NYSBA SUMMER 2008 | VOL. 22 | NO. 3

# Municipal Lawyer

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

## A Message from the Chair

*Robert B. Koegel*

Perhaps because it is summer as I write this message, but everything in print seems as "green" as the grass all around. We are exhorted to reduce our carbon footprint to combat global warming and to embrace "sustainable" economic development. Many initiatives involve such large changes in the way we live that state, federal, and international efforts will be needed to accomplish stated goals. But at the same time, local governments can be and are much more involved in "green" growth than you might think.

Take the Town of Greenburgh, Westchester County, for example. There, no building permit may be issued for any residential house unless the applicant certifies that the dwelling will meet the standards of a New York "Energy Star-Labeled Home," which include requirements for energy-efficient appliances and ventilation. That code provision appears to be in effect since 2002. In addition, the town has an "energy conservation coordinator" and an informative, user-friendly web page citing numerous ways to save energy at home and at work, make alternative energy utility choices, and meet transportation needs more efficiently, among other things. This knowledge comes from simply reviewing Greenburgh's town code and web page. No doubt the town attorney and energy coordinator could say much more.

Or consider Monroe County. The County has recently directed that all construction projects for County facilities use green building design practices following the U.S. Green Building Council's Leadership in Energy and Environmental Design ("LEED") standards. The County has also requested its industrial development agency to require businesses that apply for IDA construction grants to implement LEED standards. Today's Monroe County newspaper announced that two new corporation headquarters would be built following LEED standards. That's "green jobs" for downtown Rochester. The County also maintains a large fleet of hybrid-electric and ethanol-fueled motor vehicles, and is partnering with the local brewery to create a facility which would convert brewery waste to low-cost ethanol. Again, this is just an overview of County activity in this area.

The town where I live, Brighton, Monroe County, has also begun an ambitious campaign of challenging its residents and businesses to voluntarily reduce greenhouse gas emissions by 10 percent. The town has formed a "green" task force and dedicated a web page to the challenge.

## Inside



NYSBA

Of course, well before global warming became a popular issue, zoning and planning tools which significantly affect energy consumption and conservation were established. Cluster zoning, for instance, pushes homes together, saves open space and trees that remove carbon dioxide through photosynthesis, and encourages pedestrian use to vehicular travel. Planned use zoning districts, including those with mixed residential and commercial facilities, or those near mass transportation hubs, reduce transportation-related energy consumption. Comprehensive land use plans are being revised to build bike paths and save trees, not only to promote exercise and beauty, but also to conserve energy and reduce greenhouse gases. The trend is clear.

Our Municipal Law Section can help you in all of this. When you post a question on our listserve, you get a quick response from many helpful attorneys eager to share their knowledge with their colleagues. When you join a committee, you converse with friends who share your professional interest, and help select the topics for our continuing legal education. When you attend our CLE seminars, you learn in depth about subjects of interest to you. And, we trust, you have some fun.

See you this fall in Cooperstown.

**Robert B. Koegel**

NEW YORK STATE BAR ASSOCIATION

*Save the Dates*

**Municipal Law Section**

**Fall Program**

**October 10–12, 2008**

**The Otesaga Hotel**
**Cooperstown, NY**

NYSBA

# From the Editor

The Pace University community mourns the passing of a beloved friend and colleague, Dr. Sal J. Prezioso. A national expert in Public Administration and Parks and Recreation, Dr. Prezioso created the Public Administration Department of Pace University and was a founder of the Department's Edwin G. Michaelian Institute for Public Policy and Management.

Twenty-six years ago, Dr. Prezioso invited me to become the Director of Pace's Municipal Law Resource Center. Over the years, we shared a close personal and professional relationship. A man of unparalleled kindness and integrity, his teachings profoundly influenced and inspired the careers of so many professionals who, like me, are honored to consider him as a mentor. Known for his vision, wisdom and candor, chief executives in the public, private and not-for-profit sectors routinely sought his counsel.

All those whose lives he touched will miss him dearly. A beautiful tribute to the man, his distinguished service and his utopian ideals for local government reform was published in *The Journal News* shortly after his death and is reprinted on the following page.

## Inside

The recommendations made by two gubernatorial commissions to streamline and strengthen local governments and to control the growth of local property taxes are summarized by Darrin B. Derosia, Counsel, New York State Commission on Local Government Efficiency and Competiveness. Following his three-part series on adopting a local ethics law, Mark Davies, Executive Director of the New York City Conflicts of Interest Board, outlines model provisions for the administration of local ethics laws. Henry M. Hocherman and Noelle V. Crisalli of Hocherman Tortorella & Wekstein, LLP, White Plains, continue their quarterly review of recent land use and environmental law decisions. Finally, Municipal Briefs addresses a significant Court of Appeals ruling under the Freedom of Information Law and Appellate Division rulings pertaining to alienation of public parking property, a ban on overnight parking, and the authority of a local government to establish the position of Police Commissioner to run its police department.

**Lester D. Steinman**

## Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact the *Municipal Lawyer* Editor:

Lester D. Steinman, Esq.
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, NY 10606
Lsteinman@pace.edu

Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

**www.nysba.org/MunicipalLawyer**

# *Honoring Sal J. Prezioso*

The ordinary appreciation for Sal J. Prezioso, the long-serving state, Yonkers and Westchester government official, civic leader and visionary, who died over the Memorial Day weekend at the age of 95, would recount all of his illustrious positions, titles and deeds during many decades of service, leaving scant room for amplification of perhaps Prezioso's greatest legacy—his spot-on ideas. That would be a mistake. Prezioso was prescient about the need to streamline local government, making the case for reform a quarter-century ago, before everyone else figured out that the status quo was strangling us. His ideas for altering Westchester's course are the very same ones being prescribed today for all of high-taxed, over-governed and at-wit's-end New York. If prior to his passing Prezioso did not allow himself a hearty "I told you so," he certainly was entitled, perhaps more than anyone else observing our current predicament.

Prezioso wore many hats. He was a county parks chief; former top aide to former County Executive Edwin G. Michaelian; president of the national Recreation and Park Association; the first state commissioner of parks and recreation; state commissioner of the Office of Local Government; Yonkers city manager; and chief of Pace University's Edwin G. Michaelian Institute for Suburban Governance. But his most enduring legacy stems from his leadership of Westchester 2000, the public-private study group convened in 1983 to help chart a path for local government going into the new century. It ultimately issued some 85 recommendations, including abolishing all 22 of the county's villages, eliminating half of the 40 school districts and cutting a dozen fire departments.

None of the most significant recommendations of Westchester 2000 was ever implemented, to the detriment of so many local tax bills, which reached for the stratosphere in the early 2000s. Hardly coincidentally, a high-profile state commission—The New York State Commission on Local Government Efficiency and Competitiveness—recently recommended virtually the same variety of reforms as a means to cut New York's highest-in-the-nation combined state and local tax burdens. The state study joined a long list of recent public and private-sector groups recommending the same fixes. The Prezioso-backed measures were critical to Westchester's future when they were proposed; today, they are tantamount to a blueprint for saving all of New York. If only anyone would pay attention.

### "I was disillusioned"

"I was disillusioned, to be honest with you," Prezioso told staff writer Keith Eddings in 2003, commenting on the shelved Westchester 2000 recommendations. "It didn't happen because the political will that we needed to back us wasn't there. The reason we wanted to merge was to save money. We did one study on police, in Pleasantville and Mount Pleasant. We showed that if they were to merge—the village of Pleasantville police with the town police—they would save a minimum of $700,000 a year. We got back, 'So what? We want our own police department.' And that's hard to beat."

More recently, last fall, Prezioso spoke with columnist Phil Reisman: "When we did these studies, we knew that we were going to throw it out there as a trial balloon and see who was going to be on our side. We know who is on our side. We have all the economics on our side. We have all the development people on our side. We have all the real estate people on our side. But the people who are against us are those who don't want to lose their jobs—and they're going to hold onto them for all they're worth."

He added: "Everybody wants to be a big shot. Everybody wants a city hall. Everybody wants this, everybody wants that. And you're going to have to consolidate some of that stuff. You're going to have to bring (consolidated local governments) together."

### Some more ideas

In a Community View four years ago, Prezioso called for more studies on local governance, with an eye toward saving taxpayers' wallets in the face of daunting economic challenges. His wish list included a call for an "evaluation of the call for revaluation and reassessment of all properties"; a "re-examination and restructure of the school districts and the municipalities"; a study of "the various options for the reform and restructuring of county government"; an examination of "the zoning process throughout the county, together with their problems, impacts, expectations and objectives of upgrading or downgrading zoning in various municipalities"; an evaluation of the "need for adjustments, if any, to be made to home rule in Westchester."

Like so much of the counsel from Sal Prezioso, it was sound advice. Unfortunately, Prezioso did not live long enough to see his sound recommendations put into practice, and it remains to be seen if a generation of others will either. But we are nonetheless grateful for his many contributions. We should honor him with concerted action to bring about the change he so valiantly and tirelessly sought.

**Reprinted with permission. Copyright The Journal News.**

# NYS Commission on Local Government Efficiency and Competitiveness: Restructuring Local Government for the 21st Century

By Darrin B. Derosia

## What Is the Commission?

The New York State Commission on Local Government Efficiency and Competitiveness (the "Commission" or "LGEC") was established by the Governor in April 2007 to examine ways to strengthen and streamline local government, reduce costs, and improve effectiveness.

The Commission's 15 members were appointed by the Governor, including five upon the recommendations of the Leadership in the Legislature and the State Comptroller. Most of those appointed were current and former local and state government officials along with members of the business community. Stan Lundine, the former Lieutenant Governor, US Congressman, and Mayor of Jamestown chaired the Commission, which utilized a small staff of six, lead by Executive Director John Clarkson. In addition, an Interagency Task Force of experts from state agencies involved with local government lent their support. In all, nearly 30 agencies have been involved with technical assistance or with the local initiatives effort, which has been vital to the Commission's progress. This innovative "local initiative" process through which municipal and county leaders proposed specific initiatives for government reform has been concurrent with the year-long Commission effort. Through this course of action almost 200 local initiatives are receiving state agency assistance for reforms related to the Commission's charge.

## Its Mission

The Commission was given a year to study the issues and make findings and recommendations on the measures needed to advance partnerships among State and local governments, and to improve the effectiveness and efficiency of local government across the State. It was to address issues such as local government consolidation, merger of functions, regionalized government, shared services, cost-drivers, and smart growth, as well as transparency and a better informed and participatory public.

### The Commission's Effort

The Commission aggressively sought informed debate by reaching out to local officials, municipal organizations, and state agency experts. Early on, the Commission launched a website so the public could track its work; view webcasts of hearings and deliberative sessions; download Commission briefing papers; and easily access information, including a variety of publications and resources on topics related to the Commission.

Formal public hearings were held in Saratoga Springs, Long Island, Buffalo, and the Hudson Valley, where the Commission heard from panels on school issues, smart growth, upstate cities, and local government layers. Testimony was given by municipal associations, professional organizations, citizen's groups, and members of the public. The Commission held formal dialogue sessions with the Association of Towns, the NYS Association of Counties, and the NYS School Boards Association at their annual meetings. Staff and Commission members spoke at a variety of other conferences.

The Commission convened an academic advisory group, including 20 academic and research institutions with a focus on local government issues. These institutions provided an invaluable resource for local government reform, and they helped inform the Commission about current research on local government matters. Several members of the academic advisory group also produced particular studies of interest to the Commission.

While there have been previous Commissions with similar undertakings, the innovation of "local initiatives" helped to set this Commission's work apart. On the day that the Commission was announced, a letter was sent to local government officials across the State, asking them to identify local projects or goals in areas such as shared services, consolidation, smart growth, and regional governmental functions. The local initiatives identified a number of areas where changes in state law or programs would facilitate efficiency. Many of the proposals in the Executive Budget and a 2008 Governor's program bill reflected issues raised by local

initiatives. The local initiatives process also refocused state agencies on the needs and issues of importance to local governments. Programs have been developed to assist local leaders with studying and implementing regional efforts, such as a new aid program to support studies of county-wide property assessment and tax collection; and new publications were written to assist municipalities with particular types of projects.

## Findings and Recommendations

On April 30, 2008 the Commission submitted its final report, entitled *21st Century Local Government*, including its recommendations, to the Governor, the Legislature, and the citizens of New York State. What the Commission learned and analyzed appears in the report, but many more details appear in briefing papers (with links within the report when viewed online) that are available, along with the full report, on its website at www.nyslocalgov.org.

A list of the recommendations, presented in brief, appears as an appendix to this article. Overall, there were 73 recommendations, and that comprehensive list of detailed recommendations, along with the governmental action necessary to enact them, is available on the Commission's website. The recommendations and their rationale are broken down into seven broad categories:

- Regional Services
- Modern Municipal Structures
- School District Restructuring
- Informed and Active Voters
- Aid and Incentives
- Addressing Cost Drivers
- Sustaining Local Efficiency

One major focus of the Commission was New York's complex local government structure. Part of our local tax and inefficiency problem is that New Yorkers, like other northeastern and Midwestern citizens, live under a somewhat archaic local government structure. Most municipalities were established during the horse-and-buggy era, and still have boundaries and operations that in many ways hark back to that era. For example, a town with a population of 755,000 cannot have a fire department, but a village with less than 500 may. Thus, both boundaries and rules are outdated. Over the years, as needs have changed, the fix to this obsolete structure has frequently been to add to it, with additional governmental units, special districts, and local public authorities, and today there are nearly 5,000 independent local entities. This overlaid, anachronistic system carries a price, because many services could be provided more efficiently and effectively on a broader scale. The system also tends to obscure responsibility and reduce accountability.

Alexis de Tocqueville, when he came to the U.S. in the 1830s, saw local government as critical to the American system. He said, "The principle of sovereignty of the people governs the whole political system of Anglo-Americans. . . . Municipal independence in the United States is . . . a natural consequence of this very principle of sovereignty of the people." Tocqueville was fascinated by New England town meetings and based his view of local government on their experience.[1]

New York has a history and tradition of home rule. Indeed, one of the Commission's recommendations is to amend the Constitution to strengthen home rule in one aspect, that is, to eliminate the judicially created doctrine of "implied preemption" by requiring the Legislature to expressly declare when the State's authority over a subject is intended to be exclusive. But even the adoption of the 1963 home rule amendments to the NYS Constitution, embodied in Article IX, failed to free local governments from dependence on the State, and did not enable them to address problems such as fragmentation of government and disparities of wealth between cities and towns and within regions. In fact, some of these home rule powers and principles have entrenched suburban resistance to a more equitable sharing of regional obligations and resources.[2]

There should be local decision making autonomy within a framework of State oversight. Bigger is not always better, but in many areas it can be, particularly where a broader scale of operations and modern technology can reduce costs or improve services. Unfortunately, it is often hard to implement modern shared services because local officeholders must give up some degree of control to do so. Even where local officials aggressively work to modernize public services, they often face resistance from unionized labor or residents fearful of change.

The Commission recognized that people generally like their towns, cities, and villages, and that consolidation of municipalities can therefore be very difficult to achieve. In recognition that "one size doesn't fit all," the majority of Commission proposals enable or incentivize change rather than mandating it. The philosophy being that service consolidations should happen, but only where they make sense, which should be a local decision in many cases.

## Property Taxes and Cost Savings

New York's highest-in-the-nation local taxes put us at a serious competitive disadvantage. As Governor Paterson has said, "We cannot achieve real, sustainable property tax relief without addressing local government efficiency." This is not to say that this burden is solely or even primarily caused by local leaders. It has developed over time, and there are multiple causes. Local services are provided under state law, mandates, regulation, funding rules and other forms of oversight. Accordingly, state efforts to address this tax burden must be pursued in partnership with local government leaders.

School taxes make up the largest portion of a homeowner's local property taxes. Accordingly, more efficient structures and operations for school districts were also a focus for the Commission. Where it makes sense fiscally and educationally, Commission recommendations would make school consolidations, service sharing and other efficiencies far more likely. The Commission addressed and discussed cost-drivers such as health insurance, pension costs, the Taylor Law, and others; it estimated cost savings in the range of $900 million to $1.1 billion statewide from its recommendations in those areas where it was able to quantify the fiscal impacts.

## Property Tax Commission

The New York State Commission on Property Tax Relief (the Property Tax Commission) was created in January 2008—eight months after the Commission on Local Government Efficiency and Competitiveness—with a similar mission, but more narrowly focused on the issue of skyrocketing property taxes. The two commissions had some overlap and shared some ideas and research in an attempt to focus attention on addressing these issues.

The Property Tax Commission formally adopted eleven recommendations from the Commission on Local Government Efficiency and Competitiveness, including regional collective bargaining, health care benefits reform, pension reform, Wicks Law reform, local government procurement changes, and expansion of non-instructional service consolidation through BOCES. It also recommended supplements to other LGEC proposals. Of course, the Property Tax Commission's major preliminary recommendation is capping annual growth in the property tax levy at 4 percent or 120 percent of the Consumer Price Index, whichever is less. This approach has been adopted by the Governor and will no doubt be hotly debated in the Legislature.

## State Funding for Projects and the Continuing Effort

Additional funding for innovative demonstration projects in 21st century local governance was successfully proposed by the LGEC. An enhanced $29.4 million Local Government Efficiency Grant program was enacted with the state budget. This program—formerly known as "SMSI"—will help promote and support innovative demonstration projects, government consolidations and service sharing arrangements, including many regional efforts already being promoted by local leaders. Pilot projects that involve transformative changes, have great potential to produce cost savings, and can serve as a model for other municipalities may be eligible for competitive grants up to $400,000 per municipality, combining to even larger amounts for multiple local governments cooperatively engaged.

To make real progress in containing our local property tax burden, aggressive service consolidations and governmental restructuring are needed. This is a complex undertaking, and one that will require a continuing partnership with local governments and an ongoing effort across many state agencies, along with bold action in the Legislature. The Commission members are optimistic about the prospects for change since, in many respects the initiatives for reform came from local leaders. With hard work at all levels of government, our best tradition—local democracy—can be adapted to a 21st-century model.

## Endnotes

1. Richard P. Nathan, *Note on Theories of Local Government*, Nelson A. Rockefeller Institute of Government.
2. James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Governments*, NYS Bar Journal (January 2001).

**Darrin B. Derosia is counsel to the NYS Commission on Local Government Efficiency and Competitiveness.**

# Recommendations in Brief

### Regional Services

- Centralize certain services at the county level: assessing, tax collection, emergency dispatch, civil service commissions, vital records
- Provide flexibility for counties to share jail facilities and manage jail populations
- Expand local governments' ability to share services
- Encourage justice court consolidation
- Consolidate IDAs at the county or regional level
- Enable multiple counties to share functions like weights & measures and health directors
- Allow renegotiation of collective bargaining agreements when consolidations occur

### Modern Municipal Structures

- Require town-wide approval for new villages and local reconsideration of small villages
- Ease procedures for consolidation, citizen petitions, and coterminous town-villages
- Require local consideration of county-level management for fire protection
- End compensation for special district commissioners, turn over management of sanitation districts to towns, and require local reconsideration of all commissioner-run districts
- Allow local governments to make property tax sharing agreements
- Strengthen home rule by prohibiting the judicial doctrine of "implied preemption"
- Examine reclassifying some cities, towns and villages, and reconsider powers for each class

### School District Restructuring

- Empower the Commissioner of Education to order consolidation
- Set up local schools restructuring committees to examine service sharing and consolidation
- Authorize regional collective bargaining contracts for new hires (phased in at local option)
- Facilitate consolidation of back-office services and regional high schools

### Informed and Active Voters

- Hold all local elections on November or May dates
- Reduce number of elective offices by converting certain positions to appointive
- Provide better information for voters
- Improve local financial data for benchmarking

### Aid and Incentives

- Local Government Efficiency Grants and 21st Century Demonstration Projects
- Increase aid for efficient assessing, using modern professional standards
- Encourage regional solutions, cooperative services and consolidation

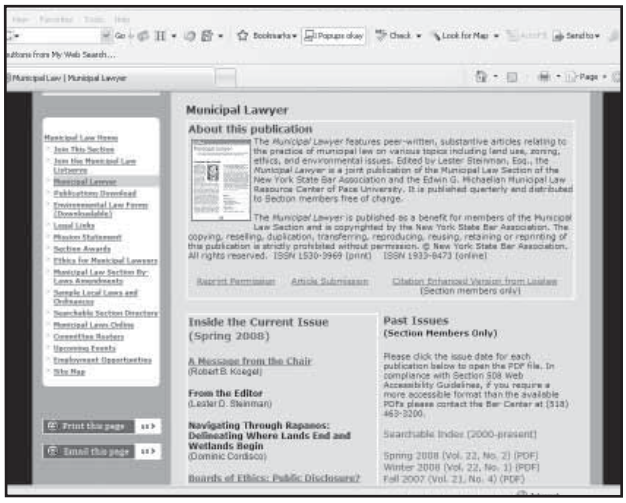
### Addressing Cost-Drivers

- Require minimum employee contributions for health insurance
- Ease municipal cooperative health plan rules
- Review public employee pension benefit options (Tier 5)
- Reform Wicks and other procurement rules

### Sustaining Local Efficiency

- Maintain a long-term focus on local efficiency at the State level, using existing State agency resources organized through a Center for Local Government Efficiency that will support local initiatives, promote cost-savings and follow-through on Commission recommendations


## The *Municipal Lawyer* is also available online




www.nysba.org/municipal lawyer

NYSBA

**Go to www.nysba.org/ MunicipalLawyer to access:**

- Past Issues (2000-present) of the *Municipal Lawyer**
- *Municipal Lawyer* Searchable Index (2000-present)
- Searchable articles from the *Municipal Lawyer* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Municipal Law Section member and logged in to access

Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

# Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

This has been a lean quarter in the world of land use decisions. Still, the Third Department has added two decisions to the vast and ever-changing body of land use law, one logical and one perhaps less so. It remains for the reader to decide which is which.

## I. Issuance of a Negative Declaration Under SEQRA Does Not Preclude Denial of an Application for Subdivision Approval Based on the Subdivision's Potential Environmental Impacts

*MLB, LLC v. Schmidt*[1] addresses, albeit on very narrow facts, the question of whether a board may deny an application solely on environmental grounds after adopting a negative declaration under SEQRA.[2] On its face that question would seem to answer itself, but the Third Department reminds us that life is full of surprises. In *MLB, LLC*, the Third Department held, among other things, that a planning board's issuance of a negative declaration under SEQRA—which can only be issued if the lead agency determines that the proposed action will have no environmental impact or that any environmental impacts will not be significant—does not preclude a planning board from denying an application for final subdivision approval based on purported potential environmental impacts of the proposed subdivision.

The petitioner was the owner of a parcel of property in the Village of Monticello, Sullivan County (the "Village") and applied to the Village's planning board (the "Planning Board") to subdivide the parcel into three residential lots. At a public hearing on petitioner's application, petitioner's engineer testified that any drainage impacts associated with the development of a residence on each of the three proposed lots could be mitigated through the use of dry wells, and the Village's engineer generally agreed.[3] Neighboring downgrade property owners voiced their objection to the project, citing their personal observation of the existing poor drainage conditions in the neighborhood, and urged the Planning Board to deny the petitioner's application on the grounds that the development of three new residences would, in their opinion, exacerbate those conditions.[4]

The Planning Board, as lead agency, first issued a negative declaration under SEQRA, in effect finding that in its opinion the proposed subdivision would not have any significant environmental impacts.[5] Strangely, however, it then proceeded to deny petitioner final site plan approval on the grounds that the proposed subdivision would exacerbate already bad drainage conditions in the neighborhood.[6]

Petitioner challenged the denial on the grounds that the opinion of its engineer that dry wells could mitigate any drainage impacts the proposed subdivision would have on neighboring property owners, and the Village Engineer's general agreement—along with the negative declaration issued by the Planning Board—demonstrate that its application should have been approved and it was improperly denied in response to generalized community opposition.[7]

The lower court dismissed the petition and upheld the Planning Board's denial of final subdivision approval.[8] The Third Department affirmed, holding that the issuance of the negative declaration did not preclude denial of the application on environmental impact grounds, reasoning that:

> Initially, we note that the Board's issuance of a negative declaration is not wholly inconsistent with its denial of petitioner's application. In its SEQRA determination, the Board acknowledged the potential adverse effects associated with drainage and flooding problems, yet simply did not find them to be so significant in their impact as to require a positive declaration. Thus, since the Board's SEQRA determination was that no *significant* adverse impacts would result from the proposed subdivision, but that there could be adverse effects associated with the drainage and flooding problems, we do not find the Board's SEQRA determination to be incompatible with its subsequent denial of petitioner's application for approval of the subdivision.[9]

In response to Petitioner's claim that the denial was improper because it was based on generalized community opposition, the Court held that the testi-

mony of the neighboring property owners did not constitute "generalized community objections," but rather found the concerns of the neighbors to be "specific and based upon personal experience and observations."[10] The Court made this finding notwithstanding that the petitioner's engineer indicated that drainage issues could be addressed through the use of dry wells, an opinion with which the Village's Engineer generally agreed, except to note that he thought the wells could be overstressed and flood in certain circumstances, basing its finding on the opposing neighbors' testimony about the *existing* conditions in the neighborhood.[11]

This decision is confusing for several reasons. In the first instance, it appears to exalt the observations and personal experiences of neighboring property owners of the existing conditions of the neighborhood over the testimony of the applicant's engineer, which was at least generally endorsed by the Village's own engineer, describing how the proposed subdivision would not exacerbate those conditions. Additionally, it apparently holds that development approvals can be denied if they have the potential to cause environmental impacts that are not significant, or at least not significant enough to require the preparation of an Environmental Impact Statement ("EIS") under SEQRA, notwithstanding the well-recognized rule that the threshold for requiring the preparation of an EIS is extraordinary low.[12]

Although one can posit a set of facts which would justify denial of an application on other than purely environmental grounds following the issuance of a negative declaration, this case is troubling because the basis for denial was limited to what is clearly an environmental impact falling squarely within the four corners of SEQRA review. The Court is in effect saying that an environmental impact which is not significant enough to require preparation of an EIS may still be significant enough to justify denial of an application. The decision turns SEQRA on its head since, following the Court's logic, an environmental assessment form which identifies at least one potentially significant environment impact will trigger an EIS, giving an applicant an opportunity to make a record and propose mitigation, while a potentially insignificant impact justifies immediate denial. One can only hope that reason will prevail and that future decisions will limit this case to its narrow facts.

## II. Interpretation of a Zoning Ordinance

In *Woodland Community Association v. Planning Board of the Town of Shandaken*,[13] the Court held that the Planning Board was not authorized to interpret the Town's zoning code, since, pursuant to the Town's code, the authority to interpret the zoning code was reserved to the Town's Zoning Board of Appeals (the "ZBA").

In *Woodland Community Association,* defendant Good Water Corporation ("Good Water") applied to the Planning Board for site plan approval and a special use permit for "water bottling and related uses," a use permitted in the subject low-density residential zoning district of the Town of Shandaken, to enable it to withdraw and transport by truck twice daily approximately 5,800 gallons of spring water from property owned by Andrew and Daria Poncic.[14] Good Water intended to use the spring water obtained from the Poncics' property for non-potable uses such as filling swimming pools. Apparently, the Planning Board made a determination that the proposed use was a "related use" under the water bottling and related uses special use permit and processed the application accordingly.[15]

In October 2006, after almost five years of review, the Planning Board granted Good Water's applications. The approvals granted by the Planning Board were subsequently challenged by the Woodland Community Association on the grounds that, among other things, the Planning Board lacked jurisdiction to determine whether the use proposed by Good Water was a special permit use since the Shandaken Code vests the authority to interpret the zoning code with the ZBA.[16]

The Supreme Court, Ulster County dismissed the petition, but the Appellate Division, Third Department reversed, agreeing with the petitioners that the Planning Board had no authority to interpret the Town's zoning code to determine whether Good Water's proposed use was in fact a special permit use.[17]

As mentioned above, it appears from the Third Department's opinion that the Planning Board determined Good Water's proposed use fell under the "water bottling and related uses" special permit use included in the Town's Code and processed the application accordingly. However, the Third Department held that Good Water's proposed use could not fall under the "water bottling and related uses" special use category because on its face the proposed use involves no water bottling and no use of the property related to water bottling.[18] Rather, the Court held that since the proposed use was not expressly permitted under the Shandaken Code and the Code provides that special uses which are not specifically permitted are prohibited unless the ZBA deems the proposed use to be "sufficiently similar" to a use in the Code, the Court reasoned that Good Water's use would only be permitted if the ZBA determined it was "sufficiently similar" to a use permitted under the Code. Accordingly, the Planning Board exceeded its authority when it interpreted the "water bottling and related uses" use category as including the proposed use and was required to refer the application to the ZBA for a determination of whether the proposed use was sufficiently similar to another use in the Code before it could process Good Water's application.[19]

The Court remanded the matter to the Planning Board for that Board to refer the application to the ZBA for a determination of whether Good Water's proposed use was "sufficiently similar" to a use in the Code.[20] On remand, the ZBA may want to review the recent Appellate Division, Fourth Department case of *Turner v. Andersen*,[21] for a reminder that while a court will defer to a zoning board of appeals' interpretation of a zoning ordinance, the court is vested with the ultimate responsibility of interpreting a zoning code and will not hesitate to invalidate an interpretation by a zoning board of appeals where it finds such interpretation to be unreasonable or irrational.[22]

It is also worthy to note that the Court, in addition to its central holding in *Woodland Community Association*, notes the petitioners did not have to apply to the ZBA for redress before bringing an Article 78 proceeding in court challenging the approvals, since petitioner's challenge was a challenge to approvals granted by the Planning Board and the ZBA is not authorized to hear appeals from decisions of the Planning Board. Rather, the Shandaken Code Section 116-46 and New York Town Law Section 274-b[9] provide for direct judicial review of a planning board's decision on special use permit applications.[23]

## III. Challenges to Conditions to Site Plan Approval Are Subject to the 30-Day Statute of Limitations

In *Hampshire Management Co. No. 20, LLC v. Feiner*,[24] the Second Department held that petitioner's challenge to a Town Board's imposition of a condition to site plan approval on the grounds that the condition was *ultra vires* was subject to the 30-day statute of limitations imposed by Town Law Section 274-a.[25]

Petitioner sought to set aside a resolution of the Town of Greenburgh Town Board granting it amended site plan approval subject to certain conditions, among which was a condition requiring the petitioner to move an electrical transformer to a certain location on the site or onto another site. The conditional amended site plan approval was filed on April 7, 2006 and petitioner commenced the instant Article 78 proceeding challenging the imposition of the condition on August 7, 2006, four months after the approval was filed.[26] The Town moved to dismiss the petition, arguing that petitioner's claim was time-barred by the 30-day statute of limitations imposed by Town Law Section 274-a. The Supreme Court granted the Town's motion and dismissed the petition. The Second Department affirmed.[27]

In opposition to the Town's motion, petitioner argued that the 30-day statute of limitations set forth in Town Law 274-a was inapplicable because the Town Board acted beyond the scope of its authority in imposing the disputed condition. The Second Department recognized that "'[w]here a local land use agency acts without jurisdiction in approving or denying a site plan, special permit, or other land use determination, a challenge to such an administrative action, as ultra vires, is not subject to the 30-day limitations period . . . ."[28] However, the court stated that in order for the statute of limitations to be tolled, petitioner has to *show* a jurisdictional defect, not just *allege* one. In this case, there was no jurisdictional defect since the Town Board was authorized both by state and local law to consider the "acoustic, visual, and otherwise aesthetic impact of the proposed land use" in the site plan review process and thus the imposition of the disputed condition was not beyond the authority of the Board.

The clear effect of the Court's holding is to require a petitioner to essentially win on the merits in order to toll the statute of limitations. The lesson for practitioners is when in doubt, assume a 30-day statute of limitations.

## IV. Liability May Not Be Imposed on a Municipality for Failure to Enforce Its Building or Zoning Laws

In *Bell v. Village of Stamford*,[29] plaintiff was the owner of a parcel of property in the defendant Village of Stamford. The plaintiff alleged that the owner of three properties across the street from her residence constructed a building and parking area on its properties without obtaining the required building permits, variances, and other approvals from the defendant Village. Plaintiff informed the Village of the unauthorized construction on the three lots, but the Village declined to take action to stop the construction. Based on the Village's failure to enforce its building and zoning regulations, plaintiff brought the instant action claiming negligence and breach of contract.

The Village moved to dismiss the complaint on the grounds that plaintiff failed to state a cause of action. The Supreme Court, Delaware County denied the motion and the Third Department reversed, dismissing the complaint and finding that plaintiff failed to allege facts to establish a "special relationship" between the plaintiff and the Village which a plaintiff must establish for liability to be imposed on a municipality. In so holding the Court stated that

> [I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation. . . . A special relationship may arise in three ways: (1) when the municipality violates a statu-

> tory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation. . . .[30]

With regard to the first factor, the Court held that the adoption of a zoning and / or building ordinance, without more, does not create a special relationship between the municipality and its residents. Moreover, plaintiff did not allege facts sufficient to establish that the Village "voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefits from the duty; or . . . assume[d] positive direction and control in the face of a known, blatant and dangerous safety violation."[31] Similarly, plaintiff did not allege any facts to support her breach of contract claim. Thus, the action was dismissed. Because plaintiff apparently did not seek relief pursuant to CPLR Article 78 in the nature of mandamus to compel the municipal officers to enforce the provisions of the Village's building and zoning laws, the Court did not reach the issue of whether an Article 78 proceeding is available to a village resident to compel village government to enforce its building and zoning regulations against another resident.

## Endnotes

1. *MLB, LLC v. Schmidt*, 50 A.D.3d 1433 (3d Dep't 2008).
2. State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law, Art. 8 and 6 N.Y.C.R.R. Part 617.
3. *MLB, LLC*, 50 A.D.3d at 1435.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *MLB, LLC*, 50 A.D.3d at 1435 (emphasis original).
10. *Id.*
11. *Id.*
12. *See, e.g., S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564 (2d Dep't 2002) ("Because the operative word for triggering an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS.").
13. *Woodland Community Association v. Planning Board of the Town of Shandaken*, 860 N.Y.S.2d 653 (3d Dep't 2008).
14. *Id.* at 654.
15. *Id.*
16. *Id.*
17. *Id.* at 654–655.
18. *Id.*
19. *Woodland Community Association*, 860 N.Y.S.2d at 654–655.
20. *Id.* at 655.
21. *Turner v. Andersen*, 50 A.D.3d 1562 (4th Dep't 2008).
22. *See id.*; *see also Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Village of Mamaroneck* (2d Dep't 2008).
23. *Woodland Community Association*, 860 N.Y.S.2d at 654.
24. *Hampshire Management Co., No. 20, LLC v. Feiner*, 52 A.D.3d 714, 860 N.Y.S.2d 204 (2d Dep't 2008).
25. *Id*; Town Law Section 274-a[11](Site Plan Review) provides that "Court review. Any person aggrieved by a decision of the authorized board or any officer, department, board or bureau of the town may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board in the office of the town clerk."
26. *Hampshire Management Co.*, 52 A.D.3d 714, 860 N.Y.S.2d 204.
27. *Id.*
28. *Id.*
29. *Bell v. Village of Stamford*, 51 A.D.3d 1263, 857 N.Y.S.2d 804 (3d Dep't 2008).
30. *Bell*, 51 A.D.3d at 1264, 857 N.Y.S.2d at 806 (citations omitted).
31. *Id.*

**Henry M. Hocherman is a member of the Executive Committee of the Municipal Law Section of the New York State Bar Association and is a partner in the law firm Hocherman Tortorella & Wekstein, LLP of White Plains, New York. He is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.**

**Noelle V. Crisalli is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the *Pace Environmental Law Review* and an Honors Fellow with the Land Use Law Center.**

PACE UNIVERSITY

**FIND US ON THE WEB**
**www.pace.edu/dyson/mlrc**

# Local Ethics Laws: Model Administrative Provisions

By Mark Davies

The past three issues of the *Municipal Lawyer* contained articles on adopting a local ethics law. Those articles also included model provisions for a municipal code of ethics and a model financial disclosure form. This article sets forth model provisions for the administration of the ethics law. For a discussion of these provisions, readers are referred to *Enacting a Local Ethics Law—Part III: Administration* in the Winter 2008 issue of the *Municipal Lawyer*. The next issue of the *Municipal Lawyer* will contain an article by Steven Leventhal, former Chair of the Nassau County Ethics Board, on the nuts and bolts of establishing and running a municipal ethics board.

Ethics law provisions should be dynamic, not static. The author thus welcomes suggestions to correct and improve these model law provisions. Any such suggestions may be sent to him at davies@coib.nyc.gov.

## Model Ethics Law Administrative Provisions

### § 201. Ethics boards: establishment; budget; qualification of members; appointment of members; terms of office.

1. There is hereby established a [municipal] ethics board consisting of five members.

2. The appropriations to pay for the expenses of the ethics board during each fiscal year shall be not less than one hundredth of one percent of the net total expense budget of the [municipality].

3. Members of the ethics board shall be chosen for their independence, integrity, civic commitment, and high ethical standards.

4. No ethics board member shall hold office in a political party. No ethics board member shall be employed or act as a lobbyist before the [municipality or any municipality of which the municipality is a part or any other municipalities served by the ethics board]. No ethics board member shall enter into any contract with the [municipality or any other municipality served by the ethics board], except a contract for the receipt of [municipal] services or benefits, or use of [municipal] facilities, on the same terms and conditions as are generally available to residents or a class of residents of the [municipality or any other municipality served by the ethics board]. No ethics board member shall hold elective office in the [municipality or any municipality of which the municipality is a part or any other municipalities served by the ethics board] or be an appointed officer or employee of the [municipality or any municipality of which the municipality is a part or any other municipalities served by the ethics board]. An ethics board member may make campaign contributions but may not participate in any election campaign. [*Optional*: No more than two members of the ethics board shall be registered in the same political party.]

5. Within sixty days after the effective date of this [chapter], and no later than December thirty-first each year thereafter, the [elective chief executive officer of the municipality, with the advice and consent of the governing body of the municipality, or, if there is no elective chief executive officer, the chair of the governing body, with its advice and consent] shall appoint the members of the ethics board. If the [governing body] fails to act within forty-five days of receipt of the nomination from the [elective chief executive officer or chair of the governing body of the municipality, as the case may be], the nomination shall be deemed to be confirmed.

6. The term of office of ethics board members shall be five years and shall run from January first through December thirty-first, except that of the members first appointed one member shall serve until December thirty-first of the year following the year in which the board is established, two shall serve until the third December thirty-first, and two shall serve until the fifth December thirty-first.

7. An ethics board member shall serve until his or her successor has been appointed. Consecutive service on the ethics board shall not exceed two full terms.

8. Ethics board members shall not receive compensation for their service but shall be reimbursed reasonable expenses incurred in the performance of their official duties.

**§ 202. Ethics boards: vacancies.**

1. When a vacancy occurs in the membership of the ethics board, the vacancy shall, within sixty days, be filled for the unexpired portion of the term in the same manner as the original appointment. Any person appointed to fill a vacancy on the ethics board shall meet the qualifications set forth in section two hundred one of this [chapter].

2. If the [elective chief executive officer or chair of the governing body of the municipality, as the case may be,] has not submitted to the [governing body] a nomination for appointment of a successor at least sixty days prior to the expiration of the term of the member whose term is expiring, the term of the member in office shall be extended for an additional year and the term of the successor to such member shall be shortened by an equal amount of time. If the [governing body] fails to act within forty-five days of receipt of the nomination from the [elective chief executive officer or chair of the governing body of the municipality, as the case may be], the nomination shall be deemed to be confirmed.

**§ 203. Ethics boards: removal of members.**

An ethics board member may be removed from office in the same manner in which he or she was appointed, after written notice and opportunity for reply. Grounds for removal shall be failure to meet the qualifications set forth in section two hundred one of this [chapter], substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office, or violation of this [chapter].

**§ 204. Ethics boards: meetings.**

At its first meeting each year, the ethics board shall elect a chair for that year from among its members. A majority of the board shall be required for the board to take any action. The chair or a majority of the board may call a meeting of the board.

**§ 205. Ethics boards: jurisdiction, powers, and duties.**

1. The ethics board may act only with respect to officers and employees of the [municipality or municipalities subject to the board's jurisdiction].[1]

2. The termination of a [municipal] officer's or employee's term of office or employment with the [municipality] shall not affect the jurisdiction of the ethics board with respect to the requirements imposed by this [chapter] on the former officer or employee for his or her actions or interests while a [municipal] officer or employee.

3. The ethics board shall have the following powers and duties:

   (a) To prescribe and promulgate rules and regulations governing its own internal organization and procedures in a manner consistent with this [chapter];

   (b) To appoint hearing officers, an executive director, if necessary, and such other staff as are necessary to carry out its duties under this [chapter], and to delegate authority to the executive director, if any, to act in the name of the board between meetings of the board, provided that the delegation is in writing and the specific powers to be delegated are enumerated and further provided that the board shall not delegate the power to determine violations, recommend disciplinary action, impose any civil fine, refer any matter to a prosecutor, or render any advisory opinion. An executive director shall meet the qualifications of an ethics board member as specified in section two hundred one of this [chapter];

   (c) To require the assistance of the [municipal attorney] and the [municipal] clerk in the performance of the ethics board's duties, provided, however, that any communications between the ethics board and such [municipal attorney] or [municipal] clerk shall be confidential and not disclosed to anyone other than the ethics board or its designees, except as otherwise required by state or federal law or by this [chapter];

   (d) To review, index, and maintain on file, and make available for public inspection and copying, lists of officers and employees, transactional disclosure statements, applicant disclosure statements, and annual disclosure statements filed with the board pursuant to sections [cite sections for transactional and applicant disclosure], two hundred six, two hundred seven, and two hundred eight of this [chapter];

   (e) To review, index, maintain on file, and dispose of sworn complaints and to make notifications and conduct investigations pursuant to sections two hundred eight and two hundred nine of this [chapter];

(f) To conduct hearings, recommend disciplinary action, assess penalties, make referrals, and initiate appropriate actions and proceedings pursuant to section two hundred ten of this [chapter];

(g) To grant waivers pursuant to section two hundred eleven of this [chapter];

(h) To render, index, and maintain on file advisory opinions pursuant to section two hundred twelve of this [chapter];

(i) To provide training and education to [municipal] officers and employees pursuant to section two hundred fourteen of this [chapter];

(j) To prepare an annual report and recommend changes to this [chapter] pursuant to section two hundred fifteen of this [chapter]; and

(k) To provide for public inspection and copying of certain records pursuant to section two hundred sixteen of this [chapter].

**§ 206. Designation of officers and employees required to file annual disclosure statements.**

Within ninety days after the effective date of this [chapter], and during the month of March each year thereafter, the [elective chief executive officer or chair of the governing body of the municipality, as the case may be,] shall:

(a) Cause to be filed with the [municipality's] ethics board a list of the names and offices or positions of all officers and employees of the [municipality] required to file annual disclosure statements pursuant to section [financial disclosure section]; and

(b) Notify all such officers and employees of their obligation to file an annual disclosure statement.

**§ 207. Maintenance and public inspection of disclosure statements.**

1. The [municipal] clerk shall transmit promptly to the ethics board each transactional and applicant disclosure statement filed with the clerk pursuant to sections [transactional and applicant disclosure sections].

2. The ethics board shall index, maintain on file for six years, and make available for public inspection and copying all transactional, applicant, and annual disclosure statements filed with the board.

**§ 208. Review of lists and disclosure statements.**

1. The ethics board shall review:

   (a) The lists of officers and employees, prepared pursuant to section two hundred six of this [chapter], to determine whether the lists are complete and accurate. The board shall add the name of any other officer or employee whom the board determines should appear on the list and shall remove the name of any officer or employee whom the board determines should not appear on the list.

   (b) All annual disclosure statements to determine whether any person required to file such a statement has failed to file it, has filed a deficient statement, or has filed a statement that reveals a possible or potential violation of this [chapter].[2]

   (c) All transactional disclosure statements.

   (d) All applicant disclosure statements.

2. If the board determines that an annual disclosure statement, a transactional disclosure statement, or an applicant disclosure statement is deficient or reveals a possible or potential violation of this [chapter],[3] the board shall notify the person in writing of the deficiency or possible or potential violation and of the penalties for failure to comply with this [chapter].[4]

**§ 209. Investigations.**

1. Upon receipt of a sworn complaint by any person alleging a violation of this chapter,[5] or upon determining on its own initiative that any such violation may exist, the ethics board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this [chapter].[6] In conducting any such investigation, the ethics board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records which it may deem relevant and material.

2. The ethics board shall state in writing the disposition of every sworn complaint it receives and of every investigation it conducts and shall set forth the reasons for the disposition. All such statements and all sworn complaints shall be indexed and maintained on file by the board.

3. Any person filing a sworn complaint with the ethics board shall be notified in writing of the disposition of the complaint, to the extent permitted by law.

4. All documents and hearings relating to the investigation and hearing of any alleged violation of this [chapter] shall be confidential and not available for public inspection or open to the public, except as otherwise required by state or federal law or by this [chapter]. All dispositions, including negotiated dispositions, in which the ethics board finds a violation of this [chapter] shall be available for public inspection and copying.

5. Nothing in this section shall be construed to permit the ethics board to conduct an investigation of itself or of any of its members or staff. If the ethics board receives a complaint alleging that the ethics board or any of its members or staff has violated any provision of this [chapter], or of any other law, the board shall promptly transmit to the [elective chief executive officer, if any, and chair of the governing body of the municipality] a copy of the complaint.

**§ 210. Hearings; assessment of penalties.**

1. Disciplinary action. In its discretion, after a hearing providing for due process procedural mechanisms and subject to any applicable provisions of law and collective bargaining agreements, the ethics board may recommend appropriate disciplinary action pursuant to section [penalties section] of this [chapter]. The recommendation of the ethics board shall be made to the appointing authority or person or body authorized by law to impose such sanctions. The board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the board refers the matter to the appropriate prosecutor. If such a referral is made, the board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

2. Civil fine. In its discretion and after a hearing providing for due process procedural mechanisms, the ethics board, pursuant to section [penalties section] of this [chapter], may assess a civil fine, not to exceed fifteen hundred dollars for each violation, upon any [municipal] officer or employee found by the board to have violated this [chapter]. The board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the [municipality].

3. Damages. The [municipality] may initiate an action in the Supreme Court of the State of New York to obtain damages, as provided in section [penalties section] of this [chapter].

4. Civil forfeiture. The [municipality], or the ethics board on behalf of the [municipality], may initiate an action or special proceeding, as appropriate, in the Supreme Court of the State of New York to obtain civil forfeiture, as provided in section [penalties section] of this [chapter].

5. Debarment. The [municipality], or the ethics board on behalf of the [municipality], may initiate an action or special proceeding, as appropriate, in the Supreme Court of the State of New York for an order of debarment, as provided in section [debarment section] of this [chapter].

6. Injunctive relief. The [municipality], or the ethics board on behalf of the [municipality], may initiate an action or special proceeding, as appropriate, in the Supreme Court of the State of New York for injunctive relief to enjoin a violation of this [chapter] or to compel compliance with this [chapter], as provided in section [injunctive relief section] of this [chapter].

7. Prosecutions. The ethics board may refer to the appropriate prosecutor possible criminal violations of this [chapter]. Nothing contained in this [chapter] shall be construed to restrict the authority of any prosecutor or the attorney general to prosecute any violation of this [chapter] or of any other law.

8. Nothing in this section shall be construed to permit the ethics board to take any action with respect to any alleged violation of this [chapter], or of any other law, by the board or by any member or staff member thereof.

**§ 211. Waivers.**

1. Upon written application by a [municipal] officer or employee and written approval by his or her agency head, the ethics board may grant the applicant, or his or her private employer or business, a waiver of any of the provisions of [the code of ethics, except the inducement of violations provision; section on appearances by the municipal official's private employer or business; sections on transactional, applicant, annual disclosure] of this [chapter], where the ethics board finds that waiving such provision would not be in conflict with the purposes and interest of the [municipality], provided, however, that no such waiver shall permit any conduct or interest otherwise prohibited by Article 18 of the General Municipal Law.

2. Waivers shall be in writing, shall state the grounds upon which they are granted, and shall

be available for public inspection and copying. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the board.

**§ 212. Advisory opinions.**

1. Upon the written request of any [municipal] officer or employee or his or her department head, the ethics board shall render a written advisory opinion with respect to the interpretation or application of this [chapter] [7]to the future or continuing conduct or interests of such [municipal] officer or employee or his or her outside employer or business.

2. Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the ethics board. The board shall publish such of its advisory opinions as it believes will provide guidance to other [municipal] officers or employees, provided, however, that the publicly available copy of such opinions shall contain such deletions as may be necessary to prevent disclosure of the identity of the involved officers and employees.

**§ 213. Judicial review.**

1. Any person aggrieved by a decision of the ethics board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules.

2. Any person who has submitted to the ethics board a written request for an advisory opinion may bring an action or special proceeding, as appropriate, for a determination of the question posed in the request, provided that:

   (a) it shall appear by and as an allegation in the complaint or petition that at least six months have elapsed since the filing of the request and that the ethics board has failed to file any determination in the matter; and

   (b) the action or special proceeding shall be commenced within ten months after the submission of the request for the advisory opinion.

**§ 214. Training and education.**

1. The ethics board:

   (a) Shall make information concerning this [chapter][8] available to the officers and employees of the [municipality], to the public, and to persons interested in doing business with the [municipality];

   (b) Shall develop educational materials and an educational program on the provisions of this [chapter][9] for the officers and employees of the [municipality], for the public, and for persons interested in doing business with the [municipality].

2. The [elective chief executive officer of the municipality, if any, or the chair of its governing body, as appropriate] shall assist the ethics board in the publication, posting, and distribution of ethics educational materials and in the development and presentation of ethics educational programs.

3. Each [municipal] officer or employee shall receive ethics training, in such form as determined by the ethics board after consultation with the appropriate department head, at least once each year.

**§ 215. Annual reports; review of ethics laws.**

1. The ethics board shall prepare and submit an annual report to the [municipality's elective chief executive officer, if any, and the governing body] summarizing the activities of the board. The report may also recommend changes to the text or administration of this [chapter].

2. The ethics board shall periodically review this [chapter] and the board's rules, regulations, and administrative procedures to determine whether they promote integrity, public confidence, and participation in [municipal] government and whether they set forth clear and enforceable, common-sense standards of conduct.[10]

**§ 216. Public inspection of records; public access to meetings.**

1. The only records of the ethics board which shall be available for public inspection are those whose disclosure is required by Article 6 of the Public Officers Law or by other state or federal law or by this [chapter].

2. No meeting or proceeding of the ethics board shall be open to the public, except as required by the provisions of Article 7 of the Public Officers Law or by other state or federal law or by this [chapter] or upon the request of the affected officer or employee and with the agreement of the ethics board.

**§ 217. Distribution and posting of code of ethics and this [chapter].**

1. Within thirty days after the effective date of this [chapter], and thereafter as requested by the ethics board, the [elective chief executive officer of the municipality, if any, or the chair of its gov-

erning body, as appropriate] shall cause a copy of the provisions of section [code of ethics] to be posted conspicuously in every public building under the jurisdiction of the [municipality] and shall cause of a copy of the provisions of this [chapter] to be posted on the [municipality's] website.

2. Within thirty days after the effective date of this [chapter], and thereafter during the month of May, the [elective chief executive officer of the municipality or the chair of its governing body, as appropriate] shall cause copies of the provisions of section [the code of ethics] to be distributed to every officer and employee of the [municipality]. The [elective chief executive officer of the municipality or the chair of its governing body, as appropriate] shall also make copies of this [chapter] readily available to all [municipal] officers and employees and to the public. Every [municipal] officer or employee elected or appointed after the effective date of this [chapter] shall be furnished a copy of the provisions of this [chapter] within ten days after entering upon the duties of his or her position.

3. Failure of the [municipality] to comply with the provisions of this section or failure of any [municipal] officer or employee to receive a copy of the provisions of this [chapter] shall have no effect on the duty of compliance with this [chapter] or on the enforcement of its provisions.

### § 218. Miscellaneous provisions.

1. No existing right or remedy shall be lost, impaired, or affected by reason of this [chapter].

2. Nothing in this [chapter] shall be deemed to bar or prevent a present or former [municipal] officer or employee from timely filing any claim, account, demand, or suit against the [municipality] on behalf of himself or herself or any member of his or her family arising out of personal injury or property damage or any lawful benefit authorized or permitted by law.

3. If any provision of this [chapter] is held by a court of competent jurisdiction to be invalid, that decision shall not affect the validity and effectiveness of the remaining provisions of this [chapter].

## Endnotes

1. Counties may wish to add at the conclusion of this sentence: "provided, however, that pursuant to section eight hundred eight of the General Municipal Law, the ethics board shall, upon written request, issue advisory opinions to officers and employees of any municipality wholly or partially within the County with respect to the provisions of Article 18 of the General Municipal Law or any code of ethics adopted by such municipality."
2. If, as recommended by the author in Enacting a Local Ethics Law—Part III: Administration, the municipality's ethics law incorporates the relevant provisions of Article 18 of the General Municipal Law, no need exists to reference Article 18 in the administrative provisions of the local ethics law, except in regard to waivers (section 211). If Article 18 is not incorporated into the municipality's ethics law, then this section should reference Article 18 ("[or / and] Article 18 of the General Municipal Law").
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Counties may wish to add at the conclusion of this subdivision: "Pursuant to section eight hundred eight of the General Municipal Law, the ethics board may also make recommendations with respect to the drafting and adoption of a code of ethics or amendments thereto upon request of the governing body of any municipality within the County."

**Mark Davies is the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York, the Chair of the Section's Government Ethics and Professional Responsibility Committee, and a member of the Section's Executive Committee. He is also the former Executive Director of the Temporary State Commission on Local Government Ethics. The views expressed in this article do not necessarily represent those of the Board or of the City of New York.**

# Municipal Briefs

By Lester D. Steinman

## Ban on Overnight Parking

The Village of Ossining Code Section 250-29 prohibits overnight parking between the hours of 3:00 a.m. and 6:00 a.m. on village streets. Where strict enforcement of this prohibition would create "extreme hardship," an exemption from the ban may be granted.

A tenant of residential property in the village applied for a hardship parking exemption. The application form required and the landlord consented to an inspection of the property by the Village Building Inspectors. The hardship exemption was denied because an illegal apartment existed in the building and there was adequate space for parking in the rear of the building. Subsequently, the landlord was issued a notice of violation of the New York State Building and Fire Code because of an insufficient number of smoke detectors and improper locks on bedroom doors inhibiting egress in the case of a fire.

The tenant and landlord then sued to invalidate the Village's ordinance because it impermissibly imposes a fee for the use of public highways, discriminates against non-residents of the Village and unconstitutionally compels the owner to submit to a warrantless inspection of his property as a precondition to the Village's consideration of a hardship parking exemption.

Affirming the Supreme Court, the Appellate Division granted summary judgment declaring Section 250-29 to be a valid exercise of the Village's power to restrict parking on the streets under Vehicle & Traffic Law Section 1604(a)(6).[1] The Appeals Court also rejected Plaintiffs' discrimination claim finding that the ordinance applies equally to residents and non-residents. Finally, the Court declared that the hardship parking application form was not unconstitutional because Plaintiffs' failed to show "that the landlord would be effectively deprived of any economic benefit from the rental property if she refused to consent to a search of the premises *(cf. Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 345, 346)."[2]

## Alienation of Public Parking Property

Under the public trust doctrine, property owned by a local government and dedicated to public park or recreational use is "held in trust for the general public, and may not be sold or leased without the specific approval of the State Legislature (*see Brooklyn Park Commrs. v. Armstrong*, 45 N.Y. 234, 243; *In re Angiolillo v. Town Greenburgh*, 290 A.D. 2d at 10; *Gerwitz v. City of Long Beach*, 69 Misc. 2d at 777)."[3] By contrast, the power of a village to dispose of surplus property used for approximately 50 years as a municipal parking lot, absent evidence that the property "was dedicated for public use through express provisions in a deed or legislative enactment," is [not] "constrained by the public trust doctrine where the property in question is not used for park or recreational purposes."[4] Unlike a public park or recreational area where continuous use as such "may impress that parcel with a 'public trust by implication,'" no authority has been cited holding that a parking lot may similarly achieve public trust status.[5]

Although upholding the Village's sale or lease of the surplus municipal parking property for private commercial use, the Appeals Court ruled that the Village may not finance the transaction by taking back a $275,000 purchase money mortgage for the entire purchase price to be paid back over 15 years at 5% interest. Citing the State constitutional prohibition on gifts or loans by municipalities to private entities, the Court declared the purchase money mortgage "cannot be reasonably viewed as anything other than a 'loan'" to a private entity barred by the State Constitution.[6]

## Police Chiefs

By Local Law Number 9 of 2006, the Town of Southampton established the position of Police Commissioner to be the chief administrative officer of the Town's Police Department. The incumbent police chief instituted a declaratory judgment action to invalidate the local law as contravening Civil Service Law § 58-1(1-c)'s mandate that the Town maintain the office of Chief of Police. The Supreme Court entered judgment in favor of the Town and the Appellate Division affirmed the lower Court's ruling opining:

> The language of Civil Service Law § 58-1(1-c) clearly and unambiguously provides only that the Town must maintain the office of Chief of Police and does not prohibit the Town from appointing a Police Commissioner to whom the Chief of Police must report. As we previously stated, "[n]othing in this law prohibits such a local

> government from making its chief of police responsible to other elected or appointed officials" (*Matter of Petri v. Milhim*, 139 A.D. 2d 652, 653).[7]

The Court found additional support for its ruling in the provisions of Town Law Section 150(2). That statute authorizes the Town Board to delegate its supervisory authority over police matters to a Board of Police Commissioners. Here, the Town, properly utilized its home rule powers to adopt a local law to supersede a provision of Town Law to delegate its supervisory powers over police matters to a single Police Commissioner.

## FOIL

The evolution from paper to electronic records is at the core of a recent ruling by the Court of Appeals construing municipal disclosure obligations under the Freedom of Information Law ("FOIL").[8]

Here, the Petitioner, Data Tree, is engaged in the business of providing electronic access to public land records to its customers who purchase, sell, finance, and insure property. Data Tree maintains a database of nearly two billion deeds, mortgages, liens, judgments, releases, maps and other documents. Data Tree obtains these documents by requesting them from county clerks or other public officials responsible for recording and archiving such documents.

In January 2004, the Records Access Officer for the Suffolk County Clerk's office received a FOIL request from Data Tree for various public land records from January 1, 1983 to date. The Clerk was requested to provide these records in "TIFF images or images in the electronic format regularly maintained by the County, on CD-Rom or other electronic storage media regularly used by the County. If electronic images are not maintained, then in microfilm format."[9]

By failing to timely respond within the five-day statutory period required by Public Officers Law Section 89(3), the Clerk constructively denied the request. On administrative appeal, the Suffolk County Attorney also denied the request for the following reasons:

> (1) the FOIL request would require re-writing and reformatting of the data which the Clerk's office is not required to do; (2) disclosure would constitute an unwarranted invasion of personal privacy due to the volume of the records requested and the commercial nature of Data Tree's business; and (3) the records are available for copying and/or downloading from the computer terminals at the Clerk's Office.[10]

Data Tree then sued to compel the Clerk to comply with its request and for costs and attorney's fees. Noting the availability of many of the requested documents in computer or paper form at the Clerk's office, the Supreme Court granted limited relief to Data Tree by allowing it to go the Clerk's office and make individual copies of the requested public documents or download the available documents on the Internet at Data Tree's expense. Otherwise, the Court upheld the Clerk's denial of Data Tree's request, accepting the Clerk's argument that "the bulk of the remaining documents could not be transferred to the requested form (TIFF) or any other electronic medium without creating a new record . . . at considerable expense to the taxpayers."[11]

On appeal, the Appellate Division affirmed the lower Court's ruling finding that the disclosure of the requested documents "would entail an unwarranted invasion of personal privacy,"[12] thus exempting the documents from disclosure. Shifting the burden to Data Tree to establish that the claimed exemption was erroneous, the Appeals Court ruled that the burden of compliance and the interest of protecting individual privacy from possible misuse of data justified the Clerk's refusal. The Court of Appeals granted leave to appeal and reversed the lower court's judgment.

First, addressing the applicability of the privacy exemption relied upon by the Appellate Division, the Court of Appeals disagreed with that court's burden-shifting analysis. Given that FOIL is based on a "presumption of access to the records, "the Court agreed with Data Tree that the burden of proof justifying the application of the privacy exemption "rests solely with the Clerk."[13] To deny disclosure, the Clerk must establish that the records sought "fall squarely within a FOIL exemption by articulating a particularized and specific justification for denying access."[14]

Further, the Court of Appeals noted the Appellate Division appeared to be incorrectly concerned that Data Tree, a commercial enterprise, was seeking the records for purposes of "data mining." Although an unwarranted invasion of public privacy under FOIL includes "the sale and release of names and addresses if such lists would be used for commercial or fundraising purposes," the exception does not apply here because Data Tree is seeking public land records for online commercial reproduction and is not seeking a list of names and addresses to solicit business.[15]

Against this background, the Court of Appeals concluded that a question of fact existed as to the applicability of the privacy exemption because certain of the records may contain "private information, such as social security numbers and dates of birth," whose release may constitute an unwarranted invasion of privacy.[16] Accordingly, the Court of Appeals directed

the Supreme Court to determine whether any of the records sought contain information that may properly be exempted from disclosure on the basis of privacy and, if so, whether such information can be redacted.

Addressing whether Data Tree's FOIL request required the creation of a new record, the Court, citing Public Officer's Law Section 89(3), stated that FOIL did not require an agency to create records to comply with a FOIL request or to compile data in a requested electronic format when it does not ordinarily maintain records in such manner. The Court of Appeals observed, however, that the term "records" includes records stored both in paper and electronic formats. Thus, in addition to printing out information on paper, the Court opined, disclosure of records may involve "duplicating data to another storage medium such as a compact disc":

> Thus, if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information. In such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another medium. On the other hand, if the agency does not maintain the records in a transferrable electronic format, then the agency should not be required to create a new document to make its records transferrable. A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document.[17]

Here, the parties dispute whether the information sought by Data Tree is maintained or can be readily transferred to the electronic format requested by Data Tree. Accordingly, the Court of Appeals remanded to the trial court the question "whether disclosures may be accomplished by merely retrieving information already maintained electronically by the Clerk's office or whether complying with Data Tree's request would require creating a new record."[18] The Court also instructed the trial court to address privacy concerns that may arise out of disclosure of the information in the format requested by Data Tree and cautioned that "if such information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL."[19]

## Endnotes

1. *Younker v. Village of Ossining*, 41 A.D.3d 470, 837 N.Y.S.2d 297 (2d Dep't 2007).
2. *Younker*, 41 A.D.3d at 472, 837 N.Y.S.2d at 299.
3. *In re 10 East Realty, LLC v. Incorporated Village of Valley Stream*, 49 A.D.3d 764, 854 N.Y.S.2d 461 (2d Dep't 2008).
4. *In re 10 East Realty*, 49 A.D.3d at 766, 852 N.Y.S.2d at 464; *see also In re 10 East Realty, LLC v. The Incorporated Village of Valley Stream*, 49 A.D.3d 770, 857 N.Y.S.2d 571 (2d Dep't. 2008).
5. *In re 10 East Realty*, 49 A.D.3d at 767, 852, N.Y.S.2d at 464.
6. *In re 10 East Realty*, 49 A.D.3d at 768, 852 N.Y.S.2d at 465.
7. *Overton v. Town of Southampton*, 50 A.D.3d 1112, 857 N.Y.S.2d 214 (2d Dep't 2008).
8. *In re Data Tree LLC v. Romaine*, 9 N.Y.3d 454 (2007).
9. *Id.* at 460.
10. *Id.*
11. *Id.* at 461.
12. *Id.*
13. *Id.* at 462–463.
14. *Id.*
15. *Id.* at 463.
16. *Id.* at 464.
17. *Id.* at 464–465.
18. *Id.* at 466.
19. *Id.*

**Lester D. Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and serves as Counsel to the law firm of Wormser, Kiely, Galef & Jacobs LLP in White Plains, New York.**

# Section Committees and Chairs

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

**Bylaws Committee**
Owen B. Walsh
Owen B. Walsh, Esq.
P.O. Box 102
34 Audrey Avenue
Oyster Bay, NY 11771-0102
obwdvw@aol.com

**Employment Relations**
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

**Ethics and Professionalism**
Mark Davies
NYC Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
mldavies@aol.com

**Land Use and Environmental**
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, 7th Floor
White Plains, NY 10601
h.hocherman@htwlegal.com

**Membership**
Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3494
psalk@albanylaw.edu

**Municipal Finance & Economic Development**
Kenneth W. Bond
Squire Sanders & Dempsey LLP
350 Park Ave., 15th Floor
New York, NY 10022
kbond@ssd.com

**Legislation Committee**
A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207

Darrin B. Derosia
NYS Comm. on Local Government Efficiency and Competitiveness
30 South Pearl Street, 6th Floor
Albany, NY 12245
dderosia@empire.state.ny.us

**Technology Committee**
Howard Protter
Jacobowitz & Gubits LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586
hp@jacobowitz.com

## Publication—Editorial Policy—Subscriptions

Persons interested in writing for the *Municipal Lawyer* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Municipal Lawyer* are appreciated.

**Publication Policy:** All articles should be submitted to me and must include a cover letter giving permission for publication in the *Municipal Lawyer*. We will assume your submission is for the exclusive use of the *Municipal Lawyer* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Municipal Lawyer* has the appropriate permission to reprint the article.

For ease of publication, articles should be e-mailed or sent on a disk or CD in electronic format, preferably Microsoft Word (pdfs are not acceptable). A short author's biography should also be included. Please spell check and grammar check submissions.

**Editorial Policy:** The articles in the *Municipal Lawyer* represent the author's viewpoint and research and not that of the *Municipal Lawyer* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

**Non-Member Subscription:** The *Municipal Lawyer* is available by subscription to law libraries. The subscription rate for 2008 is $105.00. For further information contact the Newsletter Department at the Bar Center, newsletters@nysba.org.

**Publication Submission Deadlines:** On or before the 1st of March, June, September and December each year.

**Lester D. Steinman**
**Editor-in-Chief**


### Board of Contributors

Sharon Naomi Berlin
Kenneth W. Bond
Mark L. Davies
Henry M. Hocherman
Patricia E. Salkin



NEW YORK STATE BAR ASSOCIATION
**MUNICIPAL LAW SECTION**
One Elk Street, Albany, New York 12207-1002

**ADDRESS SERVICE REQUESTED**


# MUNICIPAL LAWYER


**Editor-in-Chief**
Lester D. Steinman
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, NY 10606
Lsteinman@pace.edu

**Executive Editor**
Ralph W. Bandel

**Assistant Editor**
Jeane S. Kanes


## Section Officers


**Chair**
Robert B. Koegel
Remington, Gifford, Williams & Colicchio LLP
183 East Main Street, Suite 1400
Rochester, NY 14604
rbk@remgiff.com

**First Vice-Chair**
Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
psalk@albanylaw.edu

**Second Vice-Chair**
Howard Protter
Jacobowitz & Gubits, LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586
hp@jacobowitz.com

**Secretary**
Frederick H. Ahrens
Steuben County Law Dept.
3 E. Pulteney Square
Bath, NY 14810
freda@co.steuben.ny.us



This publication is published for members of the Municipal Law Section of the New York State Bar Association and for subscribers and affiliates of the Municipal Law Resource Center of Pace University. Members of the Section and subscribers and affiliates of the Municipal Law Resource Center of Pace University receive a subscription to the publication without charge. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editors, the Municipal Law Section, or Pace University.



Copyright 2008 by the New York State Bar Association


ISSN 1530-3969 (print) ISSN 1933-8473 (online)



NON PROFIT ORG.
U.S. POSTAGE
**PAID**
ALBANY, N.Y.
PERMIT NO. 155