. The creation of urban stream buffers.
  4. Alternative development concepts.
  5. Creation of greener streets and parking areas.

As drainage areas and watersheds do not end or begin at municipal boundaries, it is prudent to develop cooperation in the development of a municipal SWMP with adjacent and adjoining municipalities to share resources. In addition, as the cost to implement an effective SWMP is of great concern to municipalities, cooperating MS4s are more likely to receive funding and grants for their SWMP through the implementation of cooperating MS4s. The use of volunteer groups and the partnering with other groups in the development of the SWMP is another measure that may be utilized to reduce the financial impact and burden on the municipality.

4. Alternative Municipal Planning Concepts and Municipal Ordinances

As municipalities in New York State face the implementation of their SWMP, alternative land development measures must be encouraged. One of the major objectives of a designated MS4 is to reduce the amount of impervious area in new development. Alternative planning concepts such as clustering, coving and Low Impact Development (LID) offer solutions to current conventional site development that do not currently meet this objective.

However, most current municipal zoning codes and subdivision and site plan requirements inhibit such deviations from the current regulations. Conventional regulations and regulators are often inflexible and often restrict innovative development. To incorporate innovative development, zoning changes will be required as will the ability for local regulatory agencies to allow for waivers and variances from current codes.

"As drainage areas and watersheds do not end or begin at municipal boundaries, it is prudent to develop cooperation in the development of a municipal Storm Water Management Plan with adjacent and adjoining municipalities to share resources."

It is not typically advantageous nor are there incentives for a developer or applicant to approach a municipal planning board proposing just some of the obvious examples of LID concepts below:

- Narrower streets that would reduce the amount of impervious area in new development although many current codes require a standard street width and specifications.
- Strip driveways or common driveways offer another method to reduce impervious areas in development. Many municipalities and highway departments do not allow common driveways due to maintenance and utility agreements required between owners.
- Sidewalks on one side of the street as opposed to requiring sidewalks on both sides of the street.
- Concave verses convex mediums and curb cuts on islands on commercial site plans to encourage the utilization of bio-retention and groundwater recharge.

- The maximization of open space by clustering development as opposed to the standard conventional subdivision layout.
- On-lot retention or bio-retention on a lot-by-lot basis within a subdivision to reduce the amount of stormwater runoff into the storm drainage system.
- Vegetated swales in lieu of curbs and gutters along roads and streets should be encouraged where soil types would allow for infiltration. However, most municipal codes require a closed drainage system with curbs.
- Grass pavers may be utilized for overflow parking on commercial development. Again, most municipal codes require parking lot counts based upon the square footage of the proposed building or structure, employee count or the particular use of the proposed commercial development. It is apparent that most parking lots are only full at certain times during the year. The use of smaller parking lot sizes may also be encouraged to reduce the amount of impervious area on commercial sites.

It will take time to produce the changes required in site development to move away from current conventional thinking and to make LID a mainstream approach to land development. The biggest obstacles to LID are local ordinances and the knowledge and experience of local building officials and consultants.

"As municipalities implement their SWMP as required by the Phase II Stormwater Regulations, municipalities will find the need to implement new environmental, zoning and subdivision ordinances."

The old thinking approach to address stormwater runoff is to quickly remove the runoff by means of grading, the use of curbs and gutters, and the use of centralized pipe and pond controls.

Conventional development has the potential to impact the hydrology of a watershed by reduced infiltration, increased runoff volume and peak rate, a higher runoff velocity, a decreased time of detention, increased flooding, a decreased stream base flow and an increase in stream bank erosion. Without alternative site development measures, conventional site design and development also has the potential for the degradation of aquatic ecosystems by means of scouring, the accumulation of sedimentation, the export of pollutants and an increase in the temperature of water bodies due to the increase in the percentage of impervious areas.

LID is an innovative and ecosystem-based approach to land development and stormwater management. Prior to development of a site, sensitive areas should be identified such as streams and buffers, floodplains, wetlands, steep slopes, wooded or forested areas and highly permeable soils such as A and B soils. To maintain and improve the site hydrology, alternative site layouts should be explored to reduce, minimize and disconnect impervious areas.

Not only is LID a feasible development concept, it is a design element encouraged by the NYSDEC to meet the requirements of the SPDES permitting process. Applicants and their representatives need to work with local municipal officials and their consultants to implement innovative site design and development. Applicants and their representatives need to think "outside the box" and be creative in their development concepts and proposals.

As municipalities implement their SWMP as required by the Phase II Stormwater Regulations, municipalities will find the need to implement new environmental, zoning and subdivision ordinances.

Municipalities will need to review current setback requirements, road widths, cul-de-sac lengths, the elimination of curbs and gutters and the current standards for detention and inlet and storm sewer criteria.

Municipalities that have not already done so will be required to implement an erosion and sediment control ordinance as part of their SWMP to control non-point source pollution into existing water bodies.

Municipalities will need to create and implement wetland ordinances and riparian buffer ordinances for water quality protection, habitat improvement, flood control, recreational areas and aesthetics. These buffers should be maintained, the corridors in the buffers should not be interrupted, activities in buffer zones limited and the buffers kept natural.

Additionally, municipalities in New York State that strive to meet the implementation requirements of the Phase II regulations must adopt a Stormwater Management Ordinance. The objectives of a comprehensive Stormwater Management Ordinance should be:

- No net increase in non-point source pollution.

- No net increase in peak runoff rates.
- No net increase in runoff volume.

The Stormwater Management Ordinance should provide elements that may be integrated into the Town Comprehensive or Master Plan, the utilization of non-structural stormwater management practices as a primary measure, the utilization of infiltration practices as a primary measure, control runoff at its source, the utilization of a combination of stormwater management measures and facilities or "treatment" trains and to encourage the minimization of concentrating stormwater.

The Stormwater Management Ordinance should meet or exceed the standards as set forth in the NYSDEC SPDES Permit GP-02-01. The ordinance should provide specific goals, objectives and procedures, a description or reference of acceptable BMPs and specific design criteria for both during and post-construction. The ordinance should also provide for the long-term inspection and maintenance of post-construction stormwater management measures and facilities such as the creation of Stormwater Maintenance Districts for new subdivisions. Provisions in the site plan approval process should be adopted for commercial development to address an enforceable means to provide for the inspection and maintenance of post-construction stormwater management measures and facilities.

In conclusion, to meet the objectives of the NYSDEC SPDES MS4 permit and the implementation and development of a comprehensive SWMP to be fully implemented by January 8, 2008, applicable zoning, site development and stormwater management ordinances will be required in conjunction with an educational program to educate municipal elected officials, planning and zoning boards, engineering and planning consultants, developers, contractors and the public.

Mr. Artus, a Certified Professional in Erosion and Sediment Control (CPESC), is a Senior Project Manager with The Chazen Companies in Poughkeepsie, New York.

Nepotism

By Jessica Hogan

The state conflicts of interest provisions set forth in Article 18 of the General Municipal Law have been described as "disgracefully inadequate" by the former Temporary State Commission on Local Government Ethics because they offer little guidance to public officials or reassurance to citizens that their public servants are serving the public and not themselves. As found by the Commission, Article 18 fails to address many of the most basic conflicts of interest, contains language that is so vague that at least one provision has been struck down as unconstitutionally vague, offers no range of penalties (a violation is either a misdemeanor or a disciplinary infraction), is virtually unintelligible except to an experienced municipal lawyer, violates common sense, and, in the one area that it does regulate (prohibited interests in contracts), overregulates to such a degree that it turns honest public servants into criminals and inflicts substantial and unnecessary financial burdens on municipalities.[1]

"Not only does Article 18 fail to address nepotism in any form, but also it in fact expressly authorizes a public official to hire a relative, even a spouse or child."

Nepotism provides one such instance of Article 18's weaknesses. Not only does Article 18 fail to address nepotism in any form, but also it in fact expressly authorizes a public official to hire a relative, even a spouse or child.[2] Clearly, however, a municipality may—and should—adopt a more stringent code of ethics that does address such issues.[3] In doing so, a municipality should consider whether an outright prohibition on family members working for the municipality is either workable or desirable. Such a prohibition, particularly in smaller municipalities but even in larger ones, may prevent the municipality from hiring the best people into public service. Often, a commitment to public service runs in families, particularly in the fields of education and public safety. Furthermore, merely allowing family members to work for the same municipality presents little harm. Rather, the harm lies in the abuse of office that arises when a public official hires, retains, or promotes family members or supervises them or is supervised by them. In its Conflicts of Interest Law, the City of New York has addressed the nepotism issue by thus restricting abuse of office without attempting to prohibit a City agency from hiring two or more members of the same family. This approach, which this article describes, should prove workable in virtually every municipality, regardless of size.

In contrast to Article 18, New York City's ethics code, found in Chapter 68 of the New York City Charter, not only prohibits public servants from using their position to obtain a benefit for someone with whom they are associated, including certain family members, it also seeks to ensure that public servants are not even put into a position where their loyalty is questioned. While Chapter 68 does not expressly ban nepotism, it includes several provisions that prevent family members from using their office to obtain a benefit for those related to them or from appearing to be in a position where they could benefit relatives.

First, Charter Section 2604(b)(2) prohibits a public servant from engaging in "any business, transaction or private employment, or hav[ing] any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." Second, Charter Section 2604(b)(3) provides that "no public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant." A person "associated" with the public servant includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.[4] Finally, Charter Section 2604(b)(14) provides that "[n]o public servant shall enter into any business or financial relationship with another public servant who is a superior or subordinate of such public servant." Pursuant to Charter Section 2603(e), the New York City Conflicts of Interest Board ("the Board") is empowered to enforce these provisions, and, as will be discussed below, has had occasion to do so in the past.

"Relatives" for the purpose of this article means those family members who are "associated" with a public servant within the meaning of Charter Section 2601(4), i.e., mother, father, brother, sister, spouse, domestic partner, or child. Since a financial benefit to one spouse ordinarily accrues to the other spouse, "relative" effectively includes the spouse or domestic partner of a parent, child, or sibling as well. As mentioned above, there is no explicit prohibition in Chapter 68 banning relatives from working at the same City agency. However, public servants are prohibited both from actively taking steps to benefit their relatives and, even if they take no action, from merely being involved in any matters concerning these relatives. In other words, not only may a public servant not use his or her position to attempt to obtain a benefit, he or she must make sure there is complete insulation or "recusal" from any decisions involving those relatives.

Use of Position to Obtain a Benefit

Charter Sections 2604(b)(2) and (b)(3) prohibit a public servant from actively using or attempting to use his or her position to benefit a relative. The typical situation faced by the Board involves a public servant attempting to find work for his or her relative, either with the City itself or with a vendor doing business with the City. Interestingly, a violation of the Charter could occur even if there is no monetary benefit attached to this position, in other words, even if the relative receives no compensation. For example, in Advisory Opinion No. 93-21, the Board found that it would be a violation of Charter Section 2604(b)(3) for a member of the City Council to nominate his or her family member for an appointment to a community board, even though this was an unpaid position. Community board members are nominated by the City Council and chosen by the Borough President. In finding that it would be a violation to nominate a relative, the Board noted that "Charter Section 2604(b)(3) is intended, among other things, to prevent City employees from abusing the public trust by exerting official influence to secure financial gain or special treatment for family members. . . . It is also intended to preserve public confidence in government by helping to insure that official actions or decisions are motivated solely by the public interest, rather than private relationships or affiliations."[5] In addition, the Board noted that permitting such nominations would allow the Council member to use "the power of public office to secure an advantageous appointment for individuals closely tied to him or her through financial or personal relationships."[6] Thus, whether the relative receives a monetary gain is irrelevant; the violation lies in helping the relative to secure any position in government, paid or unpaid.

A key component of a sound ethics law is the ability to enforce its provisions. Absent this power, an ethics code is merely a guideline that may be obeyed or ignored at the whim of the public servant. In the case of Chapter 68, however, the Board possesses enforcement power. For example, the Board recently entered into a settlement with a former New York City Department of Education ("DOE") employee who had sent his brother's resume to all of the principals in a particular DOE region.[7] The brother received an interview as a result of this mass e-mail, but did not accept a position. Nevertheless, despite the fact that the brother did not actually obtain a position, the DOE employee still violated Charter Section 2604(b)(3) merely by sending the e-mail on behalf of his brother. The Board took into account the fact that the DOE employee attempted to recall his e-mail after realizing the folly of his actions but still fined him $1000 for misusing his position to obtain a benefit for his brother.

". . . not only may a public servant not use his or her position to attempt to obtain a benefit, he or she must make sure there is complete insulation or 'recusal' from any decisions involving those relatives."

In another case a New York City School Construction Authority ("SCA") employee used her position not only to obtain a job for her husband, but to attempt to obtain for him promotions as well.[8] Here, the public servant approached a fellow SCA employee directly involved in the hiring process and repeatedly requested an interview for her husband until he was interviewed and eventually hired. When her husband submitted his resume for a promotion, she again requested that he receive an interview for the promotion. The Board fined this employee $5000 for violating Charter Section 2604(b)(3).

These examples are not intended to suggest that violations of Charter Sections 2604(b)(2) and (3) in regard to relatives are limited to helping these relatives obtain work. Anytime a public servant abuses his or her position for the benefit of a relative a potential violation has occurred. For example, the Board fined a former Bronx Assistant District Attorney $1000 for issuing a grand jury summons to a police officer in a case on which the officer had never worked, for the alleged purpose either of preventing the officer from testifying against the public servant's

husband on a traffic ticket or of inconveniencing the officer.[9] In yet another, perhaps even more egregious case, the Board agreed to a 30-day suspension without pay, a demotion, probation, and forfeiture of $2500 of accrued leave time in lieu of a fine for a New York City Department of Transportation employee who used his position with the City to solicit a subordinate to marry his daughter and bring her from Ecuador to the United States so that she could obtain permanent resident status.[10] In yet another case, the Board fined a former vice president of a community school board $1500 for testifying at a DOE hearing on behalf of her sister without identifying herself as a relative.[11] The sister was appealing an unsatisfactory rating that she had received in her capacity as an acting assistant principal. The community school board member appeared to testify in her official City capacity, praising her sister's work without ever disclosing the familial relationship.

"Chapter 68, far more stringent than Article 18, clearly prohibits public officials from hiring or promoting spouses, children, or siblings."

Chapter 68, far more stringent than Article 18, clearly prohibits public officials from hiring or promoting spouses, children, or siblings. Moreover, the power of the Board to fine public servants for violations of the ethics law, a power not set forth in Article 18, serves as a strong deterrent to nepotism. However, these protections are not enough to prevent nepotism. It is important that public servants not even be placed in a position where they may be tempted to engage in nepotism. Stopping short of prohibiting relatives from working at the same agency or with agency vendors, Chapter 68 instead utilizes recusal, discussed below, to prevent public servants from being placed in a position by which they might benefit their relatives.

Recusal from Matters Involving Relatives

As a basic tenet of public policy, public service should be encouraged. Prohibiting relatives from working together at the same City agency may well offer an unworkable solution to the problem of nepotism. Chapter 68, through Charter Sections 2604(b)(2) and (b)(3), allows for this balance by permitting relatives to work at or with the same City agencies, provided that a sufficient recusal mechanism is in place to ensure that a public servant cannot abuse his or her position in order to obtain a benefit for a relative. But what constitutes sufficient recusal? Is it merely enough not to be actively involved in any decisions regarding one's relatives? While certainly necessary, lack of active involvement alone does not satisfy the prohibition of Charter Sections 2604(b)(2) and (b)(3). In order to avoid even the appearance that a public servant is in a position to use his or her public authority to affect his or her relatives, the public servant must be completely insulated from any matters involving the relative. This means, among other things, not attending meetings regarding those relatives, not engaging in any conversations regarding those relatives, and not receiving any documents regarding those relatives.

For example, in Advisory Opinion No. 2004-3, the Board addressed the question of whether relatives of community board members may serve as staff to that community board. The Board noted that community board members have the power to determine how the community board budget will be allocated, including allocating money for staff, such as salary increases. Because of this power the Board found "that a member of a community board cannot effectively be recused from all matters affecting community board staff. The power to hire or fire the district manager, and the power to allocate the board's limited budget, are at the core of a board member's function. Thus, if a close relative is on staff, the member will inevitably take action that affects the relative's employment."[12] Moreover, the Board found that it would also violate Charter Section 2604(b)(14), the prohibition on a superior and subordinate having a financial relationship, if a member of the community board staff was a spouse of a community board member since, of necessity, a financial relationship exits between husband and wife.

In another case the Board addressed the question of whether or not the law firm of a public servant's spouse could respond to a Request for a Proposal ("RFP") from the public servant's agency. The public servant in question held a managerial position in the agency and had regular contact with members of the RFP selection committee. The Board found that it would violate Chapter 68 of the Charter for the agency to award the contract to the public servant's spouse since "the public servant is not sufficiently isolated from either the award of the contract or the performance of the contract to avoid the ethical constraints of Chapter 68."[13] In order to preserve the public trust in government, it is vitally important that an agency completely insulates a public servant from any matters relating to a relative. Lack of this protection may result in an appearance to the public that the public servant is benefiting his or her relative. Therefore, if the agency cannot accomplish this insulation, then the public servant is in potential violation of Charter Sections 2604(b)(2) and (b)(3).

The Board faced a similar issue in Advisory Opinion No. 94-20. Here two public servants sought advice as to whether they might continue serving in their present positions at their City agency, where both had husbands with interests in firms doing business with the agency. Again, the Board found that, while one public servant could avoid all involvement in matters involving her husband's firm, the other could not continue serving in her position because her agency had advised the Board that she could not "effectively recuse" from matters involving her husband's firm.[14] The Board found that the public servant could not continue to serve in her position at the agency since she "would be in a position to obtain a direct or indirect private advantage for her husband."[15]

Thus, going far beyond Article 18 of the General Municipal Law, Chapter 68 of the City Charter prohibits public servants from even being in a position to obtain any benefits for their relatives. While some may argue that this "prophylactic" measure is unfair since it arguably presumes that all public servants, given a chance, would abuse their positions, it gives the public confidence that public servants are serving public, not private, interests.

Chapter 68, in contrast to Article 18, provides a practical solution to the problem of nepotism. It balances the need to attract qualified, dedicated employees to the City, and to obtain the best vendors, with the need to assure the taxpaying public that employees and vendors achieve their positions, promotions, and contracts based on merit, not familial relations. It does this first, and perhaps most importantly, through its clearly worded provisions that prohibit a public servant from using his or her position to benefit a relative. These provisions effectively prevent a public servant from seeking a choice position for his or her relative or from interfering in governmental process in order to assist a relation. Second, the Board exercises its power to enforce the Charter provisions that prevent nepotism, namely Charter Section 2604(b)(2), (b)(3), and (b)(14). Thus, the provisions of the Charter that prevent nepotism are not merely guidelines to be considered, but mandates to be obeyed. This approach results in an ethics code that addresses nepotism in a manner that assures the public that integrity in government is not sacrificed while allowing the municipality to hire the best persons for the job.

"[G]oing far beyond Article 18 of the General Municipal law, Chapter 68 of the City Charter prohibits public servants from even being in a position to obtain any benefits for their relatives."

Endnotes

1. *See* Temporary State Commission on Local Government Ethics, "Final Report," FORDHAM URBAN L.J. 1 (1993).
2. *See* Gen. Mun. Law s 800(3). *See also* 1967 Op. Atty. Gen. (Inf.) 158 (opining that sheriff may appoint his wife as matron of county jail).
3. *See* Gen. Mun. Law s 806(1)(a). *See also* Davies, "Addressing Municipal Ethics: Adopting Local Ethics Laws," in Salkin & Smith, ETHICS IN GOVERNMENT, THE PUBLIC TRUST: A TWO-WAY STREET 103 (NYSBA 2002).
4. New York City Charter Section 2601(4).
5. COIB Advisory Opinion No. 93-21 at pp. 3-4.
6. COIB Advisory Opinion No. 93-21 at p. 6.
7. *COIB v. Genao*, COIB Case No. 2004-515 (2005).
8. *COIB v. Vella-Marrone*, COIB Case No. 98-169 (2000).
9. *COIB vs. Campbell Ross*, COIB Case No. 97-76 (1998).
10. *COIB v. Moran*, COIB Case No. 99-501 (2001).
11. *COIB v. Adams*, COIB Case No. 2002-088 (2003).
12. COIB Advisory Opinion No. 2004-3, p. 5.
13. COIB Advisory Opinion No. 91-2, p. 3.
14. COIB Advisory Opinion No. 94-20, p. 6.
15. *Id.*

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The views expressed in this article do not necessarily reflect those of the Board. The New York City Charter provisions and Board opinions and decisions cited in this article may be found on the Board's website, http://www.nyc.gov/ethics.

Municipal Briefs

By Lester D. Steinman and Jennifer Reinke

FOIL

Lester D. Steinman

Recently, the Governor signed into law Chapter 22 of the Laws of 2005, amending subdivisions 3 and 4 of § 89 of the Public Officers Law with respect to the timeliness of responses to requests for records made under the Freedom of Information Law. Previously, under Section 89, subdivision 3, an entity subject to the provisions of the Freedom of Information Law was required, within 5 business days of receipt of a written request for a record reasonably described, to make such record available to the person requesting it, deny the request in writing or furnish a written acknowledgement of receipt of such request, and a statement of the approximate date when such request will be granted or denied.

Chapter 22 now adds a requirement that the statement of the approximate date for the granting or denial of the request "shall be reasonable under the circumstances of the request." Further, Chapter 22 adds an additional requirement:

> If an agency determines to grant a request in whole or in part, and the circumstances prevent disclosure to the person requesting the record or records within 20 business days from date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability of the agency to grant the request within 20 business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or part.

Failure of an agency to conform to this provision shall constitute a denial of the request for records.

The intent of this legislation is to require more prompt responses from agencies under the Freedom of Information Law. To this end, the legislation imposes on agencies additional obligations where the records sought cannot be furnished within 20 business days from the date of the acknowledgement of the receipt of the request. The agency must justify any delay beyond that period and specify the date when the request will be granted in whole or in part. The legislation provides that such date shall be "within a reasonable period, depending on the circumstances." Ultimately, what is reasonable will be determined by the courts.

Jennifer Reinke

However, as recently confirmed by the Court of Appeals in *Beechwood Restorative Care Center v. Signor,*[1] the standards under which the courts may award reasonable attorney's fees to a party that has "substantially prevailed" in a lawsuit challenging the failure to properly disclose documents sought under the Freedom of Information Law have not changed. To succeed in recovering such attorney's fees and litigation costs, the applicant must demonstrate that the records sought were of clearly significant interest to the general public and that the agency lacked a reasonable basis in law for withholding the records. A review of the case law prior to *Beechwood* indicates that courts have been reluctant to impose attorney's fees and costs in most instances and have required applicants to satisfy a significant burden in establishing the elements for the award of such fees and costs.

In *Beechwood*, the Court of Appeals reaffirmed the stringency of these statutory standards. There, a skilled nursing facility's license was revoked by the New York State Department of Health ("DOH") based on allegations of substandard care of its residents. Beechwood submitted 17 separate FOIL requests to DOH over an 18-month period seeking documents pertaining to its license revocation and DOH's procedures in general. Notwithstanding its finding that DOH violated FOIL by not "discharg[ing] its statutorily mandated disclosure obligations in a more thorough and timely fashion," the Court ruled that Beechwood was not entitled to recover costs and attorney's fees because the records sought were not "of clearly significant interest to the general public."

In reaching this result, the Court rejected Beechwood's claims that "closure of the facility was signif-

icant to the public" and that the courts below "erroneously concluded that the general public did not clearly have a significant interest in the records it obtained." Rather, the Court concluded, Beechwood had failed to establish "why the general public would have a significant interest" in DOH's disclosure of general records of agency operations and the internal documents relating to the Beechwood license revocation. Moreover, the Court emphasized that under the statute, "the records themselves must be of significant interest to the public, not just the event to which they relate (see Public Officers Law § 89 [4] [c] [i])." Further, the Court opined:

> The legislative history underlying this provision further demonstrates that it is not enough that the records be of potential or speculative interest to the public. Governor Hugh Carey vetoed a prior version of this legislation that contained a less stringent public interest test and, in his approval of the current provision, noted that "the bill clarifies and tightens the public interest standard by requiring that the record be of 'clearly significant interest to the general public' and not just 'potentially' so" (Governor's Mem approving L1982, Ch. 73, 1982 NY Legis Ann, at 146-147). Therefore, the public's interest in closure of the facility does not by itself establish that any records relating to DOH's actions are also of interest to society.

Finally, the Court held that attorney's fees arising out of a FOIL dispute may not be recovered under New York's Equal Access to Justice Act ("EAJA"). The EAJA authorizes "the recovery of counsel fees and other reasonable expenses in certain actions against the state (CPLR 8600)."[2]

However, this statutory entitlement is prefaced by the words "except as otherwise specifically provided by statute." According to the Court, the EAJA only applies "where another statute does not specifically provide for counsel fees." Here, since Section 89(4)(c) of the Public Officers Law expressly provides for an award of attorney's fees, Beechwood may not recover such fees pursuant to the EAJA.

Special Permits

A Zoning Board's denial of a church's request to construct a new access road as part of a proposed expansion of its facilities, where the record establishes that the expansion could be accomplished in a less intrusive manner for neighboring properties, does not impermissibly impose a requirement that the church establish a "need" for the access road contrary to the Court of Appeals ruling in *Cornell University v. Bagnardi*.[3] *Matter of Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*.[4]

In *Cornell*, the Court of Appeals endorsed the special permit process as the proper vehicle for effectively balancing "the needs and rights of educational and religious institutions seeking to expand their facilities in residential neighborhoods against the concerns of local residents who might be harmed or inconvenienced by the proposed construction projects." In that case, however, the Court annulled the zoning determinations under review "because the zoning officials in both cases had impermissibly required the colleges that sought special permits to prove their need to expand."

Here, for more than 30 years, petitioner had operated a place of worship on a 5.7-acre residentially zoned parcel on Route 32 in the Town of Moreau pursuant to a special permit issued by the Town. Upon acquiring an adjoining 14.3 acres, the petitioner sought to amend its special permit to authorize a proposed expansion of its facilities that would nearly double the size of its main church and expand or add other buildings and facilities, including its parking lot. The church also sought to build a second access road to assist the flow of traffic between the parking lot and Route 32.

Conflicting professional traffic studies were presented to the Zoning Board. The applicant's expert concluded that the proposed expansion, including the construction of a new access road, would not have a significant impact on neighborhood traffic and that no mitigation measures were necessary. By contrast, the neighbors' expert identified cut-through traffic, turning conflicts and sight line problems that would create traffic problems for church-goers and nearby residents. Also, construction of a second driveway would result in noise and light pollution and runoff problems that would adversely impact neighboring properties. The neighbors' expert concluded that construction of the second access road was not necessary and that widening the existing driveway to two lanes, together with "simple traffic management techniques" to control overlapping arrivals and departures would alleviate parking lot congestion. Similar misgivings were expressed by the Saratoga County Planning Board which also recommended the implementation of traffic control meas-

ures in lieu of the construction of a secondary access road.

Ultimately, the Zoning Board approved the church's development plan except for the construction of a second driveway. Relying upon the neighbors' traffic study, the Zoning Board determined that the negative impacts to neighboring property owners outweighed the benefits to the church and that the new driveway was unnecessary because minor adjustments to the existing road entrance could address the Church's traffic needs.

Dismissing the Church's subsequent challenge to that part of the Zoning Board's decision that denied permission to construct the secondary access, the Supreme Court ruled that such denial was supported by substantial evidence, did not impermissibly interfere with the Church's religious activities and constituted a reasonable condition to the modified special permit issued by the Zoning Board. However, the Appellate Division reversed finding that the Zoning Board's determination constituted an impermissible denial based upon the Church's failure to establish a need for the second access road and directed the issuance of a special permit authorizing its construction.

The Court of Appeals granted leave to appeal to the Zoning Board, reversed the Appellate Division and reinstated the Supreme Court's confirmation of the Zoning Board's determination. Finding substantial evidence in the record to support the Zoning Board's determination, the Court of Appeals declared:

> Unlike in *Cornell University,* the ZBA in this case did not require the Church to make an affirmative showing of a need to expand as a condition precedent to the issuance of a special use permit. Indeed, there was no discussion in the ZBA determination concerning whether the Church needed its comprehensive expansion plan, which included significant additions to existing structures, the erection of a new building and the relocation and expansion of other facilities. Rather, the inquiry was whether the proposed expansion could be accomplished in a manner that mitigated the negative impacts on the surrounding community. Based on record evidence, the ZBA found it could and granted all aspects of the application except the secondary roadway.
>
> Although the Church was denied permission to construct a new access road, this was not a denial of permission to expand. The ZBA acknowledged that the expansion project could result in internal traffic concerns, but found that the Church could address those concerns in ways other than as proposed. Instead of constructing a new roadway off Route 32, the Church was allowed to increase the capacity of its existing driveway. This was the functional equivalent of imposing mitigating conditions on the grant of an application—a practice expressly approved in *Cornell University* as long as such conditions do not "by their cost, magnitude or volume, operate indirectly to exclude" the religious or educational use of the parcel. The requirement that petitioner widen its existing driveway (in lieu of constructing a new one) is neither so costly or extreme that it undermines the efficacy of the expansion plan, nor does it prohibit the Church's religious use of the newly acquired parcel. It therefore meets the test articulated in *Cornell University*.

SEQRA

To promote free and convenient public access, beginning February 27, 2006, draft and final environmental impact statements must be posted on publicly available Internet websites, "unless impracticable." The website address must be included in all printed filings and public notices of the documents. The website posting of the EISs may be discontinued one year after all necessary governmental permits for the project have been issued.[5]

Religious Displays on Public Property

In two recent decisions, the United States Supreme Court has addressed the propriety of displays of the Ten Commandments on government property. *Van Orden v. Perry*[6] and *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.[7] While the cases do not specifically address temporary holiday displays or equal access policies to public forums for private religious and non-religious speech, the emphasis in these cases on the evolution and development of the display, and the statements made by municipal officials and other individuals

involved in the display's presentation/dedication regarding the purpose and meaning of the display, suggest that the propriety of religious displays on public property will continue to be scrutinized on a fact-specific basis.

In *Van Orden*, the petitioner commenced a 42 U.S.C. § 1983 action seeking both a declaration that the monument of the Ten Commandments sitting on Texas State Capitol grounds violates the Establishment Clause of the First Amendment and an injunction requiring its removal. The monument of the Ten Commandments was placed by the Fraternal Order of Eagles of Texas and is one of 17 monuments and 21 historical markers surrounding the Texas State Capitol. According to the State legislature, the purpose of the monuments and markers is to commemorate the "people, ideals, and events that compose Texan identity." The State accepted the monument from the Eagles and its dedication was presided over by two state legislators. Van Orden frequently encountered the monument of the Ten Commandments on his visits to the Capitol grounds.

In rejecting the use of the test elaborated in *Lemon v. Kurtzman*[8] for dealing with Establishment Clause jurisprudence, the Court in a plurality opinion authored by the late Chief Justice William Rehnquist, determined the test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." Instead, the plurality relied upon the nature of the monument and the nation's history to hold that the monument of the Ten Commandments does not violate the Establishment Clause.

In arriving at its conclusion, the plurality recognized that "all three branches of government have long acknowledged the role of religion in American life" and Texas has used its Capitol grounds to display monuments that represent the State's political and legal history. Moreover, the plurality noted, the historical role played by the Ten Commandments in our nation's history is commonly acknowledged throughout the country.

In addition to the historical aspects of the Ten Commandments, Justice Rehnquist emphasized the importance of determining the religious significance of the monument. In doing so, he reiterated prior opinions which held that while the Ten Commandments are religious, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."

Recognizing that there are limits to the display of religious messages or symbols, the Supreme Court previously held unconstitutional a statute requiring the posting of the Ten Commandments in every public schoolroom as a violation of the Establishment Clause.[9] The plurality now distinguishes *Stone* by describing the monument on the Capitol grounds as a "passive" use of the Ten Commandments. Unlike the mandatory posting in classrooms where elementary school children were confronted with the text on a daily basis, the petitioner voluntarily walked past the instant monument for six years before he sought a declaration that the monument violated the Establishment Clause. According to the plurality opinion:

> The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in *Schempp* and *Lee v. Weisman*. Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

Moreover, in his concurring opinion, Justice Breyer recognizes that there is no clear and definitive test that can be effectively and appropriately applied to draw a bright line between permissive and prohibited government acts regarding the Religion Clauses and thus, highlights the importance of looking to the context of a religious display, including its physical setting. As such, Justice Breyer states,

> Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate.

Justice Breyer places particular emphasis on the fact that the monument stood unchallenged for 40 years, thereby suggesting the public did not interpret the monument's presence as a government endorsement of a particular religion. Rather, given its context, the public more likely saw the monument of the Ten Commandments as reflecting the cultural heritage of Texas.

With the support of Justice Breyer's concurring opinion, the Supreme Court ultimately ruled that the display of the Ten Commandments on public property did not violate the Establishment Clause because the monument was passive in nature and was displayed in conjunction with other monuments and markers commemorating the State's political and legal history.

The same day the Supreme Court upheld the display in *Van Orden*, the display in *McCreary* was struck down as a violation of the Establishment Clause with the display's purpose and setting constituting the distinguishing factors. In *McCreary*, two counties posted a version of the Ten Commandments on the walls of their courthouses. In one county, the ceremony was presided over by the Judge-Executive and the pastor of his church. After a 42 U.S.C. § 1983 action was filed against the counties, both counties adopted a resolution calling for additions to the display of the Ten Commandments in an effort to show the Commandments are Kentucky's "precedent legal code." Pursuant to the counties' resolutions, a second display was erected which contained additional documents. Fatally, all additional documents also contained specific references to Christianity. Applying the *Lemon* test, the District Court determined that the counties had a non-secular purpose in the original and the second display of the Ten Commandments and entered a preliminary injunction, ordering the display be removed and prohibiting any similar displays.

After the counties retained new counsel, a third display was erected and the ACLU moved to supplement the preliminary injunction to enjoin the display. Looking to the history of the litigation, the District Court concluded that the counties did not have a secular purpose in erecting their third display and supplemented the preliminary injunction.

A divided panel of the Court of Appeals affirmed with the dissent citing that a "history of unconstitutional displays cannot be used as a sword to strike down an otherwise constitutional display." Nevertheless, the Supreme Court, in a 5-4 ruling written by Justice Souter, affirmed the decision of the District Court. After discussing the importance of analyzing the display's purpose and setting, the Court opined that the "counties' manifest objective may be dispositive of the constitutional inquiry, and the development of the presentation should be considered when determining its purpose."

In so holding, Justice Souter emphasized that the *Lemon* test is still effective and its inquiry into the purpose of the government's actions should not be trivialized as the respondent suggests. Rather, he emphasized the critical role the question of purpose plays in determining whether the government has remained neutral in their position regarding religion. Indeed, the majority opinion stated that:

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

The majority opinion relies upon the setting of the display to determine the true nature of the government's purpose since "secular purpose must be genuine, not a sham, and not merely secondary to religious objective." Likening the present display to that in *Stone*, Justice Souter noted that, "The display rejected in *Stone* had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." Thus, the majority concluded it would be improper to ignore the evolution of the displays since their evolution is "perfectly probative evidence of [the counties'] purpose in erecting the displays."

After considering the display's purpose and setting, the Supreme Court held that the counties' display of the Ten Commandments violated the Establishment Clause because when looking to the evolution of the display the Court found a predominantly religious purpose behind the display.

Endnotes

1. __ N.Y.2d __ (2005).
2. The EAJA, similar to the FOIL standard, provides fees to "prevailing parties" where the state's actions were not "substantially justified." In other respects the two statutes differ significantly. The EAJA does not include FOIL's "significant public interest" standard and an award of counsel fees is mandatory under EAJA and only discretionary under FOIL if all other elements of the statutes are satisfied.
3. 68 N.Y.2d 585 (1986).
4. __ N.Y.2d __ (2005).
5. L. 2005, Ch. 641, amending Environmental Conservation Law § 8-0109.
6. 125 S. Ct. 2854 (2005).
7. 125 S. Ct. 2722 (2005).
8. 403 U.S. 602 (1971). "*Lemon* sets out a three-prong test: First, the statue must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statue must not foster an excessive government entanglement with religion." 125 S.Ct. at 2861, n. 6.
9. *Stone v. Graham*, 449 U.S. 39 (1980).

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Establishing Penalties for Violations of Local Zoning Laws

Recently, the New York State Attorney General's Office has addressed the scope of civil and criminal penalties and other sanctions that may be imposed by a municipality for violations of its local zoning laws. In a comprehensive opinion written by Laura Etlinger, Assistant Solicitor General In Charge of Opinions, the Attorney General concluded that:

> A village may impose both civil and criminal penalties for violations of local zoning laws, although criminal penalties must be consistent with the designation and classification of offenses under the Penal Law. A village may provide for increased penalties for subsequent convictions, but may not designate any such offense as a felony. The disgorgement of profits upon conviction of a zoning violation may be obtained through an alternate sentence under the Penal Law, or through enactment of a carefully crafted civil forfeiture law.

The entire opinion is reprinted below:

You have asked several questions concerning the types of penalties the Village of Port Chester may impose for violations of its zoning regulations. You have inquired whether the Village may adopt a local law providing for a civil penalty in addition to a fine or imprisonment and whether there is a limitation on the amount of a fine that may be imposed. You have further asked whether the Village may provide that a second offense shall be deemed a misdemeanor and a third offense deemed a felony. Finally, you have inquired whether the Village may require the disgorgement of any profit upon conviction of a residential occupancy violation.

We conclude that both civil and criminal penalties are authorized and that fines must be consistent with the designation and classification of offenses under the Penal Law. We further conclude that the Village does not have authority to designate an offense as a felony. With respect to your final inquiry, we believe that the disgorgement of profit upon conviction of a residential occupancy violation may be required by utilizing alternate sentence procedures authorized by the Penal Law, or through enactment of a carefully crafted civil forfeiture law.

Analysis

A. Authority for Civil Penalties and Limitations on Penalties and Fines

Your first question is whether the Village may provide for civil penalties, in addition to criminal fines and imprisonment, for violations of its zoning regulations. Article 7 of the Village Law, which governs a village's regulation of zoning matters, provides specific authority for a village to enforce its zoning regulations through actions for an injunction, but does not address penalties for zoning violations. *See* Village Law § 7-714 (authorizing proper village authorities, "in addition to other remedies," to institute actions to prevent, correct or abate zoning violations). You have informed us that the Village's current zoning regulations were adopted as local laws in 1975. Thus, Village Law § 20-2006, which defines the penalties that may be imposed for violations of village ordinances adopted prior to September 1, 1974, including specified penalties for violations of zoning ordinances, has no application to the Village's zoning code.[1] However, we have previously recognized that a village may use its home rule powers to establish penalties for violations of its local laws. *See* Op. Att'y Gen. (Inf.) No. 88-30 (village may establish by local law penalty provisions for violation of its sewer use regulations). Municipal Home Rule Law § 10(4)(b) authorizes a local government to prescribe that violations of its local laws are to constitute misdemeanors and lesser offenses, "and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, *or by two or more of such punishments*" (emphasis added). Accordingly, the Village may adopt a local law providing for enforcement of its zoning regulations through both civil penalties and criminal fines. *See* Op. Att'y Gen. (Inf.) No. 88-22 (Municipal Home Rule § 10(4)(b) specifically authorizes villages to establish penalties for violations of local laws). Civil penalties are recoverable in a civil action instituted by the village, while fines are imposed as part of the sentence in a criminal proceeding.

With respect to determining an appropriate penalty or fine, we have noted that "[p]enalties for violation of a local regulation should have a reasonable relationship to the severity of the violation and should not be abhorrent to a sense of justice or shocking to the conscience. The reasonableness of the [penalty or] fine will depend on the nature of the particular violation." Op. Att'y Gen. (Inf.) No. 93-14 (internal citations omitted); *accord* Op. Att'y Gen. (Inf.) No. 88-30; Op. Att'y Gen. (Inf.) No. 85-30; Op. Att'y Gen. (Inf.) No. 84-32. Thus, in setting both civil penalties and criminal fines, the

village board must consider the nature and seriousness of the prohibited conduct.

Further, with respect to criminal fines for local law violations, local governments are subject to the provisions of the Penal Law governing the classification and designation of offenses. *See, e.g.*, Op. Att'y Gen. (Inf.) No. 88-30. Thus, the amount that may be imposed upon conviction in a criminal proceeding will depend upon the designation and classification of the offense. If the local law designates the offense as a violation[2] without specifying the fine, the fine is to be fixed by the court and may not exceed $250. Penal Law § 80.05(4). If the offense is designated a class A or B misdemeanor,[3] the fine is set by the court, but may not exceed $1000 or $500, respectively. Penal Law § 80.05(1),(2). The Penal Law provides for higher maximum fines for corporate defendants. *See* Penal Law § 80.10. For violations and unclassified misdemeanors,[4] the fine may be specified in the local law establishing the offense. *See* Penal Law §§ 80.05(3),(4). *See generally* Op. Att'y Gen. (Inf.) No. 88-30; Op. Att'y Gen. (Inf.) No. 85-30. Thus, the maximum fine that may be imposed in connection with a violation of the Village zoning code will vary depending upon the designation and classification of the offense.

B. Designating the Classification for Multiple Offenses

You have also asked whether the Village may provide that a second offense for violation of its zoning regulations is a misdemeanor and a third offense is a felony.

We are not aware of any authority for a village to designate the violation of a local law as a felony. Municipal Home Rule Law § 10(4)(b) authorizes a local government to prescribe that violations of its local laws shall constitute "misdemeanors, offenses, or infractions." Although in other contexts the term "offense" broadly refers to any level of criminal conduct, *see* Penal Law § 10.00(1) (offense means conduct for which a fine or term of imprisonment is provided by state or local law), we have consistently interpreted this provision as authorizing the designation of local law violations as misdemeanors or lesser offenses, i.e., violations and infractions. *See, e.g.*, Op. Att'y Gen. (Inf.) No. 85-23; *see also* Criminal Procedure Law § 1.20(39) (defining "petty offense" as violation or traffic infraction). Moreover, Municipal Home Rule Law § 10(4)(b) derives from provisions of the former City Home Rule Law, Village Home Rule Law and County Law that specifically authorized the designation of local offenses as misdemeanors,[5] lending support to the conclusion that the Municipal Home Rule Law provision was intended to authorize the designation of local offenses as misdemeanors or lesser offenses. We are not aware of any other statute or common law rule that would authorize a local government to designate the violation of a local law as a felony. Moreover, the authority of a village to designate infractions of its local laws as misdemeanors or violations but not felonies is consistent with the trial jurisdiction of the local criminal courts, which extends only to offenses other than felonies, *see* Criminal Procedure Law § 10.30(1), and with state law governing the enforcement of village ordinances, *see* Village Law § 20-2006 (establishing penalties for ordinances adopted prior to 1974 that are consistent with designation of offenses as violations or misdemeanors).

While we conclude that the Village is not authorized to declare that subsequent zoning violations shall constitute felonies, we believe that the Village, exercising its home rule powers, may provide that a first offense under its zoning law is a violation and a second offense is a misdemeanor. The creation of escalating penalties or higher classification of an offense for subsequent convictions within a specified period is not uncommon.[6] Although not directly applicable to violations of the Village's zoning laws, we note that the Legislature has provided for escalating penalties for subsequent violations of village zoning ordinances. *See* Village Law § 20-2006(1-a) (providing for term of imprisonment up to six months and escalating fine limits from $350 to $1000 for multiple convictions within a five-year period); *see also* Town Law § 268 (same, town zoning ordinances). We thus conclude that the Village may designate a first offense of its zoning laws as a violation and a second offense as a misdemeanor.

C. Disgorgement of Profits

Your final question relates to the ability of the Village to order the disgorgement of profits in connection with residential occupancy violations. In a subsequent telephone conversation you offered an example of the type of situation that such legislation would seek to address: A landlord owns property that is zoned for single family occupancy but leases the property for occupancy by two or more families, thereby obtaining additional rents in violation of the local zoning code. Your question is whether any such illegal profits may be recovered in an action to enforce the zoning regulation.

First, we note that the Penal Law already provides a procedure whereby the court, instead of imposing the fine otherwise authorized upon conviction of a misdemeanor or violation, may sentence the defendant to pay an amount not exceeding double the amount of the defendant's gain from the commission of the offense. Penal Law § 80.05(5); *id.* § 80.10(1)(e),(2)(b) (fines for corporations). The Penal Law sets forth the procedure for determining the defendant's "gain," and allows the court to fix the amount of the fine accordingly. *See* Penal Law § 80.00(2),(3); *id*. §§ 80.05(5),

80.10(3). Thus, state law already provides a mechanism whereby illegal financial gain may be used as the basis for imposition of a higher fine. Village officials might consider whether the availability of such profit-measured fines may be sufficient to address the concerns regarding local residential occupancy violations.

The disgorgement of illegal profits may also be viewed as a form of forfeiture. New York has enacted a comprehensive civil forfeiture provision that allows for the recovery of property constituting either the instrumentality or the proceeds (or substituted proceeds) of a crime. *See* C.P.L.R. art. 13-A; *id.* 1310(1),(2),(4); *id.* 1311. However, that statute applies only to forfeitures in connection with felonies, *see id*. 1310(5),(6) (defining forfeiture crimes), and courts have indicated that the state statute does not preempt local forfeiture laws. *See Grinberg v. Safir*, 266 A.D.2d 43, 43 (1st Dep't 1999); *Property Clerk, New York City Police Dep't v. Covell*, 139 Misc.2d 707, 708 fn. * (Sup. Ct. N.Y. County 1988); *see also* C.P.L.R. 1352 ("The remedies provided for in this article are not intended to substitute for or limit or supercede the lawful authority of any public officer or agency or other person to enforce any other right or remedy provided for by law."); *Matter of Property Clerk of New York City Police Dep't v. Ferris*, 77 N.Y.2d 428, 431 (1991) (procedural provision of state civil forfeiture scheme does not apply to forfeiture proceeding commenced pursuant to city's administrative code). Moreover, the requirement that local laws be consistent with general state laws is not at issue here, inasmuch as your local law would relate to convictions for misdemeanors and lesser offenses, while the state civil forfeiture provision governs only felonies.

As noted earlier, forfeiture is one of the remedies specifically authorized for enforcement of local laws. Municipal Home Rule Law § 10(4)(b); *see* Op. Att'y Gen. (Inf.) No. 92-5 (city may enact a local law providing for forfeiture of property used in commission of local law violations). Thus, we believe the Village has authority to adopt a local law authorizing the forfeiture of proceeds obtained through commission of a local offense.

With respect to how such a law might be structured, we note that civil forfeiture laws have raised various constitutional concerns, including whether the law contains adequate procedural protections and is designed to avoid forfeitures that violate the federal and state constitutional prohibitions against excessive fines. *See, e.g., County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003) (finding county forfeiture law unconstitutional because it did not provide for prompt post-seizure hearing and allowed for forfeitures that would constitute excessive fines); *see generally* 5 McQuillan, *Municipal Corporations* § 17.8 (2004). A local forfeiture law therefore must be carefully drafted to ensure compliance with these constitutional principles.

Conclusion

In sum, we conclude that the Village is authorized under its home rule powers to provide for both civil and criminal penalties for violation of local zoning laws, but that criminal penalties must be consistent with the designation and classification of offenses under the Penal Law. We further conclude that the Village may provide for increased penalties for subsequent convictions under its zoning code, but may not designate any such offense as a felony. Finally, we are of the opinion that disgorgement of profits upon conviction of a zoning violation may be obtained through the use of an alternate sentence as authorized by the Penal Law, or through enactment of a carefully crafted civil forfeiture law.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Endnotes

1. In 1974, the Legislature eliminated the power of villages to adopt ordinances; villages may now legislate exclusively through the adoption of local laws. *See* Op. Att'y Gen. (Inf.) No. 83-48. Accordingly, by its terms, the penalties provided for in Village Law § 20-2006 apply only to ordinances adopted prior to September 1, 1974, that have not been superceded by local laws. *See* Op. Att'y Gen. (Inf.) No. 88-30; Memorandum of Secretary of State (July 12, 1985), *reprinted in* Bill Jacket for ch. 488 (1985), at 11.
2. An offense defined in provisions outside the Penal Law will be deemed a violation if the law defining the offense provides for a sentence to a term of imprisonment of no more than 15 days or provides for a fine only. *See* Penal Law § 55.10(3)(a).
3. A local law may specify that an offense is a Class A or Class B misdemeanor. Where the local law declares an offense to be a misdemeanor but does not designate the class or specify the sentence, the offense is deemed a Class A misdemeanor. *See* Penal Law § 55.10(2)(b).
4. An offense is deemed to be an unclassified misdemeanor where the local law defining the offense simply provides for a sentence that includes a term of imprisonment of more than 15 days and less than one year. *See* Penal Law § 55.10(2)(c).
5. Municipal Home Rule § 10(4)(b) derives from former City Home Rule Law § 11(3)(b), former County Law § 304(7)(c) and former Village Home Rule Law § 11(3)(b). *See* Memorandum of Office of Local Government (April 15, 1963), *reprinted in* Bill Jacket for ch. 843 (1963), at 3, 4. Those provisions were repealed when the Municipal Home Rule Law was enacted. *See* Municipal Home Rule Law § 58.
6. There are numerous provisions of state law classifying subsequent convictions as more serious offenses. *See, e.g.*, General Business Law § 396-w (first offense is a violation, subsequent offenses are class B misdemeanors); Labor Law § 213 (first offence subject to civil penalty, second offense is a misdemeanor); Vehicle and Traffic Law § 1192 (first offense is a misdemeanor, subsequent offenses are felonies). The Criminal Procedure Law establishes procedures for determining an enhanced sentence based upon prior convictions, *see* Criminal Procedure Law § 400.40, and establishing prior convictions that raise an offense to a higher grade, *see id*. §§ 60.40(3), 200.60.

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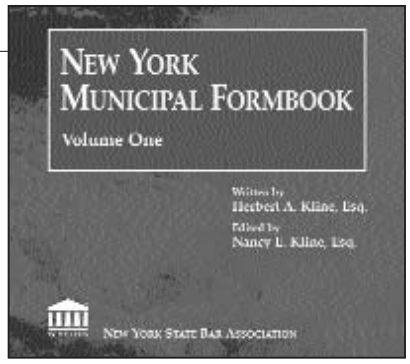

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