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Municipal Lawyer

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A Message from the Chair

2012 has been another interesting year to be involved in government law and practice for our membership representing local government or private clients interacting with local governments. New realities and increasing burdens upon local governments create greater opportunities for, and challenges to, municipal attorneys in facilitating government innovation and public private partnerships in the delivery of services. At the same time, attorneys representing private parties in dealing with local government must keep abreast of changing opportunities and impediments to private initiative. Attorneys who stay active in the Municipal Law Section are in a better position to understand the broad legal framework in which all of these issues and opportunities arise.

However, as our membership statistics demonstrate, we are an interesting demographic profile still not reaching as diverse an audience of municipal practitioners as are out there fending for themselves.

Category	Percentage
Gender	
Female	21%
Male	79%
Practice Setting	
Government	16.92%
Private Practice	74%
Office Size	
Less than 20	68%
20 to less than 50	15.42%
Over 50	15.75%
Age	
Under 45	23.82%
Over 45	76.18%
Years Admitted to Bar	
Under 20	20.17%
Over 20	79.83%
Race/Ethnicity	
White	92.98%
Non-White	7.02%

Inside

NYSBA

Our Section must reach out to more members of color, younger audiences and women, all of whom are facing the same issues without the benefits of collaboration, education and networking provided by our Section membership and participation. I ask all of our members to be aware of this concern, and to suggest ideas and ways to increase our diversity.

I also encourage you to make the most of your own Section membership by becoming involved in the great work of our committees: Bylaws, Employment Relations, Ethics and Professionalism, Legislation, Membership, Municipal Finance & Economic Development, Green Development, and Technology. This issue of the *Municipal Lawyer* contains names and contact information for members of the Executive Committee and committee leadership. Section members can conveniently join one or more of our committees online at www.nysba.org/municipal. Contact NYSBA Membership Services if you need your Web site sign-in information: 518.487.5577/800.582.2452, or membership@nysba.org.

SAVE THE DATE: Our Annual Meeting will be held on Thursday, January 24, 2013 at the New York Hilton. Sharon Berlin, Rich Zuckerman, and Natasha Phillip are serving as co-chairs and developing an exciting program agenda. We hope to see you there.

Please contact me at hp@jacobowitz.com with your suggestions or ideas for improving our Section. I look forward to meeting with you at an upcoming program.

Howard Protter

From the Editor

As I wrap up this issue of the *Municipal Lawyer*, we have just experienced Hurricane Sandy in the Tri-State area. The aftermath of Sandy has left millions of people without power, thousands of people without homes, significant loss of personal property and damage to real property. The impacts on public transportation, damage to roadways, broken sewer systems, closed public schools, Election Day challenges, and many other issues are just some of the things that have been confronting municipal attorneys. Based on the experiences from Irene in Upstate New York, and Katrina in the New Orleans region, it will take months, if not years, to fully recover. Our Section members will be called upon to deal with social services issues, public sector labor law issues, land use and environmental issues, consumer issues, transportation infrastructure and more. Curfews and other public safety and emergency local laws are also being put into place. I could go on, but suffice it to say that Sandy has redirected the typical priorities of municipal attorneys.

This issue of the *Municipal Lawyer* is packed with practical information across a spectrum of municipal practice. Richard Finkel has contributed an article on the recent Fourth Department case upholding recent amendments to the Wicks law. Albany Law School student Joanna Pericone's recent posting on the Fireplace Blog, a site maintained by the *Albany Government Law Review*, addresses the strike provision in the Taylor Law.

Turning to municipal liability issues, Karen Richards discusses the duty to adequately supervise students. On the environmental front, Taylor Palmer and Dominic Cordisco discuss the delayed effective date of the new full and short environmental assessment forms. Alyse Terhune provides a timely update on developments with the Religious Land Use and Institutionalized Persons Act, a federal statute that continues to be the subject of litigation in New York.

Municipal finance issues are addressed by Winnie Lam, who provides a review of recent municipal bankruptcy filings, and Karen Richards, who contributed a second article on tax assessments and bankruptcy court. Robert Batson explores the recent decision of the district court for the Western District of New York which recently ruled that an Indian tribe's sovereign immunity precludes a county from foreclosing on tribally owned real property for failure to pay *ad valorem* property taxes.

Please consider writing an article for a future issue of the *Municipal Lawyer*. The interesting issues you are dealing with in your practice often make excellent educational reading for others. If you don't have time to write, but have ideas on topics you think ought to be covered, please send those suggestions along as well as our student editors (also introduced to readers in this issue) would be happy to follow up to find appropriate authors.

I look forward to seeing you at the Annual Meeting in January.

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Procurement Law Update: Wicks Amendments Upheld

By Richard Finkel

Public works projects in the State of New York are subject to the Wicks Law bidding requirements if the work meets or exceeds the designated monetary threshold. In such event, the governmental entity must prepare separate bid specifications and award separate contracts for each of the plumbing, heating and ventilation, and electrical components of the project.

The intent of the bidding requirement is twofold: (1) to foster competition and enable the best work and supplies to be obtained at the lowest possible price, and (2) to help guard against favoritism, extravagance and fraud in the award of such work.

In practice, however, the results are not always as intended. Compliance with Wicks can be fiscally and administratively burdensome. Quality can be sacrificed for price. Moreover, on occasion, overzealous bidders simply bid too low, later protesting that they are unable to complete the projects at the bid price. These predicaments invite delay and added cost.

Problems such as these were even more troublesome given the sheer quantity of projects that became subject to the Wicks Law requirements. Increases in construction costs rendered the $50,000 threshold, in place since 1961, antiquated. The threshold no longer bore any relation to current economic realities, and the requirements were triggered for even those public projects now considered minor in scope.

In order to address some of these concerns, in 2008 the Legislature increased the $50,000 threshold. Previously uniform in its application across the State, the threshold was now tiered, with trigger amounts determined by the region in which the project was to be undertaken. As a result, Wicks Law requirements do not kick in on public works projects unless their costs exceed $3 million in the five New York City counties; $1.5 million in Nassau, Suffolk and Westchester counties; and $500,000 in all other counties.

Was this tiered approach appropriate or fair? Prior to adoption, several upstate legislators thought not. They argued that the trigger amounts did not adequately correspond to the increased cost of construction in their own region. They protested that while there might be a disparity in costs across the State, that gap was not as pronounced as the three tiers reflected. Nevertheless, the amendment was adopted.

Adoption of the amendment did not end the protests. Indeed, the legislation was quickly the subject of a legal challenge by, amongst others, builder and contractor trade organizations subject to its provisions, an out-of-state contractor, a minority-owned business, a women-owned business, and by the County of Erie. All sought a declaratory judgment that the legislation violated both the New York and United States Constitutions.

"Compliance with Wicks can be fiscally and administratively burdensome. Quality can be sacrificed for price [and], on occasion, overzealous bidders simply bid too low, later protesting that they are unable to complete the projects at the bid price. These predicaments invite delay and added cost."

Erie County Supreme Court dismissed the complaint on the premise that the plaintiffs lacked standing. Appeal was taken to the Appellate Division, Fourth Department. In *Empire State Chapter of Associated Builders and Contractors, Inc. v. M. Patricia Smith,*[1] the Court reinstated the complaint, but then, by the narrowest of margins, granted judgment in favor of the defendants and declared the Wicks Law amendments valid and constitutional.

The *Empire* dissent was concerned with the disparate thresholds, and echoed the position of the protesting upstate legislators. It found after its own search of the record that the legislation's goal to "exempt approximately 70% of all public construction projects from the requirements of the Wicks Law" was founded upon nothing more than the New York City Mayor's projection relative to New York City capital projects.[2] Expressing further regional frustration, the dissent wrote that "a key purpose of the 2008 amendments was to relieve New York City from much of the burden imposed by the Wicks Law, with the remainder of the State being somewhat of an afterthought."[3]

The Home Rule Challenge

Erie County argued that the amendment was unconstitutional in that it impaired its home rule powers as established in Article IX of the State Constitution. The legislation, it posited, constituted a special law unlawfully adopted without the required home rule message.

The *Empire* majority agreed, at least to a limited extent. Yes, it said, the amendment did relate to the "property, affairs or government"[4] of Erie County, and yes, it was adopted without the benefit of a home rule message. The Court even agreed that the legislation was a "special law" in that it applied differently to Erie County "in terms and in effect" than it did to those counties located downstate.[5]

Still, the Court held that there was no impairment of Erie County's home rule powers. While a special law typically requires a home rule message, *Empire* held that this case fell into the exception. Invoking language from the Court of Appeals' decision in *Patrolmen's Benevolent Association of City of New York v. City of New York*,[6] the Court noted that a special law enacted without home rule message overcomes that infirmity if the enactment bears "a reasonable relationship to an accompanying substantial State concern."[7]

This amendment, the Court said, advanced a substantial State concern by further fostering "prudent and economical use of public moneys," "honest competition," and "expertise in these areas of construction."[8] At the same time, it helped to guard "against favoritism, improvidence, extravagance, fraud and corruption."[9]

The three-tiered threshold was also found to reasonably relate to these concerns. The majority noted that in the Legislature's judgment the existing threshold had become "out-of-date;"[10] that the increased threshold would ease the burden on municipal entities by eliminating smaller projects from Wicks coverage; and that the tiers accounted for geographically based differences in construction costs.

The majority declined, as outside of its function, to question the wisdom of the tiered threshold or the various monetary amounts applicable to each region.

Equal Protection Challenge

In addition to the home rule challenge, the *Empire* plaintiffs alleged that the Wicks Law amendments violated constitutional guarantees of equal protection in favoring downstate counties over upstate counties, and union contractors over non-union contractors. Applying a rational basis standard, the Court dismissed this challenge upon the same "reasonable relationship"[11] rationale discussed above.

The Project Labor Agreement Provision

Labor Law Section 222 was adopted at the same time that the three-tiered threshold was enacted. Section 222 provides a full exemption from the Wicks Law requirements in instances where the project is covered by a qualifying project labor agreement ("PLA"). The statute defines a PLA as:

> a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work.[12]

In order to trigger the Wicks Law exemption, a PLA must provide that each contractor and subcontractor participate in apprentice training programs approved by the State Department of Labor.

The apprentice training program requirement was challenged by the *Empire* plaintiffs on the premise that it was exclusionary. The argument against it was that it unfairly burdened contractors and subcontractors by requiring them to maintain apprentice training programs of their own for *all* public projects exceeding the new threshold. As such, it served to exclude out-of-state contractors and a disproportionate number of minority-owned and women-owned businesses from large public construction projects.

The *Empire* court disagreed.[13] Initially, it held that the apprentice training requirement does not apply universally and is not a prerequisite to qualification for *all* public construction projects. Indeed, it is only mandated where the government entity has elected to utilize a PLA for the project.

Moreover, where there is a PLA on the project, the statute does not require that each individual contractor or subcontractor maintain its own apprentice training program. To the contrary, by entering into a qualifying PLA, the contractor is deemed to be participating in an approved apprentice training program. This eases the burden on the individual contractors.

Conclusion

Having so far survived the constitutional challenges, the future will tell whether the three tiered threshold provides the desired state-wide benefit. If so, there will be a marked increase in the number of public works projects exempt from the Wicks Law,

helping ease the way for public entities presently overwhelmed by its requirements. Any relief is a good thing.

Additionally, for those governmental entities that seek the efficiencies and savings that advocates for PLAs suggest they bring, consideration of a PLA that complies with Section 222 of the Labor Law on their next public construction project is economically prudent.

Endnotes

1. Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. M. Patricia Smith, 949 N.Y.S.2d 549 (4th Dep't 2012).
2. *Id*. at 564.
3. *Id*. at 563.
4. *Id*. at 554.
5. *Id*.
6. Patrolmen's Benevolent Ass'n of N.Y., Inc. v. City of New York, 97 N.Y.2d 378 (N.Y. 2001).
7. *Id*. at 386.
8. *Empire* at 555.
9. *Id*.
10. *Id*. at 566.
11. *See Empire*, 949 N.Y.S.2d 549.
12. N.Y. Lab. Law § 222.
13. *See Empire*, 949 N.Y.S.2d 549 (the dissent did not address this aspect of the majority's holding).

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Purpose for Taylor Law's Strike Provision: Redefining "Strike" in New York Public Sector and Employment Law

By Joanna Pericone

Introduction

In 1977, a fire damaged the building of the New York State Unemployment Insurance Department.[1] The employees were moved to a temporary building that posed several dangerous and uncomfortable working conditions.[2] The building was essentially unheated, and electrical cords blew fuses and posed a walking hazard because they were strewn across the floor.[3] One of the two toilets in the building was backed up and there were only two exits in the building, one of which was blocked and the other was hard to open.[4] After the employees took their work and reported to another temporary building, their supervisor ordered them to go back to the deplorable building, but the employees refused to return.[5] The New York Court of Appeals held that the workers had engaged in an unlawful strike, in violation of New York's Civil Service Law, and that they were subsequently liable for sanctions imposed by their employer.[6] Although the conditions of the workplace created a "fire trap" and the strike was prompted out of concerns for safety, the Court found this to be irrelevant; under New York's Public Employee's Fair Employment Act, commonly known as the Taylor Law, the reason for a public employee participating in any kind of a work stoppage is not pertinent when determining whether an unlawful strike has occurred.[7]

The statutory definition of a strike in New York's Taylor law should be amended to include a purpose component. The current definition of a strike is "any strike or other concerted stoppage of work or slowdown by public employees."[8] The motive for a work stoppage should be considered because the penalties against those who violate the strike prohibition are severe.[9] Steps should be taken to confirm that public employees are withholding their labor to enhance their status at the workplace, not because of a need to protect themselves from risks to their safety and well-being. Additionally, motive should be considered in order to better effectuate the policies of the Taylor Committee, which wrote the report that led to the current law. Finally, the inclusion of a purpose component will coincide with public policy concerns.

Strike Penalties

The penalties against those who participate in a strike can be devastating to both workers and unions. The Taylor Law allows for employees to be fired or disciplined if they are involved in a work stoppage.[10] The statute also allows an employer to punish an employee with the two-for-one penalty for their part in a strike.[11] A two-for-one penalty means that for each day—or part thereof—an employee is on strike, he or she forfeits a day's pay plus a fine for every day or partial day of the strike.[12] These penalties considerably raise the cost of strike penalties for unions and public employees.[13] Unions can also be punished if it is found that they have violated the strike prohibition; and if found guilty, a union can be forced to forfeit agency dues and agency shop fees for a period of time depending on how the stoppage affected the public.[14] These penalties are severe and can potentially cripple both public employees and their unions.

Severe Strike Penalties Should Result in Purpose Component

Since the consequences for violating the Taylor Law's strike prohibition are so severe, a striking employee's motive should be considered before he or she is subjected to penalization. Currently, public employees cannot avoid the effects of their behavior when they have participated in a strike. To wit, in *Van Vlack v. Ternullo*, maintenance workers and teachers who worked at a correctional facility refused to accept out-of-title assignments as replacements for striking correctional officers because they were genuinely afraid of: (1) physical retaliation from the correction officers at the picketing line; (2) future revenge from the picketing officers; and (3) not being protected from the inmates once they were inside.[15] Despite the Second Department's previous ruling that the legitimate fears of the employees protected them from strike charges and penalties, the Court of Appeals nonetheless reversed; the Court of Appeals reasoned in its holding that since the employees did not do their assigned job, they had engaged in a strike under the Taylor Law.[16] If a purpose component were added to the definition of a strike, public employees would not be sanctioned for a work stoppage that is the result of a reasonable concern for their safety or well-being.

Intent of the Taylor Committee

The Taylor Committee was assembled in 1966 by then-Governor Nelson Rockefeller in order "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time, protecting the rights of public employees."[17] The Committee made several proposals for how to improve public labor law in New York and one of its recommendations was to compel employers to take into account the motive behind a public employee's strike.[18] The Committee's definition of a strike was "any concerted work stoppage or slowdown by public employees for the purpose of inducing or coercing a change in the terms and conditions of their employment.…"[19]

The Committee understood that a public employee's sense of powerlessness may encourage him or her to go on strike, but its hope was to create a system of collective bargaining that would help him or her avoid a work stoppage.[20] Public employees, according to the Taylor Committee, have considerable power because they are in charge of state services, and they must therefore be prohibited from striking because a work stoppage can be costly and paralyze the community.[21]

Public Policy Considerations

It is not good policy to ignore the purpose of a strike or work stoppage. Workers should be entitled to protect themselves at the workplace when their safety is being threatened. A policy of ensuring that workers are actually withholding their labor to enhance their standing in the workplace should be implemented before punishing them for their actions. Public employees—or any employees, for that matter—should not be forced to accept working conditions that are hazardous to their health, safety or welfare. If work temporarily stops for those reasons, it seems fundamentally unfair to punish them for protecting themselves from reasonable risks. It is good policy to take the purpose of a work stoppage into consideration when determining whether an unlawful strike has occurred.

Conclusion

New York's Taylor Law does not regard the reasons for a strike to be relevant when discerning whether a work stoppage has occurred. Adding a purpose component to the statutory definition of strike would ensure that workers who are punished for violating the strike prohibition are actually guilty of striking. Considering the motive for a stoppage will also coincide with the intent of the Taylor Committee and be in accordance with public policy concerns.

Endnotes

1. Acosta v. Wollett, 430 N.Y.S.2d 890, 890 (App. Div. 1980).
2. *Id.* at 891.
3. *Id.*
4. *Id.* at 892 (Mikoll, J., dissenting).
5. *Id.* at 893 (Mikoll, J., dissenting).
6. *See* Acosta v. Wollett, 431 N.E.2d 966, 966 (N.Y. 1981); N.Y. Civ. Serv. Law § 210(1) (McKinney 2012).
7. *Acosta*, 430 N.Y.S.2d at 893–94 (Mikoll, J., dissenting); Public Sector Labor and Employment Law, 980 (Jerome Lefkowitz ed., N.Y. State Bar Ass'n 3d ed. 2009); Kate Montgomery Swearengen, Comment, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 Colum. J.L. & Soc. Probs. 513, 519 (2011).
8. Civ. Serv. Law § 201(9).
9. *See id.* § 210(2)(f), (3)(f).
10. *Id.* § 210(2)(a).
11. *Id.* § 210(2)(f); Public Sector Labor and Employment Law, *supra* note 7, at 985.
12. Civ. Serv. Law § 210(2)(f).
13. Martin H. Malin, *Public Employees' Right to Striking: Law and Experience*, 26 U. Mich. J.L. Reform 313, 329 (1993).
14. Civ. Serv. Law § 210(3)(f).
15. Van Vlack, v. Ternullo, 425 N.Y.S.2d 347, 347 (App. Div. 1980), *rev'd*, 425 N.E.2d 862 (N.Y. 1981).
16. *Van Vlack*, 425 N.Y.S.2d at 347; *Van Vlack*, 425 N.E.2d at 862.
17. Governor's Comm., Pub. Emp. Relations: Final Report 9 (1966), *available at* http://www.perb.state.ny.us/pdf/1966PERR.pdf.
18. *Id.* at 8 (recommending that a strike be defined as "a concerted work stoppage or slowdown by public employees, *for the purpose of inducing or coercing a change in the conditions of their employment*") (emphasis added).
19. *Id.* at 43.
20. *Id.* at 12.
21. *Id.*

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Is Danger Lurking in Our Schools? The Duty to Adequately Supervise Students

By Karen M. Richards

Although students are often unintentionally injured in school, students are also assaulted in school. This article explores a school's duty to protect students against assaults.

The general rule in New York is that a school is not the insurer of its students and thus is not obligated to guarantee their safety.[1] This proposition stems from recognition that a school "cannot be reasonably expected to continuously supervise and control all movements and activities of students."[2] In particular, it is not possible for a school "to guard against all of the sudden, spontaneous acts that take place among students daily."[3]

Despite this recognition, it is well-settled that a school nonetheless has a duty to adequately supervise its students because while a student is under a school's custody and control, the school effectively takes the place of parents.[4] A school must therefore exercise the same degree of care in supervising its students as would a reasonably prudent parent under comparable circumstances.[5]

When one student assaults another student, a claim of negligent supervision against a school can be sustained if it was foreseeable that an assault could occur. Foreseeability generally requires proof of actual or constructive notice to the school of prior similar conduct which caused the injury so that the act of the aggressor student could have been reasonably anticipated.[6]

Prior unrelated incidents resulting in discipline are generally insufficient to put a school on notice of a specific threat or danger to a student. Thus, a disciplinary record of lateness, cutting classes, and a highly disrespectful attitude towards teachers and administrators, but no violence against students, may be insufficient to put a school on notice that a student would harm another student.[7] Similarly, verbal taunting between the victim student and assailant, absent proof that either student previously engaged in violent or threatening behavior, may not provide notice.[8]

In one case, a threat to kill a former girlfriend was not considered notice that a student would kill another student. In *Marshall v. Cortland Enlarged City School District*, the decedent, a special education student, was murdered by another special education student.[9] The murder took place during lunch period in a wooded area of school property. There was testimony by other students that the assailant student made threats against a former girlfriend during the prior school year, but they were unable to articulate the actual information passed along to school personnel. Even accepting the plaintiff's premise that another student had told a teacher that the assailant student intended to "stick his girlfriend *** with a needle and try killing her," the court found that communication did not provide the school district with sufficiently specific information to have reasonably anticipated the murder.

"[I]t is well-settled that a school… has a duty to adequately supervise its students because while a student is under a school's custody and control, the school effectively takes the place of parents."

A threat or single aggressive act remote in time may also be insufficient to provide a school with notice that a student might injure another pupil.[10] Therefore, where a school knew that a student had threatened to "beat up" a specific student, the court found that the alleged threats were too remote in time to have provided the school with "notice of a particular danger at a particular time."[11]

However, even assuming that a school had the requisite knowledge or notice, where an assault by another student occurred suddenly and spontaneously and was of short duration, courts have held that no amount of supervision, however intense, could have prevented the resulting injury because there was no opportunity to intercede.[12] This is illustrated in *Taylor v. Dunkirk City School District* and in *LaPage v. Evans*.

In *Taylor*, the plaintiff sued for injuries her daughter sustained from being assaulted by another student in a school hallway after class.[13] Although the assailant student behaved disruptively and defiantly toward the classroom teacher and may have been verbally aggressive towards the victim during class, that student had no history of physically aggressive behavior. Further, on the day of the assault, the assailant student did not evince or threaten any physically aggressive behavior

in the classroom. The court found that "[t]he classroom teacher, therefore, had no reason to anticipate the sudden hallway assault, which came as a surprise even to plaintiff's daughter and another student witness."[14]

In *LaPage*, while riding on a school bus, two high school students were involved in a brief interaction where they exchanged words and one student pushed the other.[15] After this brief interaction, nothing further occurred on the bus between the two students. However, after exiting the bus, the students fought and the plaintiff's son's jaw was broken. The bus driver denied seeing the incident on the bus. He also claimed he tried to radio for help when he saw the altercation outside the bus, but his transmission was blocked by others using the signal. After the unsuccessful attempt to radio for help, the bus driver exited the bus, but the fight was over at that point. The court rejected the plaintiff's claim that the defendant was liable because the bus driver should have intervened once the altercation outside the bus began. Because the fight happened suddenly and without warning, the court found that the bus driver had no opportunity to intercede and dismissed the complaint against the school district.[16]

Courts have followed this same reasoning in situations where a student is assaulted by a non-student. In *Nossoughi v. Ramapo Central School District*, a student was assaulted in the entrance hallway of his high school by a former student trespassing in the building after regular school hours.[17] The court found that the assault was an intervening and unforeseeable act which broke any causal nexus between the school's alleged negligence and the plaintiff's injuries. The assault occurred spontaneously, with the entire incident taking less than one minute, and was of a type that could have happened even if the hallway had been supervised. The court therefore found that summary judgment should have been granted to the school district.[18]

On the other hand, sufficient notice to impose liability was found where there was a history of physical assault, threats, or other aggressive behavior by one student against another specific student[19] or where a student was involved in similar altercations with other students in the recent past.[20] For example, in *Hofmann v. Coxsackie-Athens Central School District*, prior to the actual assault, the assailant student had an extensive disciplinary record, which included 30 citations in a fourteen month period for disciplinary infractions involving misconduct committed while on school grounds.[21] These infractions included insubordination to staff, disruptive conduct in the classroom, profanity, inappropriate and forcible touching of female students, and assaults. Despite these numerous infractions, the school argued that the attack could not have been prevented because it was sudden and spontaneous. The court disagreed, stating "the male assailant's persistent refusal to conform his conduct to school rules and regulations during a period of time immediately prior to the attack raises a question as to whether the School District had taken the necessary preventive measures to safeguard the students in its charge."[22]

Generally, a school cannot be liable for injuries that occur outside the boundaries of school property and beyond "the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection."[23] At that point, a school no longer has physical custody or control of a student and its custodial duty ceases. Therefore, when a student on his way home from school was assaulted by a fellow student, the defendants were not liable for the plaintiff's injuries.[24]

Also, a student who voluntarily leaves the school grounds may no longer look to the school for protection.[25] In *Chalen v. Glen Cove School District*, a 13- year-old student and a man were found dead from ingesting poison in a car in a secluded parking area.[26] The plaintiffs alleged that the school district was negligent in allowing the man (who lived with the girl and her family) to enter the school and remove the decedent in violation of its safety and security policies. The court rejected this allegation, finding that the girl intended to meet the man as evidenced by the fact that she cleaned out her locker before leaving the building without signing out. Further, the school district had no knowledge that the man posed a danger to the girl, and it could not reasonably foresee that she would leave the school building and ingest poison while in his company.

Courts have "found circumstances in which the absence of supervision, without any more specific notice, is so egregious as to give rise to liability."[27] Often, in those cases, there was a disparity in age between the victim and assailant and the assault was sexual.[28]

Courts have explicitly recognized that younger students require a more heightened supervision than older students because their age makes them more vulnerable to an attack by an older student.[29] The oft-cited case of *Garcia v. City of New York* demonstrates this recognition.[30] In *Garcia*, the Board of Education was found liable for the sexual assault of a 5-year-old kindergarten student in a bathroom. While class was in session, the youngster was sent by his teacher from the classroom to the school bathroom, alone and unsupervised, where he was anally molested by an individual believed to be an older student at the school.

The *Garcia* court rejected the defendant's argument that because it had no notice of any similar incidents or of any prior dangerous conduct by the alleged assailant, the complaint must be dismissed. As the court stated:

> The potential danger to the child under the circumstances of this case can be reasonably foreseen and could have been prevented by adequate supervision of the school. Thus, while it would be reasonable to allow high school students to go to a public bathroom unaccompanied, the same practice surely does not to apply to a five-year-old child, who is unable to resist, is defenseless against attack, and poses an easy target for sexual molestation or other assaults. Stated another way, even the most prudent parent will not guard his or her teen at every moment in the absence of some foreseeable danger of which he or she has notice; but a five-year-old child in a public bathroom should be supervised or, at the very least, be accompanied by another child.[31]

In *Doe v. Board of Education of Morris Central School*, as in *Garcia*, there was a disparity of age between the victim and assailant. In *Doe*, during the course of a few weeks, a six-year-old student was inappropriately touched by a twelve-year-old student while on the bus to and from school and in a bathroom attached to the nurse's office at school.[32] The Third Department found that it could not be said that the underlying events were insufficient to put the defendants on notice of a potentially harmful situation for a number of reasons. First, the inappropriate touching at issue was not a one-time occurrence—it occurred multiple times. Second, the abuser's actions escalated as time went on and he was not caught. Third, the abuse often occurred on a bus while the girl was not sitting in her assigned seat, which was in the first row of the bus opposite the driver. Fourth, the abuser followed the young girl to the nurse's office and dragged her into the bathroom in that office where he then abused her. The court thus rejected the defendants' argument that the mere fact that an older boy sat next to a younger girl on a bus was insufficient to provide notice of a potentially harmful situation.

In other sexual assault cases involving young students, the length of time the students were left unsupervised was of significance.[33] For example, in *Kim L. v. Port Jervis City School District*, a triable issue of fact regarding negligent supervision existed because the school district permitted another student to repeatedly follow the third grade plaintiff to the bathroom where the two remained unsupervised for periods of time sufficient to permit sexual acts to occur for many months.[34]

Similarly, in *Doe v. Fulton School District*, although the sexual act occurred only one time (rather than for many months as in *Kim L.*), the sexual assault of a boy by teammates on his eighth-grade football team occurred at a time when there was virtually no supervision of the locker room for 20 to 30 minutes.[35] The court found that, even in the absence of notice of a prior sexual assault, a jury could find that the assault was a reasonably foreseeable consequence of the school district's failure to provide adequate supervision in the locker room.

Acts remote in time or not involving sexually aggressive behavior may be insufficient to establish the specific knowledge or notice necessary for a plaintiff to prevail on a negligent supervision claim. In a case where an 11-year-old with a troubling history sexually assaulted a 5-year-old, the school district was not liable because the 11-year-old's behavioral issues had not manifested themselves for more than two years, and he had not displayed any aggression towards anyone for two years.[36] Significantly, his history did not include any sexually aggressive behavior. Without any evidence of prior conduct similar to the unanticipated injury-causing act, the plaintiff's claim for negligent supervision failed.

As previously discussed, generally a school is not held liable for actions occurring off school grounds. However, a school breaches its duty of care when it "releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating."[37] This is aptly illustrated in *Bell v. Board of Education*, where the plaintiff's sixth grade class attended a drug awareness fair, sponsored by the school district and the police department, at a park near the school.[38] Students were permitted to walk through the park and participate in program activities that interested them. Before the outing, the plaintiff's teacher told his class where to meet so that they could return to school together. The plaintiff testified that her teacher gave her permission to leave the park with friends and have lunch at a nearby pizzeria. When it came time to return to school, the teacher took a head count and discovered that the plaintiff was missing, but he did not inform other teachers or police officers that she was missing. The plaintiff's teacher and his class left the park without the plaintiff. The teacher informed the plaintiff's mother that her child was missing, but he did not advise school officials of the plaintiff's disappearance.

After leaving the pizzeria, when the plaintiff could not locate her class in the park, she started to walk home alone. She was accosted by three boys and raped and sodomized for hours. Although the court recognized that third-party criminal acts can intervene between a defendant's negligence and a plaintiff's injuries, thereby severing the causal connection and precluding liability, it also recognized that "[t]he criminal intervention of third parties may, however, be a 'reasonably foreseeable' consequence of circumstances

created by the defendant."[39] Based on the record, the court could not say that the intervening act of rape was unforeseeable as a matter of law.

> A rational jury hearing the trial testimony could have determined, as the jury in this case did, that the foreseeable result of the danger created by defendant's alleged lack of supervision was injury such as occurred here. A fact finder could have reasonably concluded that the very purpose of the school supervision was to shield vulnerable school children from such acts of violence. As we have previously recognized, "when the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs."[40]

There are cases where a plaintiff alleges that the sexual attack occurred because of inadequate security, which was the allegation in *Jennifer R. v. City of Syracuse*.[41] In *Jennifer R.*, after receiving permission to leave a classroom and retrieve a book from her locker, a high school student was forcibly taken from school by three fellow students to a house located across the street from the school and sexually assaulted. It was alleged that the rape resulted from the failure of the school district to provide adequate security. The court stated:

> Contrary to plaintiff's contention, it is well settled "that the provision of security against physical attacks by third parties with respect to a cause of action against a school district for inadequate security or police protection…is a governmental function involving policymaking regarding the nature of the risks presented, and that no liability arises from the performance of such a function absent a special duty of protection."[42]

The school district established that it owed no special duty of protection to the plaintiff and the complaint against it was dismissed accordingly.

Even though the complaint in *Jennifer R.* did not assert a cause of action for negligent supervision, the court nevertheless addressed this issue. It found that the school district had no reason to anticipate the plaintiff's removal from school and subsequent sexual assault where there were no prior reports of sexual assaults, no record of prior sexual assaults involving the boys, and no prior complaints by the plaintiff concerning fear for her safety while in school. The acts of the three boys "were extraordinary and intervening, thus breaking the causal nexus between the District's negligence if any and plaintiff's injury."[43]

Similarly, in *Doe v. Town of Hempstead Board of Education*, it was alleged that a student's rape by a non-student in a school bathroom was due to the absence of security guards in the vicinity of the rape and near the exterior doors of the school where non-students frequently entered the school.[44] By establishing that there was no direct contact between the plaintiff and any school defendants prior to the attack, the school defendants demonstrated that no special duty was owed to the plaintiff, and therefore, they were entitled to summary judgment on the inadequate security cause of action. The school defendants were also entitled to judgment as a matter of law on the negligent supervision cause of action because they did not have knowledge or notice of any prior sexual assaults at the school. "Although they were aware of past incidents of trespassing, mainly by students, and fights between students were fairly common, the school defendants had no prior experience with, and therefore no reason to anticipate, intruders entering the school for the purpose of committing violent crimes against students."[45]

Not every claim of inadequate security results in summary judgment in favor of a school district. Courts have found there were issues of fact as to whether the type and manner of security that was in place at the time of the sexual assault was sufficient to adequately supervise the students. Therefore, in a case involving the sexual assault of a 12-year-old girl, there were questions of fact about the duties and responsibilities of the security officials where students were allowed to be in hallways, bathrooms, or missing from class without having a mechanism for checking and supervising the students more closely.[46] Also, in a case where a student was raped in a high school stairwell, evidence that a school aide assigned to patrol the stairwell where the attack took place never patrolled the stairwell and that a school safety agent who was absent on the day a rape took place was not replaced was probative as to whether the defendants breached their duty to provide adequate supervision.[47]

In conclusion, although a school cannot guarantee the safety of its students, a school has a duty to adequately supervise them. Assault cases generally require some proof of actual or constructive notice of prior similar conduct recent in time for a plaintiff to prevail on a claim of negligent supervision. However, in sexual assault cases where there is a disparity in age between the victim and the aggressor or where the students were left unsupervised for a significant length of time, lack of notice may not relieve a school from liability.

Endnotes

1. *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994); *Hofmann v. Coxsackie-Athens Central School District*, 70 A.D.3d 1116, 1117 (3rd Dept. 2010).
2. *Mirand*, 84 N.Y.2d at 49 (1994); *Hofmann*, 70 A.D.3d at 1117.
3. *Nossoughi v. Ramapo Central School District*, 287 A.D.2d 444 (2d Dep't 2001).
4. *Vernali v. Harrison Central School District*, 51 A.D.3d 782, 783 (2d Dep't 2008).
5. *Wagner v. Oneonta School District*, 68 A.D.3d 1516 (3d Dep't 2009).
6. Even if the duty to provide adequate supervision has been breached, a plaintiff must still demonstrate that such negligence was the cause of the injuries sustained. If the wrongful conduct was extraordinary and intervening, it may break the causal nexus between a school's negligence and a plaintiff's injury. *Mirand v. City of New York*, 84 N.Y.2d 44 (1944). "Liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a voluntary participant in the fight." *Ambroise v. City of New York,* 44 A.D.3d 805, 806 (2d Dep't 2007); *accord Keaveny v. Mahopac Central School District*, 71 A.D.3d 955 (2d Dep't 2011).
7. *Strnad v. Floral Park-Bellerose Union Free School District*, 50 A.D.3d 774 (2d Dep't 2008).
8. *Sanzo v. Solvay Union Free School District*, 299 A.D.2d 878, 878-879 (4th Dep't 2002).
9. *Marshall v. Cortland Enlarged City School District*, 265 A.D.2d 782 (3d Dep't 1999).
10. *Abadia v. City of New York*, 2010 WL 796836 (Sup. Ct., Kings County 2010).
11. *Bird v. Port Byron Central School* District, 286 A.D.2d 938 (4th Dep't 2001) (citations omitted).
12. *Wagner*, 69 A.D.3d at 1517 (citations omitted); *Kozakiewicz v. Frontier Middle School*, 37 A.D.3d 1138 (4th Dep't 2007). Even where an assault was sudden and spontaneous, there may be a question of whether a school employee who witnessed the assault took "energetic steps to intervene in time" to prevent injuries. *Bucholz v. Patchogue-Medford School District*, 88 A.D.3d 843 (2d Dep't 2011) (security guard); *McLeod v. City of New York*, 32 A.D.3d 907 (2d Dep't 2006) (school safety officer).
13. *Taylor v. Dunkirk City School District*, 12 A.D.3d 1114 (4th Dep't 2004).
14. *Id*.
15. *LaPage v. Evans*, 37 A.D.3d 1019 (3d Dep't 2007).
16. It was undisputed that neither boy had been involved in fights before, neither had any serious disciplinary history, they had hardly had any previous interaction, and the school district was not aware of any problems with either one individually or between the two of them. Even assuming that the bus driver saw or should have seen the incident on the bus, the court found that "this brief confrontation, without more, was insufficient to alert defendant that it should have anticipated" the altercation, which came as a surprise even to the injured student. *LaPage*, 37 A.D.3d at 1020-1021.
17. *Nossoughi v. Ramapo Central School District*, 287 A.D.2d 444 (2d Dep't 2001).
18. Similarly, in *Nocilla v. Middle Country Central School District*, 302 A.D.2d 573 (2d Dep't 2003), the plaintiff alleged a lack of supervision after being assaulted in a hallway by a former student who was habitually present in the school. Summary judgment was granted to the school district because the attack was sudden, unprovoked, of short duration, and would have occurred regardless of the level of supervision. *But see Logan v. William Floyd Union Free School District*, 2011 WL 3631803 (Sup. Ct., Suffolk County 2011) (dismissing the defendant's motion for summary judgment where the plaintiff testified that the assailant student confronted and shouted at him several times prior to the physical attack, and thus, the school district failed to demonstrate that the attack was a sudden and spontaneous act which could not have been stopped during its escalation).
19. *Wilson v. Vestal Central School District*, 34 A.D.3d 999 (3d Dep't 2006).
20. *Smith v. Poughkeepsie City School District*, 41 A.D.3d 579 (2d Dep't 2007).
21. *Hofmann v. Coxsackie-Athens Central School District*, 70 A.D.3d 1116 (3d Dep't 2010).
22. *Id*. at 1118.
23. *Stagg v. City of New York*, 39 A.D.3d 533, 534 (2d Dep't 2007) (citations omitted).
24. *Id.*; *see also Stephenson v. City of New York,* 85 A.D.3d 523, 524 (1st Dep't 2011) (where a student assaulted another student during school hours, and then assaulted the same student again two days later off school grounds, the court found that the school was not liable even though it never notified the victim's mother of the earlier assault and found "it unreasonable to impose a duty on the school to notify a parent about a fight between two students when the school had already affirmatively addressed the misconduct").
25. *Chalen v. Glen Cove School District*, 29 A.D.3d 508 (2d Dep't 2006), *leave to appeal denied*, 7 N.Y.3d 709 (2006). The court also dismissed the cause of action based on inadequate security. Since there was no direct contact between the girl or her family and any school official prior to this incident and no affirmative promise of protection had been made, no special duty of protection existed.
26. *Id*.
27. *Brandy B. v. Eden Central School District*, 15 N.Y.3d 297, 304 (2010).
28. *Whitfield v. Board of Education of City of Mount Vernon*, 14 A.D.3d 552 (2d Dep't 2005) (plaintiff failed to raise a triable issue of fact as to whether the defendant had actual or constructive notice where a five-year-old kindergarten student sexually assaulted one of his classmates).
29. *Espino v. New York City Board of Education*, 80 A.D.3d 496 (1st Dep't 2011), *leave to appeal denied*, 17 N.Y.3d 709 (2011).
30. *Garcia v. City of New York*, 222 A.D.2d 192 (1st Dep't 1996), *leave to appeal denied*, 89 N.Y.2d 808 (1997).
31. *Id*. at 196.
32. *Doe v. Board of Education*, 9 A.D.3d 588 (3d Dep't 2004).
33. The length of time students are left unsupervised is also significant in non-sexual assault cases. *See Johnson v. Ken-Ton Union Free School District*, 48 A.D.3d 1276, 1278 (4th Dep't 2008) (where the special education students were left alone in a bathroom for approximately four minutes before the plaintiff's son was injured, and "[t]hus, the School District failed to meet its burden of establishing as a matter of law that the injury sustained by plaintiff's son took place within such a short time span that a greater degree of supervision would not have prevented it"); *see also Flanagan v. Canton Central School District*, 58 A.D.3d 1047 (3d Dep't 2009) (finding there were questions of fact as to whether the defendant could have reasonably anticipated the incident that resulted in the plaintiff's injury and whether the lack of supervision in the locker room was a substantial factor in bringing about the injury where fifth grade students were left alone in the locker room after physical education class for more than three minutes, during which time

the plaintiff sustained personal injuries after being pushed by another student).

34. *Kim L. v. Port Jervis City School District*, 77 A.D.3d 627 (2d Dep't 2010).
35. *Doe v. Fulton School District*, 35 A.D.3d 1194 (4th Dep't 2006).
36. *Brandy B. v. Eden Central School District*, 15 N.Y.3d 297 (2011).
37. *Ernest v. Red Creek Central School District*, 93 N.Y.2d 664, 672 (1999), *reargument denied*, 93 N.Y.2d 1042 (1999).
38. *Bell v. Board of Education*, 90 N.Y.2d 944 (1997), *on remand*, 250 A.D.2d 1032 (1998).
39. *Id.* at 946 (citations omitted).
40. *Id.* at 946-947 (1997) (citations omitted).
41. *Jennifer R. v. City of Syracuse*, 43 A.D.3d 1326 (4th Dep't 2007). While employed as an Assistant Corporation Counsel III for the City of Syracuse, Ms. Richards was involved in the defense of this case.
42. *Id.* at 1326-1327 (citations omitted).
43. *Id*.
44. *Doe v. Town of Hempstead Board of Education*, 18 A.D.3d 600 (2d Dep't 2005).
45. *Id.* at 601-602.
46. *E.R. v. City of New York*, 2009 WL 654331 *5 (Sup. Ct., Kings County 2009).
47. *Doe v. Department of Education*, 54 A.D.3d 352, 354 (2d Dep't 2008).

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SEQR 2.0: The Effective Date Delayed for the New Full and Short Environmental Assessment Forms

By Taylor Palmer and Dominic Cordisco

Taylor Palmer

The New York State Department of Environmental Conservation ("DEC") has delayed the effective date for the new Short and Full Environmental Assessment Forms ("EAFs") until April 1, 2013. DEC adopted the new EAFs on February 16, 2012, but the forms themselves were not to be utilized until October 1, 2012. The reason for that initial delay was to allow the DEC time to finish and publish new SEQR Environmental Assessment Forms Guidance Documents ("Workbooks") that go along with the new forms. Only now has DEC released the Short EAF Workbook, with the Full EAF Workbook to follow.

This is the first major update to the EAFs, as the Full (or Long Form) EAF has not been revised since 1978 and the Short EAF was last substantially revised in 1987. Some of the revisions to the Short EAF include that it is now two pages longer, and incorporates questions concerning wetland disturbances, water supply and others issues previously relegated to the long form. The new Short Form EAF is available at: http://www.dec.ny.gov/docs/permits_ej_operations_pdf/appbseaf.pdf.

The new Full EAF also requires more information for evaluation, which, of course, requires more analysis, especially at the beginning of the SEQR process. For instance, the Full EAF requires an evaluation of environmental justice and global warming issues. Instructions for the Full EAF are available at:

> http://www.dec.ny.gov/docs/permits_ej_operations_pdf/appafeafinstr.pdf.

The Full EAF itself is available in three parts at:

> http://www.dec.ny.gov/docs/permits_ej_operations_pdf/appafeafpt1.pdf (Part I);
>
> http://www.dec.ny.gov/docs/permits_ej_operations_pdf/appafeafpt2.pdf (Part II);
>
> http://www.dec.ny.gov/docs/permits_ej_operations_pdf/appafeafpt3.pdf (Part III).

The delay until April 1, 2013 and the new Workbooks should come as some relief for practitioners who have been looking for guidance on how the new forms are to be utilized. The EAF Workbooks are designed to assist from the point the lead agency classifies the action as Type I, Type II or Unlisted, and ends at the point where that lead agency issues a positive or negative declaration. The web-based Workbooks include question-by-question guidance for both EAFs, providing the user with hyperlinks to instructions for each individual question.

Dominic Cordisco

The instructions regarding the DEC's draft web-based Workbooks are available at: http://www.nyseaf.net/. Currently, the Short EAF Workbook is open for public comment, and will remain open until October 22, 2012. A copy of the draft Short EAF Workbook is available at: http://www.nyseaf.net/files/printseaf.pdf. The Full EAF Workbook is currently being reviewed and will be posted at a later date.

Together, the new EAFs and the web-based Workbooks reflects changes in environmental concerns in New York State, and the DEC's stated goal to help streamline the EAF process without sacrificing meaningful environmental review.

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Religious Land Use and Institutionalized Persons Act (RLUIPA)—Are Municipal Boards Listening Yet?

By Alyse D. Terhune

Even before a municipal board is faced with a land use application from a religious organization, the municipal attorney should educate public officials on the Religious Land Use and Institutionalized Persons Act (RLUIPA) and its implications. When deciding RLUIPA cases, New York courts apply five principles, (1) religious and educational institutions are beneficial to public welfare, (2) the court will not second-guess a legitimate, sincerely held professed religious practice, and neither should the municipality, (3) municipal boards responsible for implementing local zoning law must make every effort to accommodate religious use, (4) with some limited exceptions (e.g., historic districts), religious use cannot be zoned out of a residential district and, thus, it is unlikely that it can be zoned out of a commercial district, and (5) keeping property in taxpaying hands is not a legitimate purpose of zoning. These five principles underpin RLUIPA (as well as pre-RLUIPA court decisions in New York) and boards must be ever mindful of them throughout the review process.[1] Finally, the recent Second Circuit case, *Fortress Bible Church v. Feiner*,[2] found, for the first time, that when the environmental review mandated by SEQRA[3] is used as a pretext to deny a religious land use application, the reviewing board runs afoul of RLUIPA.

What Is RLUIPA?

RLUIPA is a federal law enacted by Congress and signed by President Clinton in 2000. It is found in 42 U.S.C. § 2000cc *et seq*. Its purpose is to give teeth to a person's right under the Free Exercise Clause of the First Amendment to practice his or her religion free from overly burdensome government encumbrances

The Act's precept is straightforward: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[4] Thus, the judicial "strict scrutiny" standard of review is substantially incorporated into RLUIPA.

"To establish a prima facie case under RLUIPA, [the plaintiff] must allege facts sufficient to show that defendants' conduct in denying the Application: (1) imposes a substantial burden; (2) on the 'religious exercise'; (3) of a person, institution or assembly."[5] If the plaintiff makes a prima facie showing that the land use regulation or decision substantially burdens the free exercise of religion, then the burden of proof shifts to the government to show a compelling interest "except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."[6]

The statute defines the term "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and establishes a rule that "the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[7]

However, the term "substantial burden" is not defined in the statute. Rather, it is a term of art and, thus, fertile ground for litigation. In *Westchester Day School*, the Second Circuit contrasted "substantial burden" in the context of religious practice (requiring an adherent to alter behavior) to "substantial burden" in the context of a land use regulation. "[I]n the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior."[8] The court articulated a 5-part test to help determine whether a land use regulation constitutes a substantial burden:

1. Was the land use decision the result of a generally applicable, legitimate and neutral law?
2. Was the law applied in an arbitrary or capricious manner or was it unlawfully applied?
3. Did the decision coerce the religious organization into changing its behavior?
4. Did the religious organization have quick, reliable and financially feasible alternatives?
5. Was the denial conditional?[9]

If the court finds that land use regulations were applied in violation of RLUIPA, the results can be cata-

strophic for the municipality for a number of reasons, not the least of which is that attorneys' fees may be awarded to a successful plaintiff.[10]

Why Did Congress Enact RLUIPA?

The generally held belief is that Congress' interest in legislation protecting religious freedom was brought about by a number of Supreme Court decisions, but specifically, its decision in *Employment Division v. Smith*.[11] Prior to *Smith*, the "compelling interest" part of the strict scrutiny test had been applied in a way that was perceived by the public as protective of religious freedom. In two notable decisions that preceded *Smith,* exceptions to laws of general application were carved out to protect religious freedom: *Sherbert v. Verner*[12] and *Wisconsin v. Yoder*.[13]

However, the Court applied the compelling interest exceptions articulated in *Sherbert* and *Yoder* unevenly. Religious exemptions were denied in several later cases, primarily upon the grounds that exemptions would interfere with the administration of government programs such as the Fair Labor Standards Act and Social Security.[14]

Then, in *Smith,* the Court held that Oregon could criminalize the use of peyote without providing an exemption for religious use by Native Americans. The majority concluded, "…the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[15] *Smith* promulgated a straightforward rule: the Free Exercise Clause allowed the government to enact otherwise valid, neutral laws of general applicability that incidentally burdened religion without a religious exemption.[16]

The *Smith* rule was viewed as further lowering the government's burden to show a compelling interest, at least so far as it was applied in religious exercise cases. Congress reacted to *Smith* by enacting a series of laws: First, The Religious Freedom Restoration Act ("RFRA") of 1993, which was deemed unconstitutional by the Supreme Court in 1997. Second, The Religious Liberty Protection Act ("RLPA"), passed by the House in 1999, but not considered by the Senate due to fears that the Act could undermine local antidiscrimination measures.[17] Lastly, RLPA was reconstituted and adopted as RLUIPA in 2000. Although RLUIPA was not Congress' first attempt at legislation protecting religious freedom, it has survived judicial scrutiny and has had a profound effect on municipal land use law.[18]

How Is RLUIPA Applied by the Courts?

Even prior to RLUIPA, New York courts were not tolerant of land use decisions that excluded or otherwise restricted religious exercise in the community. The courts review RLUIPA cases with five governing principles in mind.

1. Religion Is Beneficial to Public Welfare

New York case law begins with the assumption that "churches and other religious institutions are beneficial to the public welfare by their very nature and that, therefore, exercises of the police power directed toward determining whether such institutions will harm the public if located in a particular residential area must begin with that assumption."[19] *Jewish Reconstructionist* clarified, in no uncertain terms, that churches could not be excluded from residential zones: "[W]here an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former."[20]

2. A Court Will Not Second-Guess a Legitimate, Sincerely Held Professed Religious Practice

The judiciary's reticence to arbitrate religious practice is well documented in federal case law. In *Thomas v. Review Bd. of Ind. Employment Sec. Div.*,[21] the Supreme Court determined that a Jehovah's Witness who quit his job because his religious beliefs prevented him from participating in the manufacture of war materials was entitled to unemployment compensation. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task…However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[22] The Court stated unequivocally that neither a government agency nor the judiciary could disavow the professed religious belief or practice of a bona fide religious organization or person.

The Court's reticence to differentiate amongst professed religious practice was even more apparent when it determined that a city ordinance prohibiting animal sacrifice for professed religious purposes [practitioners of Santeria] while allowing Kosher slaughter and hunters to bring their kill to their houses was an unconstitutional violation of religious freedom. In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Court reasoned that "[g]iven the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion cannot be deemed bizarre or incredible. Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons."[23]

Similarly, the Second Circuit broadly construes the meaning of a sincerely held "religious practice." "[C]ourts are not permitted to inquire into the central-

ity of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists.… An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are sincerely held and in the individual's own scheme of things, religious."[24]

The reluctance of federal courts to interpret the meaning of "religious exercise" is reflected in New York State decisions. Simply put by the New York Court of Appeals: "Because the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires, courts may not inquire into or classify the content of the doctrine, dogmas, and teachings held by that body to be integral to its religion but must accept that body's characterization of its own beliefs and activities."[25] If the inquiry is not proper for the courts, then it is not proper for the municipal board.

3. Local Boards Responsible for Implementing Zoning Laws Must Make Every Effort to Accommodate Religious Use

Although religious institutions are not exempt from zoning laws, municipal boards must accommodate religious use. However, the extent to which a religious use must be accommodated is fact specific. For example, in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Zoning Bd. of Appeals*, the Second Department annulled the denial of a variance to build a Mormon temple in a residential zone at a height 77% greater than the permitted height because the alternative construction would have increased the cost of the project by $1 to $2 million.[26] In *Genesis Assembly of God v. Davies*, the court determined that the ZBA abused its discretion by not making an effort to accommodate the proposed religious use by imposing reasonable conditions on a parking variance, such as limiting the number of services and attendees.[27] And, in *Mintz v. Roman Catholic Bishop*, the district court of Massachusetts decided that parking and traffic congestion were not sufficient reasons to deny a building permit for the construction of parish center.[28]

4. Religious Use Cannot Be Prohibited in a Residential District; Whether It Can Be Prohibited in a Commercial Zone Is Unclear

In 1956, the Court of Appeals ruled: "It is well established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district (emphasis added)."[29] If a church or other religious organization must, under the law, be accommodated in a residential neighborhood, then it is reasonable to conclude that it might be difficult to restrict in a commercial zone. As the Court of Appeals stated succinctly in *Jewish Reconstructionist, infra,* "[T]he power to decide where churches may not locate becomes the power to say where they may do so. That is impermissible."[30]

5. Generating Tax Revenue Is Not a Legitimate Purpose of Zoning

The question of whether land is used for a religious purpose is often litigated in the form of a tax proceeding.[31] Property owned by a bona fide religious organization is entitled to tax exemption so long as the religious organization or purpose is not a "guise or pretense."[32]

However, the loss of tax revenue will not support the denial of a religious land use application. The Court of Appeals has held that "[k]eeping property in taxpaying hands is not a legitimate purpose of zoning."[33] Furthermore, the tax-exempt status of property is not jeopardized even if the principal use is to generate funds, so long as the funds are to be used for a tax-exempt purpose. In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Town of Ramapo*,[34] the religious organization owned property that it leased to a for-profit entity for the purpose of operating a camp. The money derived from the lease (about $60,000 per year) was set aside for the purpose of building a religious school. The Second Department found that the property was tax exempt because the funds were being put to a religious use, even though not "thereon" the property in question. "The fact that the property is leased or licensed to other parties, or the fact that the owner derives some profit from the use of the property, does not defeat a tax exemption pursuant to Real Property Tax Law § 420-a (1), so long as the primary or principal use of the property is for a tax-exempt purpose of its owner."[35]

What About SEQRA?

Until recently, RLUIPA litigation was limited to the question of whether zoning regulations had been applied permissively. Although each application was subject to environmental review under the State Environmental Quality Review Act (SEQRA), the question of whether an environmental statute might constitute a zoning law under RLUIPA had not been addressed by the courts. That changed in a scathing decision rendered September 24, 2012, by the Second Circuit. In *Fortress Bible Church v. Feiner*, the court held that "when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA."[36] Thus, under certain circumstances, SEQRA can be considered a zoning law for the purpose of RLUIPA.

Reading the *Fortress Bible Church* decision is like reading a primer on what not to do when reviewing a religious land use application (or any application, for

that matter). That the Town acted in bad faith is an understatement. As a threshold matter, religious use was allowed in the zoning district. However, the Court concluded that the Town had acted in bad faith, using SEQRA as a pretext to delay and deny the application. And it had plenty of factual evidence of the Town's bad actions. To wit: the supervisor attempted to "extort" a fire truck from the church; a Town Board member referred to the application as "another church" and repeatedly suggested to the Town Planning Commissioner that he should "stop" or "kill" the project; the Planning Commissioner was replaced when he advised that the Town's traffic concerns had been mitigated and that it could issue a Conditioned Negative Declaration; instead, after the Church declined to donate the fire truck or make some other payment in lieu of taxes, the Town issued a positive declaration, triggering a full environmental review; the Town edited the FEIS to include additional problems without even telling the applicant, and last but not least, Town staff and one Town Board member intentionally destroyed discoverable evidence after it had been advised not to.

The Second Circuit concluded that although the SEQRA process does not automatically implicate RLUIPA, under certain circumstances, it could. The Court applied a four-part test: (1) the SEQRA review process was triggered because discretionary land use approvals were required, (2) the SEQRA process was intertwined with the Town's zoning regulations, (3) during the SEQRA review, the Town focused on zoning issues rather than traditional environmental issues, and (4) "to hold that RLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review."[37]

The Town denied the Church's application relying on its SEQRA Findings. The Second Circuit upheld the District Court's decision to (1) annul the positive declaration and Findings Statement, (2) order the site plan approved for SEQRA purposes, (3) order the Board to grant a waiver from the landscaped parking island requirement, (4) order the Zoning Board to issue a side yard variance, (5) order the Town to issue a building permit, and (6) enjoin the Town from taking any action that would unreasonably interfere with the project. Finally, the Court imposed $10,000 in sanctions for spoliation of evidence.

Fortress Bible Church also considered, as a matter of first impression, whether "evidence of multiple projects that were each treated differently with regard to a discrete issue" rather than a single comparator similarly situated was sufficient to prove the Church's equal protection claim. The court ruled that it was. "[W]here, as here, a decision is based on several discrete concerns, and a claimant presents evidence that comparators were treated differently with regard to those specific concerns without any plausible explanation for the disparity, such a claim can succeed."[38]

Fortress Bible Church broadens future RLUIPA litigation to include the question of whether SEQRA was used to obstruct a religious land use application and potentially opening a municipality's environmental review to strict scrutiny by the courts, the standard of review applied here by the District Court. The Circuit Court, on the other hand, found the Town's actions so egregious that they failed even the rational basis standard of review.

A municipal attorney now has one more reason to advise his boards—early and often—on the implications of RLUIPA and against the kind of bad behavior exhibited in *Fortress Bible Church*.

Endnotes

1. For an excellent primer on municipal board "Do's" and Don'ts," see Kevin J. Plunkett, Esq., "Do's and Don'ts for Municipal Attorneys when Advising Municipal Board Members, Staff and Consultants" on RLUIPA, New York State Bar Association Meeting, October 20, 2007, Municipal Law Section.
2. *Fortress Bible Church v. Feiner*, 2012 U.S. App. LEXIS 20019 (2d Cir. Sept. 24, 2012).
3. State Environmental Quality Review Act, ECL § 8-0101 et seq.
4. 42 U.S.C. § 2000cc(a)(1).
5. *Westchester Day Sch. v. Vill. of Mamaroneck*, 379 F. Supp. 2d 550, 555 (S.D.N.Y. 2005).
6. 42 USCS § 2000cc-2(b).
7. 42 USCS § 2000cc-5(7)(A), (B); *see also, Westchester Day School v. Village of Mamaroneck,* 504 F.3d 338 (2d Cir. 2007) (denial of Jewish day school application to expand facility by 44,000 square feet unlawfully burdened the school's exercise of religion).
8. *Id.* at 348-349.
9. *Id.* at 349-352.
10. "In any action or proceeding to enforce a provision of…the Religious Land Use and Institutionalized Persons Act of 2000… the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). In the seminal case, *Westchester Day Sch. v. Vill. of Mamaroneck,* 504 F.3d 338 (2d Cir 2007), the Second Circuit ultimately determined that (1) prayer and Jewish studies within a private school constitute "religious exercise" under RLUIPA, (2) the construction of a new school and renovation of the old school was necessary to fulfill its religious mission, and (3) the denial of the application imposed a substantial burden to the school's exercise of religion without a compelling governmental interest. The Village of Mamaroneck paid Westchester Day School $4.5 million to settle the RLUIPA claim (the school decided not to pursue its damages claims for an additional $17.25 million in attorneys' fees, increased construction costs and lost funding—but it could have). Karla L. Chaffee and Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA; Lessons for Potential Litigants,* 2 Albany Gov't L. Rev. 437 (2009).

11. 494 U.S. 872 (1990).
12. 374 U.S. 398 (1963) (rational relationship to colorable state interest not sufficient to deny unemployment benefits to Seventh Day Adventist who lost her job for refusing to work on Saturday, the Sabbath of her faith).
13. 406 U.S. 205 (1972) (no compelling interest sufficient to deny Amish litigants exemption from compulsory schooling).
14. *Bowen v. Roy*, 467 U.S. 693 (1986) (SSN required for application for state welfare benefits despite religious objections); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (religious organization not exempt from Fair Labor Standards Act); *United States v. Lee*, 455 U.S. 252 (1982) (Amish must pay social security taxes).
15. *Id.* at 879 (internal quotation marks omitted).
16. For a detailed explanation of the Smith decision and excellent discussion of the decisions leading up to RLUIPA, see Patricia Salkin and Amy Lavine, "The Genesis of RLUIPA and Federalism" at http://ssrn.com/abstract=1081492.
17. Karla L. Chaffe and Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 Albany Gov't L. Rev. 437, 447 (2009).
18. One focus of a recent CLE on RLUIPA was how New York municipalities could avoid RLUIPA litigation because it was so difficult to prevail. To paraphrase one presenter, "The first question the board has to ask before it begins to consider an application from a religious organization is, 'what will the lawsuit look like if we deny?'"
19. 38 N.Y.2d 283, 286-287 (1975).
20. *Id.* at 288.
21. 450 U.S. 707 (1981).
22. *Id.* at 714.
23. 508 U.S. 520, 578 (1993).
24. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (removal of the homeless by the City violates the Free Exercise Clause where the Church established that providing outdoor sleeping space for the homeless effectuates a sincerely held religious belief).
25. *Matter of Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm. of the City of New York*, 55 N.Y. 2d 512, 518 (1982).
26. 296 A.D.2d 460, 462 (2d Dep't 2002).
27. 208 A.D.2d 627, 628-629 (2d Dep't 1994).
28. 424 F. Supp. 2d 309, 321-322 (D. Mass. 2006).
29. *Diocese of Rodchester v. Planning Bd. of the Town of Brighton*, 1 N.Y.2d 508, 522 (1956).
30. 38 N.Y.2d 283, 291 (1975).
31. Real Property Tax Law § 420-a.
32. RPTL § 420-a(1)(b).
33. *Town of Mount Pleasant v. Legion of Christ*, 1 N.Y.3d 122, 129 (2006) (training center sold to religious organization entitled to tax exempt status even though the facility is used to train priests).
34. 72 A.D.3d 869 (2d Dep't 2010).
35. *Id.* at 871.
36. 2012 U.S. App. LEXIS 20019, 13 (2d Cir. Sept. 24, 2012).
37. *Id.* at 18-19.
38. *Id.* at 37-38.

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A Legal Review of Recent Chapter 9 Filings

By Winnie Lam

Introduction

Since 1934, when the first municipal legislation was enacted,[1] Chapter 9 filings have been relatively rare and case law sparse. However, over the past year there have been a number of Chapter 9 filings ranging from a municipality with a population of a little over 7,000 to the high-profile municipality listing $4.23 billion in liabilities. The cases show that when a municipality files for Chapter 9 bankruptcy, relief from creditors is not immediate. The municipality has the burden of proving that it has satisfied the eligibility requirements under §109(c) before a bankruptcy court will grant it Chapter 9 relief. In addition, filing the petition for Chapter 9 may be delayed in certain states. This is because states may impose conditions precedent to a municipality's filing for Chapter 9 federal bankruptcy protection. A municipality in such a state will have to satisfy these conditions even before filing for Chapter 9. This article will review some of the most recent cases.[2]

When Is an Organ of a State Government a "Municipality" as Defined Under the Bankruptcy Code?[3]

One of the challenges the debtor faces after filing the petition for Chapter 9 bankruptcy is that the debtor is ineligible because it has not met one or more of the requirements listed under 11 U.S.C. §109(c). One of the requirements under that section is that the debtor must be a "municipality." Although the term is defined in the Bankruptcy Code, recent cases show the difficulty courts face in determining whether an entity is a "municipality" for purposes of bankruptcy law. In addition, the financing structure of certain projects may make the determination as to whether a debtor is a "municipality," and therefore eligible for Chapter 9, a highly fact-intensive inquiry for the bankruptcy court.

Las Vegas Monorail Corporation

Las Vegas Monorail Corporation ("LVMC") utilized conduit financing, or industrial revenue bond financing, to finance the construction of a four-mile long monorail on the Las Vegas Strip.[4] On January 13, 2010, LVMC filed for Chapter 11 bankruptcy protection. Ambac Assurance Corp ("Ambac"), the insurer on the bonds, moved to dismiss the case, arguing that LVMC is a "municipality" and therefore ineligible to file anything other than a Chapter 9 bankruptcy case.[5] The bankruptcy judge assigned to the case, Judge Markell, determined that LVMC was not a "political subdivision," nor was it a "public agency." "At most, it might be an instrumentality of the State of Nevada."[6] The difficulty was determining what constitutes "an instrumentality of the state."

Judge Markell looked at the Bankruptcy Code's use of municipality and instrumentality and distilled the determination as to what constitutes a municipality into three factual inquiries:[7]

(i) The extent to which the entity has traditional governmental attributes or engages in traditional governmental functions;

(ii) The extent to which the State controls the entity's operations, with elements that go to control of the State's finances having more weight than elements that may simply be general;

(iii) The extent to which the State itself categorizes the entity as a municipality or instrumentality.[8]

Judge Markell looked at the facts in the case and determined that LVMC was not a municipality. Judge Markell wrote that although there was substantial state involvement with the monorail, that involvement was "relatively unique and not designed to protect public finances or the public fisc."[9] In addition, a key component of the transaction was that the State of Nevada would not be liable on the bonds. The bond offering explicitly stated that the only recourse for bondholders was the collateral assigned to the trustee and insurance purchased from Ambac.[10] And although tax-exemption filings with the Internal Revenue Service described LVMC as "an instrumentality of the state of Nevada… controlled by the Governor of the State of Nevada," Nevada does not treat LVMC as a municipality.[11] Therefore, Judge Markell found that LVMC was not a municipality eligible for Chapter 9 bankruptcy and dismissed Ambac's motion to dismiss the case.

Is the Chapter 9 Filing Authorized by the State?

A bankruptcy court must dismiss the municipal debtor's petition if state law does not authorize the Chapter 9 filing. Federal law does not allow municipalities to file for bankruptcy without state authorization. Under 11 U.S.C. §109(c)(2), the debtor municipality must be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such Chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter."[12] In addition, section 903 states that Chapter 9 "does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of the municipality, including expenditures for such exercise…" The two sections "allow states to act as gatekeepers to their municipalities' access to relief under the Bankruptcy Code."[13] In Chapter 9, the bankruptcy court is not concerned with balancing the rights of the debtor and creditors.[14] The bankruptcy court must adhere to the Tenth Amendment and respect the sovereignty of the states.[15]

Suffolk Regional Off-Track Betting Corporation

On March 18, 2011, Suffolk County OTB, a public benefit corporation, filed a petition for Chapter 9 bankruptcy.[16] Churchill Downs, one of the unsecured creditors, filed its objection to the petition, arguing that the Suffolk County Legislature did not have authority to authorize Suffolk OTB's bankruptcy filing under §109(c)(2).[17]

Suffolk OTB conceded that it was not specifically authorized by state law to file its bankruptcy petition. However, Suffolk OTB argued that the requirement of §109(c)(2) was satisfied by compliance with the second clause of that provision, because the bankruptcy filing was specifically authorized by the Suffolk County Legislature, which, according to Suffolk OTB, is "a governmental officer or organization empowered by State law to authorize Suffolk OTB to be a debtor under Chapter 9."[18] The question was whether New York State law empowers the Suffolk County Legislature to authorize Suffolk OTB's bankruptcy filing.

The bankruptcy court determined that (i) state law did not permit the county to authorize a filing *by a separate entity*, such as Suffolk OTB, and (ii) New York State law contained a "comprehensive and detailed regulatory scheme" in the area of off-track betting which preempted any local law on the subject, including the County's resolution.[19] Moreover, the court emphasized that the County resolution made one of the state's public-benefit corporations subject to the Bankruptcy Code, which directly usurped the state's sovereign power, thereby raising a significant Tenth Amendment concern.[20] The bankruptcy court ruled that the county resolution authorizing the debtor to file for Chapter 9 relief exceeded the scope of the county legislature's authority. Therefore, the debtor was not properly authorized to file a Chapter 9 petition, as required by §109(c)(2) of the Bankruptcy Code.

In re New York Off-Track Betting Corporation

On December 3, 2009, NYC OTB, a public benefit corporation which operated a pari-mutuel betting system, filed a voluntary petition for relief under Chapter 9 of the Bankruptcy Code. Three months prior, on September 1, 2009, the Governor of New York State issued an executive order specifically authorizing NYC OTB to file for bankruptcy protection.[21] One of the questions in NYC OTB was whether the Governor was "empowered by State law to authorize" NYC OTB to file for bankruptcy under §109(c)(2).

The bankruptcy judge assigned to the case, Judge Glenn, wrote that the legislature's failure to specifically authorize the Governor to file for Chapter 9 does not bar the governor from taking that action pursuant to executive order.[22] Executive Order No. 27, signed by the governor, granted specific authorization for a municipality to file for Chapter 9.[23] NYC OTB tells us that in New York, even though there is no enabling statute authorizing NYC OTB to file for Chapter 9, specific authorization to file for Chapter 9 can come from "a governmental officer empowered by state law."

Barnwell County Hospital, South Carolina

On October 5, 2011, debtor Barnwell County Hospital filed a voluntary petition for Chapter 9 bankruptcy in the United States Bankruptcy Court for the District of South Carolina.[24] Barnwell County Hospital was created by the South Carolina Legislature to provide hospital facilities to the residents of Barnwell County. In *Barnwell*, one of the issues was whether debtor was eligible for Chapter 9 under §109(c). The bankruptcy court had to first determine whether debtor was a municipality as defined by the Bankruptcy Code. If it was, then debtor is authorized to file for Chapter 9 relief pursuant to South Carolina law.[25]

In *Barnwell*, the court found that the debtor was an instrumentality of the state and that it fell "squarely within the definition under §101(4)."[26] The court also found that debtor satisfied the municipality test applied in the *Connector 2000* case because it was subject to control by public authority. The court reasoned that the debtor is ultimately controlled by the City Council, which is a public authority because its members are elected by the citizens of Barnwell County. Accordingly, the debtor constituted a "municipality" as defined by the Code.

Is the Municipality "Insolvent" as Required by the Bankruptcy Code?

A municipality must be insolvent to be eligible to file for Chapter 9.[27] The term "insolvent," "with reference to a municipality," is a "financial condition such that the municipality is (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due."[28]

The Case of Boise County, Idaho

On March 1, 2011, Boise County filed a petition for Chapter 9 bankruptcy. The question in Boise County was whether Boise County was "insolvent" as required by Chapter 9. The bankruptcy court found that the county's budget deficit and failure to pay a single outstanding judgment debt were not adequate to support a showing of insolvency under §101(32)(C) of the Bankruptcy Code, which requires general nonpayment of debts as they become due.[29] In addition, the court did not find that the $500,000 in medical indigency payments is "due" for purposes of §101(32)(C)(i). "Due" in this context has been defined as "presently, unconditionally owing and presently enforceable."[30] Therefore, the bankruptcy court dismissed Boise County, Idaho's Chapter 9 filing pursuant to §921(c) as the county failed to demonstrate that it was insolvent under §109(c)(3) of the Code.

The Boise County case can be distinguished from the City of Vallejo case in 2009. In Vallejo, the unions argued that the city was solvent, that if Vallejo had taken the "Union's offer to extend the March 2008 modification of the CBAs (collective bargaining agreements), Vallejo could have operated for another year."[31] The 9th Circuit BAP concluded that the bankruptcy court did not err in finding that even if the union's proposal could keep Vallejo out of bankruptcy for another fiscal year, it would not "provide long term solvency beyond the first year."[32]

Can State Law Change the Priority of General Obligation Bondholders in Chapter 9?

General obligation bondholders do not receive preferential treatment in Chapter 9 bankruptcy, unlike special revenue bondholders, who do, under §928 of the Bankruptcy Code. In a Chapter 9, generally speaking, general obligation bonds not secured by a pledge of any specific revenue or assets are treated as unsecured debt. This means that the municipality is not required to make payments of either principal or interest on such bonds during the Chapter 9 bankruptcy. However, the case of Central Falls illustrates that a state may ensure that certain bondholders' interests will be unimpaired in a bankruptcy. The case also reminds us that Chapter 9 does not lift from the municipality the burdens imposed upon it by state laws.

Central Falls, Rhode Island

In 2010, the Rhode Island General Assembly passed a law which states that bonds are secured by a Rhode Island statutory lien on property taxes and general fund revenues.[33] The law specifically protects general obligation bondholders and makes their claims superior to all other claims in bankruptcy. The law states:

> The power and obligation of each city and town to pay its general obligation bonds and notes, whether or not issued pursuant to this chapter, shall be unlimited, and each city and town shall levy ad valorem taxes upon all the taxable property within the city or town for the payment of the general obligation bonds or notes and interest on these bonds or notes, without limitation of rate or amount, except as otherwise provided by or pursuant to law.

As another indication that the Rhode Island legislature takes protecting bondholders seriously, the law also states:

> …any municipal or district employee or official who intentionally violates the provisions of this section shall be personally liable to the city, town or district for any amounts not expended in accordance with such appropriations.

In August 2011, the city of Central Falls became the first Rhode Island municipality to file for Chapter 9 bankruptcy.

May States Revoke a Prior Authorization to File for Chapter 9?

Municipalities need the support of the state government when seeking Chapter 9 relief. States are free to specifically authorize municipal bankruptcies, conditionally authorize municipal bankruptcies, or prohibit filing altogether. The City of Harrisburg case shows that in states that do authorize a Chapter 9 filing, that authorization may be revoked. In such a case, the bankruptcy court can only defer to the state's sovereignty.

City of Harrisburg, Pennsylvania

In September 2010, the City of Harrisburg announced that it would miss a payment on general obligation bonds, which are insured by Assured Guaranty. Three months later, in December 2010, the City of Harrisburg entered the Act 47 program. Act 47 permitted a municipality that was authorized under Pennsylvania law to file a "municipal debt adjustment action" if one of five statutory conditions was met.[34]

On June 30, 2011, the Pennsylvania General Assembly passed Act 26. The act included a provision which restricted the ability of a financially distressed city of the third class, as defined in Act 47, to file a petition for relief under Chapter 9 of the Bankruptcy Code.[35] This meant the City of Harrisburg could not file for Chapter 9 relief.

On October 11, 2011, the City Council for the City of Harrisburg filed a petition for Chapter 9 bankruptcy on behalf of the city. The Commonwealth of Pennsylvania, the County of Dauphin, the city's Mayor, other creditors, and other interested parties objected to the filing and asserted that the City is not eligible for Chapter 9 bankruptcy under §109(c) of the Code.

The *Harrisburg* case presented two issues. The first issue was whether the City Council, without the support of the Mayor or without review by the City Solicitor, had the authority to commence a bankruptcy case on behalf of the City of Harrisburg. The second issue was whether the City of Harrisburg was specifically authorized under state law to be a debtor under the Bankruptcy Code.

On November 23, 2011, the U.S. Bankruptcy Judge presiding over the case dismissed the bankruptcy because it was not authorized by state law. The bankruptcy court wrote that although the City of Harrisburg met at least one of the five conditions and would have been specifically authorized to file a petition under Chapter 9 on the day it filed, Act 26 governed and the bankruptcy filing violated Act 26.[36] The Bankruptcy Code explicitly requires state authorization for a municipality to file for Chapter 9 and it was within Pennsylvania's discretion to revoke its prior authorization under Act 47.

Therefore, the bankruptcy court concluded that the City Council did not have the authority to commence a Chapter 9 filing on behalf of the City of Harrisburg without the approval of the Mayor and/or City Solicitor, and the City of Harrisburg was not specifically authorized under state law to be a debtor under Chapter 9 of the Bankruptcy Code as required by 11 U.S.C. §109(c)(2).[37]

Does a Municipality Need Bond Debt in Order to File for Chapter 9 Bankruptcy?

Two recent Alabama cases held that a municipality does not need outstanding bond debt in order to file for Chapter 9.

Jefferson County, Alabama

On November 9, 2011, Jefferson County filed the nation's largest Chapter 9 municipal bankruptcy to date,[38] listing $4.23 billion in liabilities, including $3.14 billion in sewer debt.[39]

The issue presented by the Jefferson County case is whether a city or county must have bond debt in order to be allowed by Alabama law (state law) to file for Chapter 9 bankruptcy. The undisputed evidence is that Jefferson County has no outstanding bond debt.[40] The vast majority of the county's debt is in the form of sewer warrants.

The attorney for the creditors argued that Jefferson County was not eligible, citing the city of Pritchard's bankruptcy filing in 2009, in which a U.S. Bankruptcy judge dismissed the filing. In *Jefferson County*, U.S. Bankruptcy Judge Thomas Bennett, in his opinion, said that the ability to file a municipal bankruptcy isn't limited to counties or municipalities with bonded debt. Judge Bennett overruled the objections and said in his order that any form of debt—bonds, warrants, promissory notes—can be the basis for an Alabama county to file for bankruptcy.

City of Pritchard, Alabama

On October 9, 2009, the City of Pritchard filed for bankruptcy protection when its pension fund ran dry. The City stopped paying pensioners, breaking a state law requiring it to do so.

There was no evidence that the City of Pritchard had any bond debt. A group of city employees objected to the bankruptcy filing, arguing that Alabama's laws require a municipality to have bond debt in order to qualify for bankruptcy protection.

In August 2010, a U.S. Bankruptcy Court judge ruled that the city of Pritchard was not entitled to file bankruptcy because it did not have outstanding bonds and dismissed the bankruptcy. The City of Pritchard appealed that decision to U.S. District Court in Mobile. The District Court Judge, Kristi DuBose, put the case on hold and asked the Alabama Supreme Court to say whether Alabama law requires bond indebtedness as a condition of eligibility to proceed under Chapter 9.

In April 2012, the Alabama Supreme Court ruled unanimously that Alabama cities are not required to have bond debts in order to seek Chapter 9 bankruptcy protection. The ruling meant the City could now proceed with its filing for Chapter 9 bankruptcy.

Conclusion

These cases demonstrate the pre and post-petition hurdles a municipality will face if it wishes to file for Chapter 9 bankruptcy protection. For a municipality seeking a breathing spell from its creditors, that relief will be delayed as the order for relief is not entered when the municipal debtor files its petition, but, rather, only if the petition is not dismissed.[41] On top of this, a bankruptcy court has the responsibility to "review Chapter 9 petitions with a jaded eye. Principles of dual

sovereignty, deeply embedded in the fabric of this nation and commemorated in the 10th Amendment of the United States Constitution, severely curtail the power of bankruptcy courts to compel municipalities to act once a petition is approved."[42] These cases demonstrate the fact-based determinations that bankruptcy courts must make in resolving Chapter 9 eligibility issues. They also demonstrate that access to chapter 9 bankruptcy will vary from state to state.

Endnotes

1. Pub. L. No. 251, 48 Stat. 798 (1934).
2. We have also included select cases that were filed prior to 2011.
3. 11 U.S.C. §101(40) defines a municipality as "a political subdivision or public agency or instrumentality of a State."
4. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 774 (Bankr. D. Nev. 2010).
5. *Id.* at 774.
6. *Id.* at 775.
7. *Id.* at 788 and 789.
8. *Id.* at 795.
9. *Id.* at 797.
10. *Id.* at 773.
11. *Id.* at 800.
12. 11 U.S.C. §109(c)(2).
13. *In re City of Vallejo*, 403 B.R. 72, 76 (Bankr. E.D. Cal. 2009).
14. *In re New York City Off-Track Betting Corporation*, No. 09-17121 (MG), 2011 BL 18849, at *10 (Bankr. S.D.N.Y. January 25, 2011).
15. §§ 903 and 904 of the Bankruptcy Code curtail a bankruptcy court's powers in a Chapter 9 case. In addition, the Tenth Amendment to the U.S. Constitution states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
16. *In re Suffolk Regional Off-Track Betting Corp.*, 462 B.R. 397, 401 (Bankr. E.D.N.Y. 2011).
17. *Id.* at 402.
18. *Id.* at 415.
19. *Id.* at 418.
20. *Id.* at 420.
21. *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 267 (Bankr. S.D.N.Y. 2010).
22. *Id.* at 271.
23. *Id.* at 268.
24. *In re Barnwell County Hosp.*, No. 11-06207-dd Chapter 9, 2012 BL 128312, at *2 (Bankr. D.S.C. May 23, 2012).
25. *Id.* at 13.
26. *Id.* at 14.
27. 11 U.S.C. §109(c)(3).
28. 11 U.S.C. §101(32)(C).
29. *In re Boise County*, 465 B.R. 156, 171 (Bankr. D. Idaho 2011).
30. *Id.* at 172, (citing *Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares*, 143 F.3d 1381, 1385 (10th Cir. 1998)).
31. *Local 1186 v. City of Vallejo (In re City of Vallejo)*, 408 B.R. 280, 290 (B.A.P. 9th Cir. 2009).
32. *Id.* at 294.
33. R.I. Gen. Laws §45-12-1.
34. *In re City of Harrisburg, PA.*, 465 B.R. 744, 754 (Bankr. M.D. Pa. 2011). Section 261 of Act 47 authorizes the City to file for federal bankruptcy protection (1) if the coordinator recommends such action; (2) if there is imminent jeopardy of creditor action which will negatively affect the City's ability to provide health and safety services; (3) if creditors reject a proposed recovery plan; (4) if federal bankruptcy relief can potentially solve the City's financial distress; or (5) if the City fails to adopt or carry out a financial recovery plan.
35. *Id.* at 751. The specific language in the act provides that "[n]otwithstanding any other provision of law, including Section 261 of [Act 47], no distressed city may file a petition for relief under 11 U.S.C. Ch. 9 (relating to adjustments of debts of a municipality) or any other federal bankruptcy law, and no government agency may authorize the distressed city to become a debtor under 11 U.S.C. Ch. 9 or any other federal bankruptcy law."
36. *Id.* at 755.
37. The Council members challenged the dismissal. On May 15, 2012, the appeals court ruled that council members cannot challenge the dismissal.
38. Stockton, California, filed its petition for Chapter 9 bankruptcy on June 28, 2012 and is the nation's most populous to file for Chapter 9.
39. Jefferson County's filing replaced the previous biggest municipal bankruptcy in history ($1.7 billion by Orange County, Calif. in 1994).
40. *In re Jefferson County*, No. 11-05736-TBB9, 2012 BL 76742 (Bankr. N.D. Ala. Mar. 4, 2012).
41. 11 U.S.C. §921(d).
42. *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010).

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The Role of a Board of Assessment Review and a Bankruptcy Court in Determining a Real Property Tax Assessment

By Karen M. Richards

11 U.S.C. §505 provides that a bankruptcy court "may determine the amount or legality of any tax, fine or penalty relating to a tax, whether or not previously assessed, whether or not paid" as long as the amount or legality was not "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the [bankruptcy] case."[1] It has long been recognized by New York courts that a review of a real property tax assessment by a municipality's assessment board of review constitutes adjudication by a judicial or administrative tribunal of competent jurisdiction.[2]

In the seminal case of *In re Onondaga Plaza Maintenance Co.*, the Second Circuit recognized that the New York State Real Property Tax Law ("RPTL") sets forth procedures by which taxpayers may challenge property tax assessments and empowers a board of assessment review to hear and determine complaints in relation to real property assessments.[3] A board of assessment review can administer oaths, take testimony, hear proofs in regard to any complaint and the assessment to which it relates, and require that the complainant or his agent or representative appear at the hearing to be examined.[4] Following the hearing, a board of assessment review is required to give notice of its determination, with the notice advising the complainant that he can seek judicial review if he is dissatisfied with the determination.[5] These powers make a board of assessment review quasi-judicial in nature because it "has the responsibility of making findings of fact and applying the law before coming to a fair judgment in connection with complaints filed contesting an assessment."[6] Since New York law provides a property owner with a full and fair opportunity for a hearing by a board of assessment review, a board of assessment review that complies with the procedures in RPTL and makes a determination regarding the contested assessment is a judicial or administrative tribunal of competent jurisdiction.[7]

The purpose of 11 U.S.C. §505 is to "protect creditors from the prejudice caused by a debtor's failure to contest tax assessments. It was not enacted to afford debtors a second bite at the apple at the expense of outside creditors."[8] Indeed, Congress built into section 505 "certain safeguards to protect states from unwarranted federal intrusion" because it "never intended to create a second tax adjudication system."[9] One fundamental safeguard is: if a real property tax assessment was already addressed before the commencement of a bankruptcy proceeding by a board of assessment review, a bankruptcy court is prohibited from determining the amount of tax liability.[10]

Thus, courts have consistently rejected arguments that a debtor is entitled to the intervention of a bankruptcy court merely because a determination of a board of assessment review is subject to further *de novo* review by a state court.[11] "[T]he fact that the decision of an administrative tribunal may be reviewed *de novo* hardly means that the decision did not constitute an adjudication."[12] Section 505 "makes it clear that adjudication by an entity such [an assessment board of review] was contemplated by Congress when it referenced adjudication by either a judicial or administrative tribunal" and "[t]here is no language in the statute to indicate that the adjudication must be 'final.'"[13]

If a claim was not adjudicated by a board of assessment review or another judicial or administrative tribunal of competent jurisdiction prior to the commencement of a bankruptcy proceeding, a bankruptcy court "may" determine the amount of a tax, but it is not required it to do so.[14] In deciding whether to exercise their authority under 11 U.S.C. §505 to determine unadjudicated tax issues, bankruptcy courts have generally considered six basic factors. These factors are: (1) the complexity of the tax issue to be decided; (2) the need to administer the bankruptcy case in an expeditious, orderly and efficient manner; (3) the burden on the bankruptcy court's docket; (4) the length of time which would be required for trial and decision; (5) the asset and liability structure of the debtor; and (6) the prejudice to the debtor and to the taxing authority and creditors.[15]

The first factor, the complexity of the tax issue, was scrutinized by the court in *In re Lyondell Chemical Co.*, which involved valuing an oil refinery in Texas in the range of $1 billion to $1.4 billion.[16] The bankruptcy court realized that valuing the refinery would require consideration of a number of complex issues and "on

a matter that involves valuation of an oil refinery, knowledge of the refining business is likely to be useful—a matter where [the bankruptcy judge in New York would] bring nothing to the table, but a Texas court very well might."[17] After a careful review of the other five basic factors, the bankruptcy court abstained from determining the amount of property tax payable by the debtor.

In *In re The Railroad Street Partnership*, the bankruptcy court analyzed whether deciding the matter would provide a more expeditious resolution of the tax assessments than waiting for a determination from the state court.[18] The debtor argued that the four to eleven months that it would take the case to reach trial in the state court would have an immediate impact on its plan and its ability to obtain refinancing. However, the bankruptcy court was uncertain whether it could make a determination any sooner than the state court, and therefore, after considering this second factor and others, it concluded that reviewing the assessment was unwarranted and inappropriate.[19]

The third factor is the burden on a bankruptcy court's docket, and the fourth factor is the length of time necessary to conduct the hearing and to render a decision thereafter. If the court's docket is full, and if a trial on the valuation will be lengthy, a bankruptcy court is likely to abstain from hearing the case.[20]

The asset and liability structure of the debtor, the fifth factor, was examined in *In re Delafield 246 Corp*.[21] In this case, the bankruptcy court rejected the debtor's argument that its ability to confirm a plan and reorganize rested on a favorable disposition of the tax issues because the twenty-four parcels of property owned by the debtor appreciated in value more quickly than the city's interest on delinquent taxes had accrued.[22]

This factor was also reviewed by the bankruptcy court in *In re Onondaga Plaza Maintenance Co., Inc.*, where the debtor was a single asset real estate case with only one debtor, the City of Syracuse, and there were no unsecured creditors awaiting distribution by the debtor.[23] The court noted that other courts abstained from reviewing tax disputes in similar circumstances because adjudicating the tax assessment under these circumstances would not expedite any distribution to unsecured creditors since there were none.[24] It therefore denied the debtor's motion seeking review of the assessment of the property.[25]

In *In re New Haven Projects Ltd. Liability Co.*, the sixth factor, the prejudice to the debtor and the taxing authority and creditors, was the focus of the bankruptcy court's decision to abstain from redetermining the debtor's tax liability.[26] The court noted that some factors favored exercising jurisdiction under §505.[27] However, overshadowing those factors was the fact that any benefit to be derived from exercising its discretion to conduct a redetermination of tax liability would create "an inappropriate windfall" to the debtor, its affiliates, insiders, and related controlling parties and entities at the "great expense" of the city and the tax lien purchasers.[28] The court also observed that the unsecured creditors would not meaningfully benefit from §505 review because the amount of unsecured debt was *de minimus*.[29] Reviewing the tax assessment under these circumstances would "def(y) the spirit" and "frustrate" the statute's purpose of protecting creditors from a debtor's failure to contest tax assessments.[30]

Bankruptcy courts are not limited to analyzing only the six basic factors. They can, and often do, consider other factors. For example, they are cognizant that determining only one tax year and leaving other tax years for a state court to determine could result in inconsistent assessments. One bankruptcy court recognized that "uniformity of assessment is of 'significant importance'" and concluded that a determination by it would be unwarranted and inappropriate, even though it "empathized" with the debtor's desire to expedite the process in order to obtain some semblance of certainty as it formulated its reorganization plan.[31]

In conclusion, a bankruptcy court has discretionary authority to determine a real property tax assessment if it was not previously adjudicated by a judicial or administrative tribunal of competent jurisdiction, such as a board of assessment review. In determining whether to exercise this discretion, a bankruptcy court must first determine if abstention is appropriate. If abstention is not appropriate, a court then considers a number of factors to ascertain if its review would further the bankruptcy statute's purpose of protecting creditors from the prejudice caused by a debtor's failure to contest a tax assessment.

Endnotes

1. 11 U.S.C. §505(a)(1).
2. *In re Onondaga Plaza Co., Inc.*, 206 B.R. 653 (Bankr. N.D.N.Y. 1997).
3. *Id.* at 656.
4. *Id. citing* RPTL §525(2).
5. *Id. citing* RPTL §527.
6. *Id. citing* RPTL §525(4). Further, the court noted that New York's law provided an alternative procedure for holding hearings on complaints should a board of assessment review fail to meet for the purpose of holding hearings on complaints.
7. *Id.*
8. *In re New Haven Projects Ltd. Liability Co.*, 225 F.3d 283, 290 (2d Cir. 2000), *cert denied*, 531 U.S. 1150 (2001).
9. *Id.* at 289 n.3.
10. 11 U.S.C. §505(a)(2)(A); *In re Cody*, 338 F.3d 89, 94 (2d Cir. 2003).
11. *In re The Railroad Street Partnership*, 255 B.R. 644, 647 (Bankr. N.D.N.Y. 2000).

12. *In re Cody*, 338 F.3d at 96.
13. *In re The Railroad Street Partnership*, 255 B.R. 644, 647 (N.D.N.Y.2000)(finding that adjudication by the City of Syracuse Board of Assessment Review triggered the jurisdictional bar of §505(a)(2)(A) despite the pendency of a state court proceeding to review the tax liability determination of the City of Syracuse Board of Assessment Review and declining to determine the assessments).
14. 11 U.S.C. §505(a)(1).
15. *In re The Railroad Street Partnership*, 255 B.R. at 647.
16. *In re Lyondell Chemical Co.*, 2010 WL 1544411 (Bankr. S.D.N.Y. 2010).
17. *Id.* at *2.
18. *In re The Railroad Street Partnership*, 255 B.R. 644 (Bankr. N.D.N.Y. 2000).
19. *Id.* at 648.
20. *In re Lyondell Chemical Co.*, 2010 WL 1544411 at *3.
21. *In re Delafield 246 Corp.*, 368 B.R. 285, 295 (Bankr. S.D.N.Y. 2007).
22. *Id*. at 295.
23. *In re Onondaga Plaza Co., Inc.*, 206 B.R. at 656-57.
24. *Id.*
25. *Id.*
26. *In re New Haven Projects Ltd. Liability Co.*, 225 F.3d 283 (2d Cir. 2000).
27. *Id.* at 289.
28. *Id.* at 286.
29. *Id.*
30. *Id*. at 289-290.
31. *In re The Railroad Street Partnership*, 255 B.R. at 648; *see also In re New Haven Projects Ltd. Liability Co.*, 225 F.3d at 287 ("the need to maintain a uniformity of tax assessments may certainly be considered by a court in determining whether to reassess taxes under §505").

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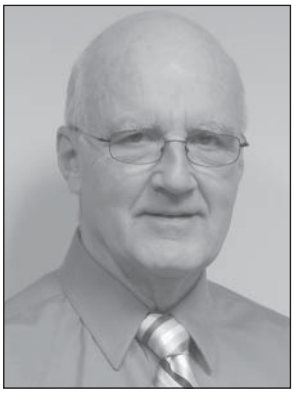
County Enjoined from Tax Foreclosure on Property Owned by Indian Tribe

By Robert C. Batson



The District Court for the Western District of New York recently ruled that an Indian tribe's sovereign immunity precludes a county from foreclosing on tribally owned real property for failure to pay *ad valorem* property taxes.[1]

The Cayuga Indian Nation of New York (the "Tribe") is a federally recognized Indian tribe that owns real property in Seneca County, New York (the "County"). The land is within the boundaries of the 64,000-acre reservation acknowledged by the Treaty of Canandaigua in 1794 (the "1794 Reservation").[2] The Tribe sold the entire reservation to New York State in transactions in 1795 and 1807.[3] The Tribe has recently purchased on the open market several parcels within the boundaries of the 1794 Reservation.

Seneca County claims that it is entitled to *ad valorem* property taxes on the parcels, while the Tribe contends that it is not obligated to pay them. After failing to collect the taxes, the County initiated foreclosure proceedings in New York State Supreme Court.[4] The Tribe then commenced an action in the U.S. District Court for the Western District of New York seeking preliminary injunctive relief enjoining the County from foreclosing on the property.

In determining that the Tribe's motion for an order enjoining the foreclosure must be granted, the Court stated:

> Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties, unless Congress authorizes it to do so, or unless the Cayuga Indian Nation waives its sovereign immunity from suit. Congress has not authorized Seneca County to sue the Cayugas, and the Cayugas have not waived their sovereign immunity. Consequently, the Cayugas' motion for an order enjoining the foreclosure actions must be granted.[5]

Understanding the outcome of this case requires addressing two questions: (1) Why is real property owned by an Indian tribe subject to taxation by a political subdivision of a state; and (2) Why can't foreclosure be used to collect the tax?

If the Tribe had not sold its reservation to New York State, it would have sovereign authority over the land, excluding any claim to jurisdiction by New York State, Seneca County, or any other political subdivision of the State.[6] In a previous action, the Tribe contended that the sale of the land was in violation of Federal law and therefore void.[7] While agreeing that New York State violated Federal law when it purchased the land, the Court denied the Tribe's request for possession of the claimed land, ruling that ejectment was not a proper remedy.[8] After a jury trial, the District Court awarded the Tribe trespass damages.[9] The Second Circuit Court of Appeals reversed the District Court based on equitable considerations.[10]

The Tribe then purchased the parcels in question on the open market, and claimed sovereign authority over the land based on a theory of unification of its aboriginal title (which arguably had never been legally extinguished) with the fee title. In 2005, the U.S. Supreme Court rejected a similar claim of sovereign immunity from state and local taxation by the Oneida Indian Nation, which had similarly purchased land in the area of its 1794 reservation.[11]

> We now reject the unification theory… and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.[12]
>
> Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue.[13]

Seneca County collects delinquent real property taxes through an in rem foreclosure proceeding pursuant to

Article 11 of the New York Real Property Tax Law.[14] The Court held that the County "does not have the right to collect those taxes by suing to foreclose on the properties, unless Congress authorizes it to do so, or unless the [Tribe] waives its sovereign immunity from suit."[15] Since neither of those conditions has been met, the Tribe's motion for an order enjoining the foreclosure action was granted.

In 1998, the U.S. Supreme Court reaffirmed the federal common law doctrine that Indian tribes cannot be sued unless Congress authorizes the suit or the tribes waive its immunity.[16] This principle was cited by the Second Circuit Court of Appeals in affirming an injunction against Madison and Oneida Counties from foreclosing on the properties of the Oneida Indian Nation.[17] The Panel concluded that the Oneida Indian Nation was "immune from suit under the long-standing doctrine of tribal sovereign immunity. The remedy of foreclosure is therefore not available to the counties."[18]

These cases involve "two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." By purchasing the land, the Tribe did not regain its sovereign authority that would preclude local taxation. Thus, Seneca County is authorized to impose the tax, but it is not authorized to take legal action to collect the tax. Judge Cabranes' concurring opinion in *Oneida* best summarizes the result here:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed. This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law.[19]

The County also argued that because the foreclosure action is an in rem proceeding, tribal immunity from suit should not apply. This issue was raised in the action involving the Oneida Nation and rejected by the Northern District:

> It is of no moment that the state foreclosure suit at issue here is *in rem.* What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem,* when it is, in actuality, a suit to take the tribe's property.[20]

While the counties argued this point in the appeal to the Second Circuit, the Western District noted that "although the Panel did not discuss Defendant's argument about *in rem* proceedings in the decision, it obviously considered and rejected it."[21]

While not at issue in this case, there was some discussion about whether the Tribe can claim sovereign immunity from foreclosure proceedings as to properties outside the geographic boundaries of its 1794 Reservation:

> On this point, the Court finds one of Plaintiff's statements at oral argument to be particularly interesting. Specifically, Plaintiff's counsel indicated that the Tribe does not claim to have sovereign immunity against tax foreclosure proceedings on all real property that it owns, regardless of location, but instead, only claims such immunity with regard to its property within the geographic boundary of the Cayuga Reservation as established by the Treaty of Canandaigua. In other words, Plaintiff maintains that it has sovereign immunity from suit as to foreclosure actions against properties within the Reservation, which it maintains has never been disestablished, but not as to properties outside the Reservation. This argument seems to admit that the Cayugas' ability to claim sovereign immunity from suit is inherently tied to its ability to exercise at least some amount of sovereign authority over the land.[22]

The Second Circuit addressed this question in the *Oneida* foreclosure case, indicating that sovereign immunity from suit applied even to foreclosure actions involving property that was never part of an Indian reservation.[23] In 1998, the U.S. Supreme Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[24] In any event, to invoke this argument, the County would need to show that the Cayuga Reservation was disestablished. In the *City of Sherrill* litigation, the Second Circuit rejected the defendants' contention that the Oneida Reservation was disestablished by the 1838 Treaty of Buffalo Creek.[25] While the Supreme Court reversed the Circuit Court, it did not reach the question of reservation disestablishment.[26] Following the Second Circuit, the District Court for the Northern District of New York rejected the argument that the 1838 Treaty of Buffalo Creek disestablished the Cayuga Reservation.[27] If the Tribe ultimately loses on the issue of sovereign immunity, it has two other viable grounds to challenge the foreclosure.

The first ground is based on Federal law. The Indian Trade and Intercourse Act ("Nonintercourse Act") prohibits the "purchase, grant, lease, or other conveyance" of land from "any Indian nation or tribe of Indians" unless it is pursuant to a "treaty or convention entered into pursuant to the Constitution."[28] In the *Oneida* foreclosure case, the Northern District found that "[p]roceeding with the state court foreclosure would result in the transfer of title to land owned by the Nation to the County—alienation of Indian land. This is precisely what is prohibited by the Nonintercourse Act."[29]

The second ground for challenging foreclosure if the sovereign immunity fails is based on New York State Law. New York's Real Property Tax Law provides that real property owned by an Indian tribe within an Indian reservation is exempt from taxation.[30] In holding that Madison County may not foreclose on lands of the Oneida Indian Nation of New York, the Northern District stated:

> The properties at issue are located within the Nation's reservation. Pursuant to state law, taxes should not have been assessed against the Nation's properties and such properties are exempt from taxation. Therefore, the County's assessment of taxes upon the property and its attempts to foreclose for non-payment of such taxes is contrary to state law.[31]

On remand from the Supreme Court, the Second Circuit declined to exercise supplemental jurisdiction over claims arising under state law, and vacated the District Court's determination that the Oneida Indian Nation is entitled to property tax exemptions under state law. It remanded to District Court with instructions to dismiss the state law claims without prejudice.[32]

It is likely that Seneca County will appeal this decision and ask the Court of Appeals for the Second Circuit to revisit the question of tribal sovereign immunity. It is unlikely that the County will prevail unless it can bring this matter to the Supreme Court and persuade it to reexamine its decision in *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*

Endnotes

1. *Cayuga Indian Nation of N.Y. v. Seneca County*, 2012 WL 3597761 (W.D.N.Y. 2012).
2. Treaty with the Six Nations, November 11, 1794, 7 Stat. 44.
3. *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990), *rev'd on other grounds, Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. den.*, 547 U.S. 1128 (2006). The Indian Trade and Intercourse Act (codified at 25 U.S.C. § 177) prohibits all conveyances of Indian land "except where such conveyances were entered into pursuant to the treaty power of the United States" (citing *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985)). The 1795 and 1807 transactions were never ratified by the President with the advice and consent of the Senate as required by Article II, Section 2 of the U.S. Constitution.
4. *Seneca County*, supra, note 1.
5. *Id.* at 5.
6. *Worcester v. Georgia*, 31 U.S. 515 (1832). *See, Williams v. Lee*, 358 U.S. 217 (1959). *See also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
7. The Tribe requested a declaration that it is the owner of all the land in the 1794 reservation, and that the court restore it to immediate possession of all the land claimed. District Court certified a defendant class of landowners. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2005), *cert. den*, 547 U.S. 1128 (2006).
8. *Cayuga Indian Nation v. Cuomo*, No. 60-CIV-930, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) "…monetary damages will produce results which are as satisfactory to the Cayugas as those which they could properly derive from ejectment." *Id.* at 79.
9. *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001).
10. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. den.*, 547 U.S. 1128 (2006).
11. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).
12. *Id.* at 213.
13. *Id.* at 202-203.
14. *Seneca County, supra*, note 1.
15. *Id.* at 2.
16. *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998).
17. *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010).
18. *Id.* at 151. The Supreme Court vacated the Second Circuit's decision on procedural grounds when the Oneidas waived sovereign immunity. *Madison County v. Oneida Indian Nation of N.Y.*, 131 S.Ct. 704 (2011). The Supreme Court did not reach the merits of the Second Circuit's determination that the Oneida Nation is immune from suit in the absence of a waiver of sovereign immunity or authorization of the suit by Congress.
19. *Id.* at 163.
20. *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005).
21. *Seneca County, supra*, note 1 at 7.
22. *Id* at 6.
23. *Oneida Indian Nation*, *supra*, note 17.
24. *Kiowa Tribe,* note 16 at 760.
25. *Oneida Indian Nation of NY v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003).
26. *City of Sherrill,* note 11. In footnote 9, the Supreme Court stated: "The Court has recognized that 'only Congress can divest a reservation of its land and diminish its boundaries.'" *Solem v. Bartlett,* 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); see also 18 U.S.C. § 1151 (defining Indian country); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation.). The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation, as Sherrill argues."
27. *Cayuga v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004). After the Supreme Court decided *City of Sherrill*, the

Second Circuit remanded with instructions to reconsider, and the district court vacated its earlier injunction, holding that the Cayuga Nation does not enjoy sovereign immunity from local zoning. The court did not disturb its earlier determination that the Cayuga reservation never terminated. *Cayuga v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005).

28. 25 U.S.C. § 177.

29. *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219 (N.D.N.Y. 2005). In affirming on the ground of sovereign immunity, the Second Circuit did not reach other rationales relied upon by the District Court. *Oneida Indian Nation*, note 17.

30. Real Property Tax Law § 454, Indian Law § 6.

31. *Oneida Indian Nation*, note 29 at 231.

32. *Oneida Indian Nation of NY v. Madison County*, 665 F.3d 408 (2011).

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Welcome to the Student Editors of the *Municipal Lawyer*

The Municipal Law Section is pleased to be partnering with Touro Law Center for the production of the *Municipal Lawyer.* Dean Patricia Salkin will continue to serve in her role as editor-in-chief and Touro Law Center students Cynira Clay and Allen Shayanfekr have been awarded Municipal Law Fellowships and will serve as student co-editors of the *Municipal Lawyer*.

(l-r) Cynira Clay, Patty Salkin and Allen Shayanfekr

Cynira Clay is a third-year law student focusing her studies on government law, national security, and legislative practice. Prior to beginning her studies at Touro Law Center, she worked at a private civil practice firm where she gained hands-on experience in trial work and case law research. She gained invaluable skills and knowledge working one-on-one with clients and focusing on their individual needs, but she knew she wanted her work to impact many different cultures, ethnicities, and nationalities. She recently completed an internship at the Nassau County Attorney's Office. There, she spent the summer working in diverse areas of law such as general litigation, labor, torts, and criminal law, gaining first-hand knowledge of working within a municipality and focusing on public policy and the law. Cynira was honored to be chosen as a Municipal Law Fellow and looks forward to working closely with the Section on topics that offer a wide range of interests in municipal law. She stated, "I am excited to begin researching and editing articles that have an impact on social justice and the lives of countless individuals in and beyond the local community."

Allen Shayanfekr is currently a third-year law student whose interests include contractual, real estate, bankruptcy, tax, trust and estate, business, land-use, and finance work. He interned for a semester at the American Civil Liberties Union, spent a summer working closely with a New York State Bankruptcy Trustee, and most recently underwent an intensive licensing procedure to become a National Title Producer. Allen works closely with a title insurance company as its title producer in 29 states. Allen recently joined Touro Law's Mortgage Foreclosure and Bankruptcy Law Clinic where he aids those in need. On being named a Municipal Law Fellow Allen said, "I am thrilled at this opportunity to work as co-editor of the *Municipal Lawyer* and work closely with Dean Salkin and the members of the Municipal Law Section."

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