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Prosecutions of Attorneys and Judges for Honest Services Fraud in the Cauldron of *Skilling v. United States*

By Richard A. Dollinger

In 2010, the United States Supreme Court in *Skilling v. United States*[1] held that an undisclosed conflict of interest could not be the basis for an honest services mail fraud conviction.[2] But, while the Court closed the door on one species of corruption, federal prosecutors have continued to assert honest services fraud charges against attorneys and judges relating to breach of their fiduciary duties to their clients and the public.[3]

In the last two years, a string of prosecutions, refocused in the light of *Skilling*, suggest that prosecutors have re-sharpened an old weapon in their fight against corruption in the legal profession. The Code of Professional Responsibility and other ethical rules and regulations, combined with conspiracy and "aiding and abetting" indictments, are more frequently reaching conduct by attorneys who scheme to defraud the public or their clients. At the crux of these indictments, the government seeks to establish an illegal motive in a scheme to defraud by evidence that the attorney or judge has violated their professional standards as expressed either in a Code of Judicial Conduct or the state's Code of Professional Responsi-

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Inside

NYSBA

A Message from the Chair

This is an exciting time to be involved in government law and practice, whether you represent local government or private clients interacting with local governments. Today we are dealing with new issues presented by last year's state-mandated tax cap, with continued economic stagnation and reduced tax revenue and state funding for local governments, with the movement to convert unsold luxury housing to rental units, and with the inability of seniors to afford the senior housing built over the past boom years. These new realities create a greater opportunity for, and challenge to, municipal attorneys in facilitating government innovation in the delivery of services. At the same time, attorneys representing private parties in dealing with local government must keep abreast of the 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.

SAVE THE DATES: Our Fall Meeting will be held on October 12-14, 2012, at the Otesaga in Cooperstown, New York. Our program Co-Chairs Adam Wekstein, Owen Walsh and Tom Wassel have been working to create a timely program which will include some of the following programs:

- FOIL and Open Meetings Law Update, including the recent White Plains case involving a Board of Ethics compliance obligations;
- Public Authorities Accountability Act and the Office of the State Comptroller's newly aggressive approach to the use of Local Development Corporations;
- Dealing with the impacts of the tax cap on collective bargaining and other municipal functions—one year in;
- Potential impacts on municipalities resulting from consolidation of state agencies and analysis of the SAGE Commission report due in June;
- Update on legislation and court decisions, including new municipal procurement legislation;
- Intra-municipal Conflicts and the use of alternative dispute resolution strategies to resolve.

I also encourage you to make the most of your Section membership by becoming involved in the great work of our committees: Employment Relations, Ethics and Professionalism, Government Operations, Land Use and Environmental Law, Legislation, Membership, Municipal Finance and Economic Development, Green Development, and Economic 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 ww.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**.

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

Thank you to the Section members who are more actively engaging in the work of the Section and contributing outstanding substantive content for the *Municipal Lawyer*. This issue features a series of articles addressing land use and environmental law, municipal ethics, labor and employment law, public finance, Open Meetings Law and municipal liability.

Charles Gottlieb's article provides an update on many of the issues surrounding hydraulic fracturing in New York including the status of the rulemaking process at DEC, legislation making its way through the Legislature, and a discussion of the recent trial court cases upholding local government authority under the Municipal Home Rule Law to prohibit the use in all zoning districts. Anthony Gioffre III, Lucia Chiocchio and Daniel Laub examine recent developments in federal law and policy regarding the siting of wireless facilities, offering suggestions on how to make certain that local regulations are in compliance with federal law. Alita Giuda revisits the application of the balancing test for government exemptions from municipal zoning, and Noelle Crisalli Wolfson provides the popular land use case law update.

On the ethics front, Lisa Fleming Grumet addresses the challenging ethical issues that routinely arise when municipal attorneys interact with members of the public. She offers some guidance for attorney conduct consistent with Rules 4.2 and 4.3. Steven Leventhal pitches the idea that the State Bar Association should change the name of the Professional Ethics Committee to the Professional Conduct Committee given the move from the Code of Professional Responsibility to the Rules of Professional Conduct. Judge Richard Dollinger provides a thoughtful article with a caution to lawyers and judges who may be subject to prosecution under the honest services fraud statute in light of the U.S. Supreme Court's decision in *Skilling* through violations of the Code of Judicial Conduct or the Rules of Professional Responsibility.

The tax cap, or more accurately, the "Tax Levy Limitation Law," is discussed by Douglas Goodfriend, who analyzes the law in the context of the State constitution and examines, among other things, the question of whether capital debt service can be excluded from the cap. A republished blog posting from the Public Authorities Blog by Amy Lavine sheds light on the subject of Personal Income Tax (PIT) bonds in New York.

As local governments continue to look for ways to restructure, Terry O'Neil and Brian Murphy raise issues related to the Taylor Law with respect to municipal consolidation and dissolution. Harvey Randall contributes a case update altering members to the recent Court of Appeals decision in *Sheeran*, overturning the Third Department's decision discussed in this publication last year dealing with leaves of absence.

Karen Richards explores the question of "actual notice" to a municipality when petitioning for late notice of claims when a police report is at issue. The location of public meetings to satisfy the Open Meetings Law is discussed by Daniel Gross, with a particular examination of what happens when there is a larger than expected public turnout.

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.

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bility. In this debate, the potential conversion of ethical violations into proof of illegal motive is a harbinger of increased ethical scrutiny of lawyers, especially those who interact with public officials, governments and judges.

A Brief History of the Honest Services Wire Fraud Statute

Before discussing the use of the honest services wire fraud statute against lawyers and judges, the history of the statute deserves a quick summary. Enacted more than a century ago, the honest services requirement was enshrined in 18 U.S.C. §1346 and was interpreted broadly to provide a basis to indict anyone who, while using the mail or wires,[4] breached their duty of honest services to others.[5] Broadly embraced by prosecutors to attack political corruption and loss of "the intangible right to honest services," the statute was used as an adjunct to traditional bribery and kickback statutes, until *McNally v. United States*.[6]

In *McNally*, the Supreme Court struck down the statute as overly broad when applied to a Kentucky insurance commissioner who let insurance contracts to companies which, through circuitous means, shared commissions with companies in which the Commissioner had an interest.[7] While *McNally* clipped the wings of prosecutors, an alert Congress restored the fight against corruption by adding an amendment to Title 18 that resurrected the broad scope of section 1341 and 1346.[8] Restored by Congress to its pre-*McNally* vigor, section 1346 routinely was used to prosecute public officials for violations of their duty of honest services, which until 2010 included instances in which defendants failed to disclose conflicts of interest that impacted their duties.[9]

In 2010, the Supreme Court, after repeated shots over the bow of section 1346,[10] put a bullet into the theory of undisclosed conflicts of interest as subjects of federal wire fraud indictments. In *Skilling v. United States*, the Court held that section 1346 did not reach undisclosed conflicts of interest and honest services fraud only applied to "paradigmatic" bribe and kickback cases.[11] In the wake of *Skilling*, many commentators predicted a slew of petitions from those who had fallen under the broad reading of honest services and a slow demise for federal corruption prosecutions of public officials and their attendant lawyers, lobbyists and others involved in public life.[12]

But, the death knell was premature.[13] *Skilling* silenced only a small part of the section 1346 prosecutions. Instead, prosecutors have probed attorneys, judges and others under a theory that a conflict of interest—disclosed or otherwise—seldom is without some benefit to the concealing party. In the search for that often hidden or concealed benefit, prosecutors have more closely examined gifts, favors, political assistance and campaign contributions under a "stream of benefits" theory that may reach the heretofore quiet conduct of attorneys, judges and those who interact with public officials.[14] To prove the intent to deceive or defraud by legal professionals, prosecutors are more frequently seeking to introduce evidence of violations of professional duties, embodied in the Code of Professional Responsibility or Codes of Judicial Conduct, under the theory that a jury will find that breaches of those duties are evidence of fraudulent intent.[15]

Honest Services Wire Fraud Prosecutions for Lawyers' Breaches of Fiduciary Duty

The use of the honest services wire fraud statute to prosecute lawyers for breach of their fiduciary duties to their clients under the Code of Professional Responsibility predates *Skilling* and *McNally*. Two years before *McNally*, the Second Circuit Court of Appeals affirmed the conviction of a former state senator who, while working in his capacity as an attorney, failed to disclose a conflict of interest between his own client and a client of his law firm in *United States v. Bronston*.[16]

In *Bronston*, the attorney was attempting to steer a government contract for bus shelters in the City of New York to his client and friend. Simultaneously, his law firm was representing a client who was competing for the same contract.[17] The attorney, in asserting his defense to federal honest services wire fraud charges under section 1341 and 1346, argued that he had no duty, as a matter of federal criminal law, to disclose his conflict of interest and there was no evidence that his conduct harmed any party.[18] The proof indicated that the attorney, in addition to failing to disclose the conflict, was also paid $12,500 by his client for promoting his client at the expense of the firm's clients. There was no evidence that the payment was a bribe: instead, the payment was for legitimate legal services, albeit, as the prosecution argued, the services were performed in an alleged violation of the attorney's professional duty.

The court, affirming the conviction, specifically looked to the Code of Professional Responsibility at the time, DR 5-105, which required the law firm—including Bronston—to "provide the undivided loyalty of the partners."[19] The court concluded that the government could meet its burden to show a "specific intent to defraud" by proving a violation of the defendant's "duty to disclose material information."[20] The court held that it was "beyond doubt" that Bronston violated his ethi-

cal duties and, hence, the government had proven his "intent to defraud."[21]

The opinion in *Bronston* features a vigorous dissent, one that perhaps presages the judicial skepticism over honest services in *McNally* and the continuing debate in *Skilling* and beyond over using ethical violations of rules of conduct to support federal criminal charges against lawyers and judges. The dissent argued that the attorney had not breached his ethical duties under the Code of Professional Responsibility because there was no evidence that he used any confidential information against the firm's clients.[22] The dissent argued that the trial court should have allowed the defense to admit expert testimony that the attorney had not violated the Code of Professional Responsibility and should not have permitted the jury to even hear evidence that a violation of the Code had occurred. Additionally, the dissent argued that the Code violation could not be evidence of fraudulent intent because the underlying conduct was, at best, a questionable violation of the Code.[23]

However, despite the dissent and further criticism,[24] *Bronston* still stands for the principle that an attorney's breach of the Code of Professional Responsibility can be evidence of "intent to defraud" sufficient to support his conviction for "honest services fraud." Neither *McNally* nor *Skilling* has diminished *Bronston*'s potential precedential impact on attorneys. While *McNally* struck down conflict of interests as basis for "honest service" prosecutions, the Congressional amendment in 1988 restored its vigor and, under the amendment, it is likely that Bronston would have faced the same prosecution, the same judicial conclusion regarding his breach of his ethical duties as evidence of his intent to defraud and the same verdict from a jury. *Skilling* may not provide a reprieve to future attorneys, ensnared like Bronston in the web of honest services prosecutions either. Justice Scalia, in his separate opinion in *Skilling*, cites *Bronston*.[25]

While *Bronston* is not a "paradigmatic kickback or bribery case," as *Skilling* suggests future honest services prosecutions must be, the fact that Bronston was paid by his client to perform services in alleged breach of his ethical duties might qualify as a monetary reward sufficient to justify a prosecution.

The danger posed by the majority opinion in *Bronston*, readily apparent to the vigorous dissenter and subsequent commentators,[26] remains: a jury, when hearing that an attorney had engaged in unethical conduct, may be too likely to conclude that the ethical violation was evidence of a criminal intent to deceive.[27] While no other court has yet cited *Bronston* for its far-reaching conclusion regarding the ethical conduct of attorneys, the Supreme Court's citation to it in *Skilling* and *Cleveland v. United States*[28] demonstrates the case has not disappeared. Meanwhile, the linkage of violations of professional Codes with violation of honest services remains a vibrant debate.

Even if *Bronston*'s holding may be weakened by the Supreme Court decision in *Skilling*, the federal courts show little sign of shielding attorneys from prosecutions under the honest services statute. In another pre-*Skilling* case, *United States v. Rybicki*,[29] the Second Circuit held that attorneys who gave financial payments to insurance adjusters to expedite the handling of their cases were engaged in a scheme to violate the honest services statute. The attorneys were sentenced to jail terms and significant fines.[30] In *Rybicki*, the Second Circuit described the *Bronston* holding as "atypical," although it declined to overrule the ethical question at the heart of *Bronston*: whether the ethical breaches by the attorney could provide some evidence of an unlawful motive sufficient to meet the "intention to defraud" required in an honest services prosecution.[31] Importantly, the Supreme Court in *Skilling* repeatedly cited *Rybick*i with approval, endorsing the concept that attorneys could be involved in a scheme to defraud by providing a stream of benefits to others who breached their fiduciary duty to their employers.[32] Finally, in the wake of *Skilling*, it is undisputed that an attorney can be subject to prosecution under section 1346 merely for engaging in a scheme to deprive others of honest services.[33]

Two major prosecutions prior to *Skilling* show the emerging correlation between honest services fraud and ethical violations by lawyers. The securities firm Milberg Weiss and many of its partners were indicted in 2006 and the charges were premised, in part, on an honest services fraud claim and included allegations that the defendants had made undisclosed payments to lead plaintiffs in securities litigation in violation of their ethical duties.[34] In another major fraud investigation, federal prosecutors indicted members of the Scruggs Law Firm in Mississippi for honest services and bribery charges in 2007, which resulted in guilty pleas by the attorneys to conspiracy to commit honest services fraud.[35] In addition to the high profile indictments, federal prosecutors routinely targeted attorney malfeasance in a number of contexts and utilized violations of ethical standards as part of the prosecution.[36]

After *Skilling*, the federal courts, in a number of different contexts, reviewed the correlation between the unlawful scheme to defraud and attorney violations of their ethical duties. First, at the crux of these post-*Skilling* cases is one concept: in order to prove an honest services fraud, the government needs to establish, as prerequisite, a fiduciary duty between the allegedly criminal actor—and his or her aiders and abettors or co-conspirators—and some other party.[37] In addition, in some cases, if an attorney, through his conduct, induces or facilitates another to breach his or her duty to a third-party, the attorney can easily be swept

by centripetal forces into conspiracy and accomplice liability.[38] Judges, who are bound by judicial codes of ethics, face similar difficulties.[39]

Second, the more clearly demarcated the fiduciary duty, the greater the potential trial consequences of a breach of that duty. It is undeniable that jurors, hearing that a party "breached his fiduciary duty" will be more likely to cast a skeptical, if not critical, eye on the fiduciary's conduct and more likely to draw adverse inferences against the breaching party. As one commentator noted:

> Mail and wire fraud require a specific intent to defraud, which has been explained as an intent to deceive, coupled with the intent to deprive the victim of the right to honest services. In practice, however, the defendant's intent to deceive often is inferred from his or her underlying failure to disclose the fiduciary breach, making the intent element not only circular but also exceedingly easy to prove. Due to the inchoate nature of the crime, this weakened *mens rea* standard raises the specter that a defendant may be convicted on the basis of a "scheme" alone—or in other words, for mere thoughts.[40]

As this comment indicates, the party that breaches one's fiduciary duty either may be unaware of the breach or, even if aware, will be unlikely to make any disclosure to his or her principal. If so, then the breach of the duty itself, without further proof, becomes evidence of unlawful intent in an honest services charge under section 1346.[41]

Third, in this context, the state Codes of Professional Responsibility—the gold standard for attorney conduct—or state Codes of Judicial Code—a platinum standard for more respected judges—become more than just a compilation of professional rules: a jury can easily jump from the conclusion that an undisclosed ethical violation is compelling evidence of a motive to deceive or a scheme to defraud, the necessary predicate for a federal crime.

The Difficulties of Admitting Evidence of Professional Misconduct in Federal Honest Services Trials

In the wake of *Skilling*, attorneys and judges remain targets for federal prosecutors under the bribery and kickback schemes. In many cases, the attorney has worked in government positions or had access to government officials.[42] In other cases, the attorney-defendant was a member of government.[43] A close examination of several recent cases highlights the difficult issues raised when a judge or attorney finds his violation of professional standards becomes evidence in a federal honest services trial.

1. Two Answers to the Same Question in Ohio's Northern District

In *United States v. Terry*,[44] the court closely examined the question of when a violation of a Judicial Code of Ethics can be introduced in a criminal trial under the honest services statute. In that case, a newly appointed judge received campaign help from a powerful political figure and, under the prosecution's theory, agreed to deny two summary judgment motions in pending foreclosure cases. The request for the denial of the motions was made at the request of the political figure and was intended to benefit one of his allies. The lawyer-beneficiary desired the rulings to facilitate a settlement of the foreclosure actions and, after the motions were denied, the cases settled. Under the government's theory, the judge received a campaign contribution and ruled on the summary judgment motions in exchange for the benefits.

Initially, the court noted that an honest services charge under section 1346 must, at its core, allege breach of a "duty imposed under state law."[45] The government argued that violations of the Code could establish the basis for the "breach of the duty" and were highly relevant to the issues of materiality and intent. In response to the defendant's motion attacking the indictment, the court struck from the indictment all references to Ohio Code of Judicial Conduct, which prohibited *ex parte* communications. The court held that the Code could not provide "the legal duty necessary" to support a conviction for honest services fraud because it did not have the "force of law."[46] The defendant then moved to bar the admission of any evidence of the judicial code and prohibit an expert from testifying on the ethical nature of his conduct.[47] The court acknowledged that if the defendant knew of the bar on *ex parte* communications and engaged in them, it would be "some evidence of defendant's intent to defraud" and would have "probative value." But, the court declined to permit the expert to testify, noting:

> there is tremendous concern that the introduction of evidence regarding judicial code violations would cause the jury to view the defendant as an unethical judge who might be more inclined than others to engage in a bribery scheme. Further, as previously stated, the evidence might also tend to confuse the jury by suggesting that the federal government, who has no authority to prosecute potential ethical violations of judges and attorneys, is attempting to do just that. In addition, the Court finds that the admission

> of this evidence would result in an unnecessary "mini-trial" on the issue of the alleged judicial code violations that would distract from the central focus of the case.[48]

However, the court, recognizing the potential defense strategy, held that if the defendant claimed the *ex parte* conversations were appropriate, the door would be opened to evidence regarding the judicial code's ban on such conversations.[49]

At trial, Terry was convicted of honest services fraud, among other charges.[50] But, as the court predicted, the defendant opened the door to the judicial code's impact during his own testimony by trying to explain the conversations. After the judge testified about his communications with the political godfather, the government cross-examined the defendant on the Code prohibitions of *ex parte* communications, but it offered no evidence and did not comment on the issue during closing.[51] In sum, the defendant was faced with a Hobson's choice: in attempting to explain why the *ex parte* communication occurred, the defendant opened the door to be cross-examined about the unethical nature of his conduct. The defendant, having opened the door, was exposed to the exact danger the court forecast in its pre-trial decision: the jury could have concluded—despite limiting instructions—that the unethical conduct was not just evidence of an unlawful intent but instead might be equated with a violation of the honest services statute.[52]

However, in a companion case resulting from the same federal corruption investigation, a different result, under different facts, emerged. The same trial court *did* allow an expert to testify about the Ohio Judicial Code, its application to *ex parte* communications and the disciplinary consequences of violating certain provisions, despite its apparent prejudice in *United States v. McCafferty*.[53] In that case, the defendant was charged with lying to the FBI.[54] Before trial, the judicial defendant moved to prohibit any evidence of the violation of the ethical standards. The court, analyzing the proffer under Rule 404(b) of the Federal Rules of Evidence,[55] noted:

> the government has indicated that its expert will not testify that the defendant has violated any portion of the judicial code. Rather, she is expected to testify to the standards contained within the code, that certain conduct violates the code, and is further expected to testify as to the disciplinary consequences of violating these code provisions.[56]

With these restrictions, the court permitted the expert to testify.[57]

After conviction, the defendant renewed the motion, arguing that the expert proof on the ethical violations had permitted the jury to transform the ethical violations into a federal crime. The court observed that the defendant had opened the door to the expert testimony because, while admitting *ex parte* communications, she sought to tailor her admission to an exception to the rule. Because of her testimony, the court held that expert testimony on the nature of the Code was required "to fully appreciate why a judge's *ex parte* communications can be inappropriate" and lead to disciplinary actions.[58] The court noted that it had utilized a "limiting instruction" on the issue to inform the jury that it could only consider the evidence of the ethical violations as weighing on motive and not as evidence of a substantive crime.[59] The defendant was convicted and sentenced to 14 months in prison. In her post-trial motion to stay her sentence, the court was confronted by the defendant's assertion that the court's decision contradicted its earlier holding in *Terry* by admitting evidence of the violations of the Judicial Code. The court described the defendant's reliance on the *Terry* holding as "misplaced" because *Terry* was "thoroughly distinguishable from the present case."[60] The court held that the testimony was permitted under Rule 404(b)—"with a limiting instruction"—as evidence of motive "because it provided an explanation as to why the defendant may have felt she could not be truthful during her FBI interview."[61]

Thus, in two cases from the same court, involving the same broad corruption investigation, the same court came to different conclusions regarding the government's use of a breach of the Judicial Code as a sword to buttress allegations of unlawful motive in a judge's conduct. The difference between the two cases could be easily overlooked. In *Terry*, the court concluded that the Code could not provide the underlying "duty" and its breach could not be evidence of unlawful motive in an honest services trial. In *McCafferty*, the Code was not a necessary component of the indictment: it was purely a tool to ascribe unlawful motive to the defendant's lying and misrepresentations to the FBI. While the two cases differ, the conclusion is inescapable: government prosecutors will continue to attempt to use breaches of state codes of conduct, for lawyers and judges, as evidence that the defendant has engaged in unlawful conduct. However, the line between using the judicial code as "somewhat probative of intent to defraud" under section 1346, as was attempted in *Terry* and as direct evidence of a "motive to lie" as was done in *McCafferty,* seems a somewhat slender reed on which to build a substantial distinction. In both cases, the breach of the Code is offered at trial to provide evidence of motive: the motive to defraud and the motive to lie. The distinction may be little solace to future lawyers and judges caught in a web of ethical violations and federal bribery, honest

services or perjury charges. While there is no clarifying ruling from an appeals court yet, the issue of the use of a code—judicial or otherwise—as evidence of the motives of lawyers and judges in honest services trials remains unsettled.

2. Cases Restricting the Prosecutorial Use of Codes of Ethics

Other courts, both before and after *Skilling*, have agreed with the *Terry* determination to restrict the government's use of state codes of ethics to leverage federal honest services criminal charges. In *United States v. Marlinga*,[62] the indictment alleged that a prosecutor made false statements in pleadings to the Michigan Supreme Court to benefit certain defendants in exchange for campaign contributions. The government alleged the false statements violated the Michigan Rules of Professional Conduct. The court dismissed the honest services charges and held that the Code provisions did not have the "force of law" and the honest services indictment could not be premised on the Code violations.

After *Skilling*, the Louisiana district court reached a similar conclusion in a case involving a non-attorney, accepting an assertion that the "federalization" of state ethics code violations was not permitted. In *United States v. Leslie*,[63] the court gave short shrift to the government's attempt to build an honest services charge on a violation of a state ethics code, describing that breach as "an allegation best left to state prosecutors and state courts."[64]

3. Cases Allowing the Prosecutorial Use of Codes of Ethics

In contrast to *Terry* and *Marlinga*, other federal courts handling the judicial prosecution in the *Scruggs*-related cases held that the Mississippi Code of Judicial Conduct could provide a basis for a prosecution under the honest services statute.[65] The court held that the indictment was sufficient when it alleged that the defendant "knew his alleged conduct of providing a party to a lawsuit secret access to the court and engaging in *ex parte* communications were, at the very least, a violation of [certain] canons of the Mississippi Code of Judicial Conduct."[66] While not addressed in the opinion, the decision clearly paved the way for the government to introduce evidence of the ethical lapses as part of its proof of intent to defraud under section 1341 and 1346.[67]

The conclusions in *Terry* and *Marlinga* also differ sharply from the District Court applications of the North Carolina Bar Ethics Rules in *United States v. Sprouse*.[68] In this multi-layered case, the defendant was a real estate closing attorney who was charged with conspiracy[69] in a real estate fraud in which she processed closing documents for unscrupulous mortgage brokers.[70] However, the government had no evidence that the attorney accepted bribes or kickbacks as the closing attorney.[71] Thus, the case against the attorney could not be prosecuted as the "paradigmatic kickback or bribery" case sanctioned by *Skilling*. Instead, the case hinged on the attorney's breach of the fiduciary duty to her clients. Sprouse, before trial and before the Supreme Court decision in *Skilling*, moved to strike any references in the indictment to violations of the North Carolina Bar Ethics Rules, claiming that "they might be confused with violations of federal law."[72] The court held that the defendant's status as an attorney was relevant to the charged offenses "because she allegedly engaged in the mortgage fraud schemes while functioning as a real estate attorney."[73] The court declined to strike the reference to the ethical rules from the indictment, reasoning that "the duty of honest services is appropriately defined by reference to state law" and the disputed provisions, including the North Carolina Bar Ethics Rules, identified the defendant's "duty of honest services as a closing agent and attorney."[74] While the defendant argued that violations of state ethics rules "might be confused with violations of federal law," the court commented "that this is very unlikely" and further that limiting instructions would prevent the jury from concluding that an ethical violation would be equivalent to a federal honest services offense.[75]

Sprouse was convicted[76] but in her post-trial motions—heard after *Skilling*—the court vacated her convictions, concluding that all the conspiracy counts were based on a now-discredited honest services theory.[77] The court reviewed jury instructions which suggested that an attorney "may have a duty of honest services arising from…the attorney's ethical obligations" and the government repeatedly noted, in its opening and closing arguments, that the defendant had been dishonest with her client. The court reviewed a government witness, identified as an expert in real estate closings and "ethical duties in real estate closings," who testified that the defendant had violated her legal, ethical and professional duties as a lawyer and notary public, but the court concluded that conduct does not "show honest services fraud as that crime is now defined after *Skilling*."[78] In short, the court held that the government had impermissibly intertwined the ethical breaches and the "honest services" fraud, allowing a spillover effect so that the jury, in convicting for honest services wire fraud, was actually convicting the defendant of nothing more than ethical lapses. As the court noted:

> The charges [relating to ethical violations and honest services violations] were "inextricably intertwined." Both counts contain allegations that the Defendant conspired to make false statements to banks and/or to commit honest services fraud. The evidence re-

> lated solely to making false statements was not distinct—it was "inextricably intertwined" with evidence of honest services fraud. The intertwined nature of this evidence, coupled with the Government's concentration in opening statements and closing arguments on the honest services fraud theory, likely incited or aroused the jury into convicting the Defendant on the other counts.[79]

In its post-trial motion, the district court found that the danger it attempted to minimize in its earlier decision had come to pass after *Skilling*: the linkage between state ethical violations, admitted solely to prove an intent to defraud, too easily became the predicate for a concluding that a federal crime had occurred.[80]

In perhaps the most novel extension of the Code of Professional Responsibility to provide the *sine qua non* of a mail fraud indictment, the court in *United States v. Scanlon*[81] confronted a classic kickback scheme but was challenged to find a fiduciary duty when the conspirator had not directly breached any duty to the victim. In that case, the court concluded that the defendant knew that his co-conspirator had a fiduciary duty to his clients and, in a unique twist, the court premised that duty on the District of Columbia Rules of Professional Conduct, even though his co-conspirator, lobbyist Jack Abramoff, was not an attorney.[82] Abramoff had held himself out as working for a law firm and he wrote to the client indicating that his conduct would be bound by those rules. Scanlon, his co-conspirator, knew that Abramoff was holding himself out as a fiduciary and when Scanlon conspired with Abramoff, he knew that Abramoff was breaching his duty to his clients. Under these circumstances, the court found there was sufficient evidence to support his guilty plea to honest services wire fraud.[83] In this instance, the court took an expansive view of proof regarding a "fiduciary duty," holding that a fact finder could evaluate a non-attorney's conduct for breach of the Rules of Professional Conduct in deciding whether a co-conspirator violated the honest services statute.[84]

4. Precautionary Instructions as a Vehicle for Admitting Codes of Ethics

While there is no recent circuit court opinion—post-*Bronston*—directly on point, two recent decisions involving introduction of professional standards in mail fraud trials suggest that the better judicial logic appears to support the *Sprouse* approach—admission of the evidence with a precautionary instruction—rather than the "barred-from-admission" approach espoused in *Terry*. In *United States v. Fumo*,[85] the government sought to introduce evidence regarding the Pennsylvania Ethics Act, which related to the defendant-legislator's conduct. The trial court admitted the evidence on the Act and permitted an expert to testify about discipline under the Act and the distribution of the Act to the Legislature, of which the defendant was a member. The expert never expressed any opinion on whether the defendant violated the Act.[86] The trial court issued an instruction that the jury could consider the evidence of the Act to the "extent it sheds light on questions of willfulness, intent to defraud and good faith" but added that a violation of the Ethics Act was not tantamount to the violation of federal law.[87] The defendant was convicted and his conviction affirmed.

Similarly, in *United States v. Offill*,[88] the court approved the admission of testimony from two experts regarding the functions of the securities markets, operation of federal and state laws, and concluded that it was "difficult to imagine" that the government could present a securities fraud case "without the assistance of expert testimony to explain the intricate regulatory landscape and how securities practitioners function within it."[89] The lawyer-securities specialist was convicted and his conviction affirmed.[90]

The Use of Codes of Ethics in State Court Prosecutions

In addition to the federal prosecutions, states have prosecuted lawyers and judges for corruption and allowed codes of conduct or ethics statutes to be introduced as evidence of motive or intention to deceive. New York has taken a somewhat more expansive view of the use of professional codes in considering the conduct of judges and public officials involved in corruption. In *People v. Gordon*,[91] the Second Department upheld a bribery conviction of a state legislator and concluded the Code of Ethics in the New York's Public Officers Law provided a basis for the criminal conviction.[92] The court held that the Code, while not containing any criminal sanctions, imposed a "mandatory duty of conduct" on legislators and a violation of the Code, combined with proof or a "reward" for such a violation, will sustain a conviction.[93]

In dealing with the judiciary, New York has more closely followed the federal courts in the *DeLaughter* and *Sprouse* cases rather than the more restrictive view of the district court in *Terry*. In *People v. Garson*,[94] the judge, indicted for receiving a reward "for having violated his duty as a public servant,"[95] argued that there was no statutory "duty" to avoid *ex parte* communications or refrain from other conduct. The government alleged that Rules of Judicial Conduct, regulatory rules enacted by the court system, prohibited the conduct and the Rules set forth the "duty" sufficient to sustain the charges.[96] The court, in reinstating charges under the indictment, held that violation of the Rules of Judicial Conduct could be a predicate for the conviction. The Court of Appeals noted that the concept of duty in the state's unlawful gratuities statutes was left

intentionally vague by the legislature: it held that the duty could come from the Rules of Judicial Conduct or from live testimony from a lay witness or expert,[97] an internal or informal body of rules or "other indicia of a defendant's knowledge of wrongdoing."[98]

The *Garson* and *Gordon* holdings easily lead to the conclusion that any "body of rules" or even a "code of conduct" could provide the predicate "duty" for a bribery-related or honest services prosecution if there is evidence of a breach of that duty and some reward to some party, either the breaching party or some affiliated person.[99]

While judges and public officials may have their duties defined through ethical rules, the same may not be true for attorneys in New York. The Court of Appeals has held that the Code of Professional Responsibility does not have the force of law.[100] The court has been reluctant to "read the rules literally" but has instead opted to look to the rules as guidelines to be applied with due regard for the broad range of interests at stake. The court opined:

> When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned.[101]

Under the court's acknowledgment that the rules do not have the force of law and should be used sparingly outside their normal attorney-disciplinary process, it seems unlikely that the court would permit a breach of the rules to be used as evidence of unlawful motive in the indisputably "uncertain" area of honest services fraud. Furthermore, this limited view of the rules and their application to attorneys in non-disciplinary actions strongly suggests that the New York Court of Appeals may not have concurred in the result reached by the Second Circuit Court of Appeals in *United States v. Bronston* that a breach of the Code of Professional Responsibility could be a used as evidence of motive in a federal honest services fraud charge against the attorney.

In contrast, a New Jersey appellate court declined to use a departmental Code of Ethics as the basis for a finding of official misconduct.[102] The court, highlighting the dilemma of the "trial-within-a-trial," noted:

> By this rationale, there would be no practical distinction between two key elements of the crime, the failure to perform a duty [under the Code of Ethics] and the unlawful purpose. They would be one and the same. Likewise, with the failure to report counts, because failure to report an ethical violation could always be construed as acting with intent to deprive the Department of the opportunity to enforce its Code of Ethics, the two elements in those counts would likewise be collapsed into one. This tautology would result in strict criminal liability or nothing more than an ethical violation. We cannot accept this rationale.[103]

The Supreme Court of Louisiana, in considering a comparable case, reached a conclusion must more akin to the New York rule in *Gordon* and *Garson*. In *Louisiana v. Petitto*,[104] the court held that the state Code of Governmental Ethics, while not a criminal statute, gave "clear notice of exactly what conduct was prohibited" and added that "ethical impropriety may co-exist with criminal conduct and the existence of the former does not pre-empt the imposition of criminal sanctions."[105]

Conclusion

As this discussion demonstrates, there is little consensus among the state and federal courts over the probative value of evidence of ethical violations in honest services and related corruption cases. Several difficult issues remain. First, the "duty under state law" as a predicate for honest services prosecutions, as debated in *United States v. Terry* and elsewhere, raises important federalism questions. The courts in *Terry* and *Sprouse* took different views of the "state duty" implied in the codes of conduct. The New York Court of Appeals decision in *People v. Garson* regarding the use of a judicial code of conduct in a criminal prosecution sharply differs from the decision in *Terry*. As federal prosecutors seek to use "the duty under state law" as proof in an honest services case, the results may vary from state to state. The variance suggests that the same conduct, in two different states, may be prosecuted differently under federal law. The variance would seem to be at odds with a uniform administration of justice in federal criminal cases and need further appellate clarification.

Second, as these cases demonstrate, there is a real danger that evidence of unethical conduct, admitted solely to establish motive, could easily "spill over" and taint jury deliberations on honest service counts. In both *Terry* and *Sprouse*, the trial courts feared that the testimony of ethical violations could mislead the jury that proof of ethical violations was synonymous with proof of honest services fraud. When the testimony was heard by the jury, either on direct or cross-examination, both defendants were found guilty of honest services fraud. As the *Sprouse* case vividly demonstrates, the ability to cast a defendant as "unethical" can easily taint the jury's perception of the defendant's conduct.

But, an equally compelling danger arises if the evidence is excluded: the jury may have no touchstone to evaluate the motive of the legal professional in the performance of his or her work. Excluding the evidence leaves the jury in an ethical limbo, unable to use even well-established, well-defined and longstanding ethical rules—well known to the trial attorneys for the prosecution and defense, the trial judge and the defendant—to evaluate the defendant's conduct. Under these circumstances, an uninformed jury could conclude that a judge could engage in *ex parte* communications or a lawyer engage in conflicts of interest—or other unethical conduct—with impunity.

Under these circumstances, and while balancing these potential dangers to defendants and the administration of justice, the evidence of potential ethical violations based on either the Code of Professional Responsibility or a Code of Judicial Code should be admissible as evidence of a defendant's motive in honest services fraud cases. Attorneys are held to high ethical standards and trained in ethics; judges have the same training in their field. A lawyer or a judge will find it difficult, if not hypocritical, to argue that they were unaware of or not bound by well-established ethical rules, such as the ban on judicial *ex parte* communications at issue in *Terry*, *McCafferty*, *DeLaughter*, and *Garson*. If the jury hears this evidence, it can evaluate the defendant's conduct in the proper ethical context. The government's burden to prove fraudulent motive beyond a reasonable doubt will shield the defendant from a verdict based on uncertain ethical violations. Furthermore, exacting limiting instructions—perhaps before and after trial—can also shield defendants from the spillover effect detailed by the court in overturning the *Sprouse* conviction.

Into this confusion over the probative value of ethical violations in honest services cases, an appellate determination on *Sprouse* clarifying the lower court's determination, further appellate review of this evidentiary dilemma or further Congressional action to amend section 1346 may help define the balance between the defendant's right to a fair trial and the public's right to insist on the legal profession's compliance with its rules and regulations. The public confidence in lawyers and judges as the instruments of a fair justice system requires that ethical standards be maintained and if a departure from those standards results in a breach of a fiduciary duty, unwarranted benefits to the undeserving and the loss of a client's or the public's right to honest services, the ethically challenged defendant should be prosecuted under Section 1346 and confront his or her ethical violations in the courtroom. The nation's confidence in its system of justice and the professionals who work in it should require nothing less.

Endnotes

1. Skilling v. United States, 130 S. Ct. 2896 (2010). The conflict-of-interest theory of honest services fraud criminalized undisclosed self-dealing by public officials whose actions furthered their own financial interests while purporting to act on behalf of the public. United States v. Bryant, 655 F.3d 232, 245 (3d Cir. 2011), *citing Skilling*, 130 S. Ct. at 2932.
2. The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud). The honest-services statute, 18 U.S.C. § 1346, defines the term "scheme or artifice to defraud" in these provisions to include a scheme or artifice to deprive another of the intangible right of honest services.
3. The concept of fiduciary is granted "almost talismanic significance in most discussions of honest services, despite the fact that its meaning varies widely." Joan H. Krause, Skilling *and the Pursuit of Healthcare Fraud*, 66 U. Miami L. Rev. 363, 376 (2012). A second commentator noted:

   > Fiduciary duty, after all, is not a one-size-fits-all concept. The duties of a fiduciary depend almost entirely on the kind of fiduciary she is. To say that someone has a "fiduciary duty" is simply to say that the law has decided she has more duties than the man on the street.
   >
   > Samuel W. Buell, *The Court's Fraud Dud*, 6 Duke J. Const. L. & Pub. Pol'y 31, 39, n.58 (2010).

4. No one should expect to escape the broad reach of the wire fraud statutes because they can be applied to the mail, telephone and the use of email. *See* United States v. Scruggs, No. 3:07CR192-B-A, 2011 U.S. Dist. LEXIS 86405, at 45 (N.D. Miss. 2011). The law firm used email to send a "draft order" to a judge in furtherance of the conspiracy. Even though the defendant was not on the email train, the use of emails to further the conspiracy was "reasonably foreseeable." As one court noted, "it is beyond debate that the Internet and email are facilities or means of interstate commerce" for the purposes of an interstate nexus to support federal charges. United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009).
5. Emphasizing Congress' disjunctive phrasing in Section 1346, the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights. *Skilling*, 130 S. Ct. at 2926. By 1982, all Courts of Appeals had embraced the honest-services theory of fraud. *Id.*
6. 483 U.S. 350 (1987).
7. The *Skilling* majority described its prior decision in *McNally* as stopping the "development of intangible rights doctrine" in its tracks, adding:

   > We held that the scheme did not qualify as mail fraud. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." [citations omitted]. "If Congress desires to go further," we stated, "it must speak more clearly."

   Skilling, 130 S. Ct. at 2927.
8. The Court majority held: "There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud." *Skilling*, 130 S. Ct. at 2928.

9. Three cases were before the Court when it decided *Skilling*. In the other two cases, there were variants of the undisclosed conflicts of interest that were alleged to deprive certain individuals of the "intangible rights to honest services." Black v. United States, 130 S. Ct. 2963 (2010) (undisclosed conflict with corporate interests); Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (legislator failed to disclose potential employment with firm lobbying him on oil and gas issues). Black's subsequent appeals, while quashing the "conflict of interest" charges, were unavailing: his convictions for pecuniary fraud and obstruction of justice were affirmed. United States v. Black, 625 F.3d 386 (7th Cir. 2010). Weyhrauch eventually pled guilty to a state misdemeanor charge relating to lobbying, was fined $1,000 and allowed to keep his law license but his defense costs were $663,000. Richard Mauer, *Judge Emphatic in Decision that Weyhrauch Not Entitled to Costs*, Anchorage Daily News, July 29, 2011.

10. Justice Scalia, a critic of the reach of § 1346, dissented from the denial of certiorari in United States v. Sorich, 523 F.3d 702 (7th Cir. 2008), *cert. denied,* 555 U.S. 1204 (2009) and commented:

> In many cases, moreover, the maximum penalty for violating this statute will be added to the maximum penalty for violating 18 U.S.C. § 666, a federal bribery statute, since violation of the latter requires the additional factor of the employer's receipt of federal funds, while violation of the honest services provision requires use of mail or wire services, §§ 1341, 1343. Quite a potent federal prosecutorial tool.

555 U.S. at 1206.

11. Skilling v. United States, 130 S. Ct 2896, 2933 (2010). In *Skilling* itself, the Supreme Court distinguished conventional fraud from § 1346 honest-services fraud as follows:

> Unlike [conventional] fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment.

130 S. Ct. at 2926.

12. *See* Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after* Skilling, 112 Colum. L. Rev. 359, 385 (2012) ("many commentators considered the decision in *Skilling* to mark the 'end of an era' of honest services fraud prosecutions").

13. For example, in Bereano v. United States, No. WMN-11-961, 2012 U.S. Dist. LEXIS 26886 (D. Md. 2012), the attorney sought to overturn his 1994 conviction on the basis of *Skilling* but the Court rejected the petition. *See also* United States v. Belt, No. 07-10018, 2010 U.S. Dist. LEXIS 101421(W.D. La. 2010) (kickback from government official to his family members was honest services fraud even after *Skilling*); United States v. Jones, No. 10-5598, 2011 U.S. App. LEXIS 2269 (6ht Cir. 2011) (vote buying scheme survived *Skilling*).

14. Under the stream-of-benefits theory a bribe may be given in the form of a series of benefits (gifts, favors, tickets to events and campaign contributions) in exchange for official action on an "as needed" basis. United States v. Bryant, 655 F.3d 232, 245 (3d Cir. 2011). The court added that "nothing in *Skilling*, however, undermines the viability of the stream-of-benefits theory, which this Court first endorsed in United States v. Kemp, 500 F.3d 257 (3d Cir. 2007)." *See also* United States v. Whitfield, 590 F.3d 325, 352-53 (5th Cir. 2009); United States v. Ganim, 510 F.3d 134, 144-47 (2d Cir. 2007); United States v. Urciuoli, 613 F.3d 11, 13-14 (1st Cir. 2010) (confirming stream-of-benefits theory survived *Skilling*).

15. In honest services fraud, this deception is not so much the underlying breach of fiduciary duty as it is the failure to disclose that breach to the employer, citizenry, or other principal to whom the duty is owed. As Professor John Coffee explains, "the fiduciary breach [is] the means to an ultimate end and not the end itself." The cases are unclear, however, as to whether only serious breaches qualify, or whether the failure to disclose almost any breach will suffice—as well as what circumstances will impose a duty to disclose in the first place. Krause, *supra* note 3, at 376-77. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 163 (1994); John C. Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 167 (1981).

16. 658 F.2d 920 (2d Cir. 1985). This case was first instance in which 18 U.S.C. § 1346, the honest services wire fraud statute, had been used against a private defendant in the Second Circuit. Tannenbaum, *supra* note 12, at 371 n.62.

17. As oft happens, the fight over the government contract for bus shelters in the City of New York resulted in civil litigation. BusTop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989 (S.D.N.Y. 1981) (dismissal of anti-trust claims against Bronston and his law firm).

18. In what should serve as a warning to attorneys and others, the "wires/mail" portion of the statue was satisfied because the attorney sent a letter to government officials on his state Senate stationery and, hence, utilized the mails to "furtherance of the fraudulent scheme." *Id.* at 929.

19. *Bronston*, 658 F. 2d at 927.

20. *Id*.

21. *Id.* In support of the court's conclusion that it was "beyond doubt" that Bronston had violated his ethical duties under the Code of Professional Responsibility, the court could cite no New York authority and instead cited a textbook. *Bronston*, 658 F. 2d at 927, *citing* T. Morgan and R. Rotunda, Professional Responsibility, 53-58 (2d ed. 1981).

22. *Bronston*, 658 F. 2d at 931-32 (VanGraafeiland, *dissenting*).

23. The dissent cautioned trial courts in applying both the honest services statute and the attorney's duties under the Code of Professional Responsibility:

> Where, as here, liability is predicated upon the vicarious fiduciary responsibility of an individual lawyer in a large, modern-day law firm and there is no evidence that the defendant exploited the vicarious relationship for personal gain, the statute should be applied with careful attention to its basic purpose.

Bronston, 658 F2d at 931 (Van Graafeiland, J., *dissenting*).

24. Coffee, *supra* note 15, at 130-34.

25. *Skilling*, 130 S. Ct. at 2937 (Scalia, *concurring*). The Supreme Court majority also cited *Bronston*, with seeming approval, in Cleveland v. United States, 531 U.S. 12 (2000), another public corruption case under the wire fraud statute. The case was cited in a footnote to this comment:

> At the time *McNally* was decided, federal prosecutors had been using § 1341 to attack various forms of corruption that deprived victims of "intangible rights" unrelated to money or property. Reviewing the history of § 1341, we concluded that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."

Id. at 18-19.

26. Coffee, *supra* note 15, at 130-34.

27. The *Bronston* dissent said it cogently, in describing the trial judge's attempt to distinguish the difference between the ethical violation and the intent to defraud as "prejudiciously erroneous":

> This questioning by the district court dealt either with a breach of legal ethics or with the alleged violation of section 1341. It could have had no other purpose. In view of the trial judge's instructions that the jurors were not to be concerned with the question of ethics, they might well have concluded that the judge was pointing them to a clear statutory violation.

Bronston, 658 F.2d at 932-33 (Van Graafeiland, dissenting).

28. *Cleveland*, 531 U.S. at 19, n.2.

29. 354 F.3d 124 (2d Cir. 2003).

30. As Justice Scalia noted in his dissent to the failure to grant certiorari in United States v. Sorich, the "potent prosecutor's tool" embodied in § 1346, when combined with other mail fraud violations and concomitant bribery charges, can result in extended prison sentences. United States v. Terry, No. 1:10CR390, 2011 U.S. Dist. LEXIS 121016 (N.D. Ohio 2011) (63-month sentence for convicted judge); United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) (judge sentenced to 110 months for assorted federal crimes including honest services); United States v. Scruggs, No. 3:07CR192-B-A, 2011 U.S. Dist. LEXIS 51757 (N.D. Miss 2011) (attorney sentenced to fourteen months and fined $250,000). Attorneys in Milberg Weiss, charged with honest services violations, had varied sentences from two years to 30 months and the firm paid a $75 million fine. Joseph Nocera, *Serving Time, but Lacking Remorse*, N.Y. Times, June 7, 2008; Jonathan D. Glater, *Big Penalty Set for Law Firm, but Not a Trial*, N.Y. Times, June 17, 2008.

31. In *Rybicki*, the Second Circuit noted:

> *Bronston*, was atypical. A partner in a New York law firm undertook, and was paid for, representing a personal client in its pursuit of a contractual relationship, while knowing that his firm was representing a competing client seeking the same contract. The defendant was convicted of mail fraud and we affirmed, reading the "theft of honest services" crime broadly, and finding a possibility of detriment in the firm's client's loss of "the precise interest which [the firm] had been retained to defend."

Rybicki, 354 F. 3d at 141, n.16.

32. For a discussion of the stream of benefits, *see supra* note 14.

33. United States v. McDonnell, Nos. SACV 10-1123 DOC, SACR 04-0309 DOC, 2011 U.S. Dist. LEXIS 66148, p. 22 (C.D. Cal. 2011) (*citing Rybicki*).

34. The allegations supporting the honest services fraud count were that by paying the named plaintiffs under the table, the Milberg lawyers (and the named plaintiffs) breached fiduciary duties owed to the unnamed class members resulting in the unnamed class members receiving less money than they would otherwise have received. Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy*, 30 Rev. Litig. 183, 195 (Winter, 2011). The prosecution of Milberg Weiss and its members has been substantially criticized. *Id*. at 185-86, n.6-10.

35. *See* United States v. Scruggs, No. 4:10-CV-868-A, 2011 U.S. Dist. LEXIS 14851 (N.D. Miss. 2011) (declining to vacate conspiracy plea in the wake of *Skilling*); United States v. Scruggs, No. 3:07CR192-B-A, 2011 U.S. Dist. LEXIS 86405 (N.D. Miss. 2011) (declining to vacate pre-*Skilling* plea after concluding that attorney knew about *ex parte* communications with a judge and drafted an order he knew was a product of those communications).

36. *See* United States v. Drury, 687 F.2d 63, 65 (5th Cir. 1982) (court permitted evidence of violation of the Louisiana Code of Professional Responsibility to be a predicate for honest services fraud because "it was coupled with concealment or misrepresentations of material facts in a plan to deceive); United States v. Hausman, 345 F. 3d 952 (7th Cir. 2003) (attorney convicted in a referral and billing arrangement with a chiropractor in violation of Rules); United States v. Reamer, 589 F. 2d 769 (4th Cir. 1978) (court admitted testimony regarding that the Maryland Code of Professional Conduct prohibited solicitation of clients and included the Code provisions in the jury charge).

37. Honest services fraud is actionable only when the perpetrator owes a heightened duty, such as a duty of loyalty, to the victim; in the words of the Ninth Circuit, "there must be a legally enforceable right to have another provide honest services." United States v. Milovanovic, 627 F.3d 405, 412 (9th Cir. 2010). In many (but not all) cases that duty is grounded in a fiduciary relationship, although neither the statute nor cases define the universe of fiduciary duties that will suffice. Krause, *supra* note 3, at 374.

38. *See, e.g.*, United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (attorneys indicted for conspiracy to defraud insurance companies of their right to honest services of their employees). To establish a violation of the aiding and abetting statute (18 U.S.C. § 2), the Government "must prove that 'the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it.'" United States v. Carbo, 572 F.3d 112, 118 (3d Cir. 2009) (*citing* United States v. Kemp, 500 F.3d 257, 293) (internal quotations and citations omitted).

39. Judicial corruption, before *Skilling*, was not unheard of. *See* United States v. Whitfield, 590 F.3d 325, 352-353 (5d Cir. 2009) (judges involved in bribery schemes); Guest v. McCann, 474 F.3d 926, 929 (7th Cir. 2007) ("Operation Greylord uncovered extensive corruption in the Illinois courts, including bribes being paid to multiple judges in exchange for dismissals"); McGreal v. Ostrov, 227 F.Supp.2d 939, 944 n.1 (N.D.Ill. 2002) ("Operation Greylord…led to the prosecutions and convictions of numerous lawyers and judges"); United States v. Grubb, 11 F.3d 426 (4th Cir. 1993) (judge convicted for raising illegal campaign contributions).

40. Krause, *supra* note 3, at 378. *See also* Bruce A. Green, *Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327 (1998) (discussing the dangers of "overcriminalization" by transforming ethical breaches into federal criminal charges).

41. Professor Green noted:

> In the end, the *Bronston* decision is troubling both from a regulatory perspective because it seems to criminalize virtually any violation of the conflict rules, thereby leaving it to the discretion of prosecutors to decide whether or not to bring criminal charges against a lawyer who had an impermissible conflict, and from a doctrinal perspective because it appears to assume that disciplinary rules generally, and the conflict-of-interest rules in particular, establish fiduciary duties that lawyers owe to their clients.

Green, *supra* note 40, at 342.

42. *See* United States v. Mosberg, No. 08-0678 (FLW), 2011 U.S. Dist. LEXIS 129844(D. N.J. 2011) (developer and planning board attorney charged with bribery, conspiracy and mail fraud); United States v. Lander, 668 F.3d 1289 (11th Cir. 2012) (honest services charges arise because the Court noted that there was "a blurry line between [the attorney's] private practice and

his work as the county attorney" but dismissed the charges because the proof at trial varied from the indictment).

43. "Pardignatic" bribery and kickback cases involving attorneys remain favorite targets. *See* United States v. DiMasi, 817 F. Supp. 2d 9 (D. Mass. 2011) (lawyer-legislator convicted for kickbacks paid through his law associate).

44. United States v. Terry, No. 1:10CR390 2011 U.S. Dist. LEXIS 57288 (N.D. Ohio, 2011).

45. *Id.* at 20, *citing* United States v. Brumley, 116 F.3d 728 (5th Cir. 1997).

46. In his post-trial motions, the defendant argued that proof of "ethical violations" was the archetypical "amorphous" conduct that the Supreme Court in *Skilling* said could not support a conviction for honest services fraud. United States v. Terry, No. 1:10CR390, 2011 U.S. Dist. LEXIS 121016 (N.D. Ohio 2011).

47. *Id.* at 8.

48. *Id.* at 10-11. The court considered the government's proposal for a "limiting instructions," which would have allowed the jury to hear the evidence and the court would have cautioned the jury that it could only consider the evidence of an ethical violation as it relates to the intent to defraud but the court declined to take that approach, reasoning that such an instruction is not likely to overcome the potential for substantial prejudice to the defendant. *Id.* at 11.

49. *Id.* at 13.

50. The former judge was sentenced to 63 months of incarceration.

51. *Id.* at 6, n.1.

52. The court, which had been sympathetic to the defendant's plea to differentiate the ethical violations from the honest services charges prior to trial, seemed much less sympathetic after trial and the defendant had opened the door to potential violations of the judicial code of conduct, intermingling that with the government's case in chief for honest services fraud, noting:

> the Court's jury instructions specifically provided that a scheme involving "bribery or kickbacks" was an essential element of the crime of honest services mail fraud. As the jury is presumed to have followed these instructions, *see* United States v. Davis, 306 F.3d 398, 416 (6th Cir. 2002), the defendant's concern that the jury convicted him on some theory other than one involving bribery or kickbacks is without merit and does not rise to the level of a substantial issue.

Terry, 2011 U.S. Dist. LEXIS 121016 at 6.

53. No. 1:10CR387, 2011 U.S. Dist. LEXIS 35700 (N.D. Ohio 2011) ("McCafferty I").

54. The Court noted that the defendant in *McCafferty* was charged with lying to the FBI in violation of 18 U.S.C. § 1001 and it was the government's theory that she lied because she knew she would be disciplined by the Ohio Supreme Court for ethical violations relating to her *ex parte* communications. United States v. McCafferty, 2011 U.S. Dist. LEXIS 89972 at 8. In *Terry*, the honest services charge was under 18 U.S.C. § 1346 and the government sought to use the ethical violation proof as part of its proof of an "unlawful intent to defraud."

55. The court employed a three-part test to review the admissibility of evidence under Rule 404(b): first, the district court must decide whether there is sufficient evidence that the other act in question actually occurred. Second, if so, the district court must decide whether the evidence of the other act is probative of a material issue other than character. Third, if the evidence is probative of a material issue other than character, the district court must decide whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect. 2011 U.S. Dist. LEXIS 35700 at 7.

56. *McCafferty I*, 2011 U.S. Dist. LEXIS 35700, p. 7-8.

57. The court considered the proffered testimony under Rule 703 of the Federal Rules of Evidence. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993). However, the court acknowledged that "relevant evidence" may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the evidence." FED. R. EVID. 403. *McCafferty*, 2011 U.S. Dist. LEXIS 35700 at 4.

58. United States v. McCafferty, 801 F. Supp. 2d 605, 619 (N.D. Ohio 2011) ("McCafferty II").

59. *McCafferty II*, 801 F. Supp. 2d at 621. The jury instruction, drafted with the assistance of the defense counsel, stated:

> You have heard testimony indicating that as a judge, the defendant was governed by the canons of the Ohio Code of Judicial Conduct and other codes of conduct. Violations of the canons and other codes of conduct is not a crime and the defendant [McCafferty] is not charged with any such crime. You may consider this evidence only as evidence of the defendant's motive and for no other purpose.

Id. at 62.

60. United States v. McCafferty, No. 1:10CR387, 2011 U.S. Dist. LEXIS 89972 (N.D. Ohio 2011) ("McCafferty III").

61. *Id.* at p. 8.

62. No. 04-80372, 2006 U.S. Dist. LEXIS 50601 (E.D. Mich. 2006).

63. No. 09-115-JJB-DLD, 2010 U.S. Dist. LEXIS 81800 (M.D. La. 2010).

64. *Id* at 4. In United States v. Leslie, the government alleged that the defendant had repurchased horses without following the legally required state procedure but the government could not prove any monetary harm to the state. No. 09-115-JJB-DLD, 2010 U.S. Dist. LEXIS 81800 at 3.

65. United States v. DeLaughter, No. 3:09-CR-002GHD-SAA-2, 2009 U.S. Dist. LEXIS 48483 (N.D. Miss. 2009). The list of judges caught in the snare of honest services is not limited to *Terry* and *DeLaughter*. *See* United States v. Barraza, 655 F. 3d 375 (5th Cir. 2011) (judge convicted for bribe of sexual favors in return for helping a defendant's case); United States v. Whitfield, 590 F.3d 325, 352-53 (5th Cir. 2009).

66. *Id* at p. 6.

67. The Mississippi judge was removed from office and disbarred. Mississippi Commission on Judicial Performance v. DeLaughter, 29 So. 3d 750 (Miss. 2010) (judge removed from office and barred from seeking judicial position); The Mississippi Bar v. DeLaughter, 38 So. 3d 631 (Miss. 2010) (judge disbarred after sentenced to eighteen months in prison).

68. No. 3:07-CR-211, 2009 U.S. Dist. LEXIS 12240 (W.D.N.C. 2009).

69. The elements of conspiracy under 18 U.S.C. § 371, are: (1) an agreement between two or more persons to commit an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one of the conspirators in furtherance of the agreement. United States v. Fernandez, 559 F.3d 303, 322 (5th Cir. 2009).

70. One convicted mortgage broker was sentenced to 19 years in prison. United States v. Pahutski, No. 11-4536, 2012 U.S. App. LEXIS 2685 (4th Cir. 2012).

71. United States v. Sprouse, No. 3:07cr211-2, 2011 U.S. Dist. LEXIS 62284, at 15 (W.D.N.C. 2011).

72. United States v. Sprouse, No. 3:07-CR-211, 2009 U.S. Dist. LEXIS 12240 (W.D.N.C. 2009) ("Sprouse I"). The defendant argued that her office was overwhelmed with work and her work was sloppy but not an ethical violations. Attorneys will not find this defense worth much in honest service prosecutions. *See* United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987). "For [the defendant] now to hide behind the facade of a high-volume caseload to suggest lack of knowledge is surely disingenuous."

73. *Id.* at 3.

74. *Id*. at 4.

75. *Id*.

76. In the wake of the *Spouse* holding, attorneys should not feel a sense of reprieve: simultaneously with the federal charges, a civil action brought under the Racketeering Influenced Corrupt Organization ("RICO") Act. Southstar Funding LLC v. Sprouse, No. 3:05-CV-253-W, 2007 U.S. Dist. LEXIS 22585 (W.D.N.C. 2007). The civil RICO action involved the lesser burden of proof: the financing company proved by the preponderance of the evidence that the attorney violated her duty of honest services and the jury awarded $150,000 in actual damages, $140,000 in legal fees and $1 million in punitive damages. The court had little difficulty with the question of expert testimony on ethical violations in the civil trial, finding them "highly probative." *See* Resource N.E. of Long Island, Inc. v. Town of Babylon, 80 F. Supp. 2d 52 (E.D.N.Y. 2000) (the campaign contribution as "bribery" and honest services wire fraud were predicates for a civil RICO claim). The use of a civil RICO claim with its "enterprise" liability and use of "conspiracy" claims expands the scope of those who may be subject to criminal charges for "influence peddling." *See also* Hope for Families and Community Services v. Warren, No. 3:06-CV-1113-WKW[WO] 2010 U.S. Dist. LEXIS 66873 (D. Ala. 2010) (in the wake of *Skilling*, civil RICO action dismissed but the Court acknowledged that honest services wire fraud claims serve as the predicate offense for a civil claim under RICO).

77. United States v. Sprouse, No. 3:07cr211-2, 2011 U.S. Dist. LEXIS 62284 (W.D.N.C. 2011).

78. *Id.* at 41.

79. *Sprouse*, 2011 U.S. Dist. LEXIS 62284 at 49-50.

80. The order requiring a new trial has been appealed by the United States to the Fourth Circuit Court of Appeals. United States v. Sprouse, No. 11-4715 (4th Cir. 2012).

81. 753 F. Supp. 3d 23 (D.D.C. 2010).

82. United States v. Scanlon, 753 F. Supp.3d at 28.

83. *Id.*

84. Another Abramoff-related defendant was convicted for honest services fraud for violations of rules that were not enshrined in state law. *See* United States v. Ring, 628 F. Supp. 2d 195 (D.C.C. 2009) (violations of congressional rules can, when combined with "inherently dishonest acts" such as "misrepresentation or intentional non-disclosure," be predicates for honest service charges).

85. 655 F.3d 288 (3d Cir. 2011).

86. *Id.* at 297.

87. The appeals court noted that without this evidence, it would have been very difficult for the Government to prove fraudulent intent. *See* United States v. Copple, 24 F.3d 535, 545 (3d Cir. 1994) ("Proving specific intent in mail fraud cases is difficult, and, as a result, a liberal policy has developed to allow the government to introduce evidence that even peripherally bears on the question of intent."). United States v. Fumo, 655 F.3d 288, 302 (3d Cir. 2011).

88. 666 F.3d 168 (4th Cir. 2011).

89. The court noted:

> We conclude that the specialized nature of the legal regimes involved in this case and the complex concepts involving securities registration, registration exemptions, and specific regulatory practices make it a typical case for allowing expert testimony that arguably states a legal conclusion in order to assist the jury. The jury in this case needed to understand not only federal securities registration requirements but also the operation of several obscure Texas Code provisions and their relationship with the federal regime.

United States v. Offill, 666 F.3d 168, 175 (4d Cir. 2011).

90. *Id.* at 175.

91. 72 A.D. 3d 841 (2d Dep't 2010).

92. N.Y. PUB. OFF. LAW § 73 (McKinney 2012). *See also* United States v. Seminerio, No. S1 08 Cr. 1238 (NRB), 2010 U.S. Dist. LEXIS 92881 (S.D.N.Y. 2010) (the same Code of Ethics was evidence of the duty owed by the public official).

93. *Gordon*, 72 A.D. 3d at 842.

94. 6 N.Y.3d 604 (2006).

95. N.Y. PENAL LAW § 200.25 (McKinney 2012).

96. *See* N.Y. COMP. R. & REGS. TIT. 22, § 100.3(B)(6). The court held that there was evidence that the judge had violated explicit duty not to "initiate, permit, or consider *ex parte* communications…concerning a pending or impending proceeding." *Garson*, 6 N.Y.3d at 614.

97. Because the case came to the Court of Appeals on the sufficiency of the indictment, the court did not provide guidance on the scope of permissible expert testimony or who could testify as an expert on issues related to the breach of the Rules of Judicial Conduct.

98. *Garson*, 6 N.Y.3d at 612. In a sharp dissent, Judge George Bundy Smith argued the preamble to the Rules of Judicial Conduct expressly state that the Rules are not designed or intended as a basis for a criminal prosecution. *Garson*, 6 N.Y.3d 3d at 624 (Smith J., dissenting). The Smith dissent aligns with the holding in United States v. Terry, No. 1:10CR390 2011 U.S. Dist. LEXIS 57288 (N.D. Ohio 2011).

99. As one commentator noted:

> The Legislature has not defined what constitutes a violation of a duty of a public servant, given the wide variety of public servants to which the statute applies. Instead, the Legislature has required that the People prove the duty violated in each case. Such proof can come in the form of live testimony from a lay witness or expert, reliance on an internal or formal body of rules, or other indicia of a defendant's knowledge of wrongdoing.

N.Y. CRIMINAL PRACTICE § 70.07, Matthew Bender (2011).

100. Niesig v. Team I, 76 N.Y.2d 363, 369 (1990).

101. *Id.*; s*ee also* Midwood Chayim Aruchim Dialysis Ass. Inc., v. Brooklyn Dialysis, LLC, 82 A.D.3d 1177 (2d Dep't 2011).

102. State v. Thompson, 402 N.J. Sup. 177, 952 A. 2d 491 (App. Div. 2008) (New Jersey Conflicts of Interest Law and a departmental Code of Ethics do not, standing alone, set forth the basis for criminal liability under the state's official misconduct statute).

103. *Thompson*, 953 A. 2d at 506.

104. 59 So. 3d 1245 (La. 2011).

105. *Id*. at 1253.

Taylor Law Implications of Municipal Consolidation and Dissolution[1]

By Terry O'Neil and Brian P. Murphy

Terry O'Neil

According to the National Bureau of Economic Research, the "Great Recession," which began in December of 2007, officially ended in June of 2009.[2] Apparently, someone forgot to tell that to New York State and the vast majority of its counties, cities, towns and villages. The perfect storm of high unemployment, decreasing revenues, unfunded mandates and the 2% tax cap have pushed New York's municipalities to their fiscal brink.

In response to state and local governments' present financial situations, the drumbeat for municipal consolidations and/or dissolutions has grown louder, as people have searched for ways that municipalities can become more efficient, eliminate redundancy, and reduce the size and cost of government. To encourage and facilitate municipal consolidations and/or dissolutions, in 2009 then-Attorney General Andrew Cuomo drafted The New N.Y. Government Reorganization and Citizen Empowerment Act (the "Act"). The bill was signed into law by then-Gov. David Paterson and was effective on March 21, 2010.[3] The statute

> empowers citizens, local officials and counties to reorganize outdated and inefficient local governments. The Act establishes uniform and user-friendly procedures for local government entities to consolidate or dissolve. Through the use of these procedures, in appropriate cases, local governments can enhance the delivery of services, achieve savings and reduce local real property taxes and other taxes and fees.[4]

The Act applies to towns, villages, fire districts, fire protection districts, fire alarm districts, special improvement districts or other improvement districts, library districts, and other districts created by law[5] and establishes uniform procedures for the consolidation and/or dissolution of local governments. Specifically, the Act provides for four types of actions: (1) Board initiated consolidation; (2) Voter petition initiated consolidation; (3) Board initiated dissolution; and (4) voter petition initiated dissolution. In brief, the Act differs from its predecessors because it:

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1. Establishes uniform, streamlined and simplified consolidation and dissolution procedures;
2. Empowers governing bodies to initiate consolidation and consolidation processes for all types of local government entities;
3. Empowers citizens to place consolidation/dissolution on a popular ballot by collecting petition signatures from voters;
4. Clarifies and defines the petition process and the petition forms so that citizens may more easily initiate consolidations/dissolutions;
5. Establishes a uniform signature requirement of 10%, or 5,000 residents, whichever is less, to initiate the consolidation/dissolution process. If an entity has fewer than 500 voters, the petition must contain signatures of at least 20% of the voters;
6. Strikes from the law all pecuniary or property qualifications for signing petitions and/or voting on propositions to consolidate/dissolve a governmental entity; and
7. Authorizes counties to abolish entire units of local government, subject to certain conditions such as county-wide referendums with special majority requirements.[6]

Notwithstanding the Act's positive legislative changes, the Act almost entirely fails to address what is typically the most complex—and costly—aspect of municipal consolidations and/or dissolutions, namely, what do you do with the impacted public sector employees, the vast majority of whom are union members whose terms and conditions of employment are governed by collective bargaining agreements? In fact, the Act's only mention of collective bargaining agreements is found in N.Y. GEN. MUN. LAW § 767, *Effect of Transition on Employees*, which states, in pertinent part:

> Except as otherwise provided by law and except for those officials and employees protected by…[a] collective bargaining agreement, upon the effec-

> tive date of consolidation, all…positions then existing in all component local government entities involved in the consolidation shall be subject to the terms of the joint consolidation agreement or elector initiated consolidation plan, as the case may be. Such agreement or plan may provide for instances in which there is duplication of positions and for other matters such as varying length of employee contracts, different civil service regulations in the constituent entities and differing ranks and position classifications for similar positions.

Thus, the Act's only mention of collective bargaining agreements actually flies in the face of the very purpose of the Act, as it allows for consolidation agreements or plans to provide for the *duplication of positions*, presumably so as not to run afoul of existing collective bargain agreements. Inexplicably, the Act fails to even mention the Public Employees' Fair Employment Act (the "Taylor Law"),[7] which grants state and local government employees the right to collectively bargain with their employers over "terms and conditions of employment," including wages, salaries, hours and all other terms of conditions of employment which the Public Employment Relations Board ("PERB") has, through case law, held to be mandatory subjects of bargaining. Among those "other" PERB-created "terms and conditions of employment" most relevant to this article are subcontracting and transfers of bargaining unit work. Depending on the situation, these two issues, as well as the obligations imposed by collective bargaining agreements in general, can pose formidable and even insurmountable obstacles to municipal consolidations and dissolutions.

When drafting the Act, then-Attorney General Andrew Cuomo and/or the legislature had an opportunity to address the obstacles the Taylor Law and PERB precedent might pose to consolidations and dissolutions by specifically legislating that for the specific and narrow purposes of consolidation and/or dissolution, the Act supersedes the Taylor Law and PERB case law. This would have allowed state and local governments to—solely for the sake of consolidations and dissolutions—set aside existing collective bargaining agreements, consolidate or dissolve, and then, as a successor employer or a new entity, enter into new collective bargaining agreements with its public employees. Unfortunately, this did not occur. As a result, without any specific guidance from the Act, state and local authorities must consider and address the implications the Taylor Law imposes on municipal consolidations or dissolutions.

Mandatory Subjects of Bargaining

As mentioned above, the potential negotiability of subcontracting and transfers of bargaining unit work are the two most significant Taylor Law impediments to municipal consolidations and dissolutions. Because the two concepts overlap, they are often analyzed together.

Subcontracting occurs when a public employer contracts with another entity (public or private) to perform work that was previously exclusively performed by unit members. Absent a clause in a contract specifically allowing public employers to unilaterally subcontract out work, an employer's decision to subcontract is a subject that must be negotiated with a union that exclusively performs the work.

Similarly, a transfer or reassignment of bargaining unit work occurs when a public employer elects to transfer work exclusively performed by one bargaining unit to another of its bargaining units and/or to non-bargaining unit personnel in its employ.

Absent a waiver by the affected unions, an employer's failure to bargain a decision to subcontract out such work or to transfer or reassign such bargaining unit work constitutes a refusal to bargain in good faith and an improper practice under the Taylor Law.

In both subcontracting and transfer of bargaining unit work analyses, the key issue is knowing what "bargaining unit work" is protected. If the work in question is protected bargaining unit work, then the decision to subcontract and/or transfer it is a mandatory subject of negotiation. However, if the work is not protected, then the employer may be able to unilaterally subcontract and/or transfer the work without having to negotiate with the union. When determining whether "bargaining unit work" is protected, PERB looks at two questions. First, PERB determines whether the work has historically been performed *exclusively* by the unit's employees. If the answer to the first question is "yes," PERB turns to the second question and looks to see whether the work itself remains *substantially the same* as it was prior to the transfer.[8]

If the answer to both questions is "yes," the work in question is protected bargaining unit work and absent a waiver by the union, the employer must negotiate any subcontracting or transfer with the employees' union.

Over time, PERB's exclusivity analysis has become increasingly complex. Initially, PERB held that there is no exclusivity over work when it is performed by both unit and non-unit employees.[9] However, PERB's position evolved so that exclusivity could be shown if it could be demonstrated that the unit can "establish a *discernible boundary* to the claimed unit work which would approximately set it apart from work done by non-unit personnel."[10] In a discernible boundary analysis, PERB must determine the job duties actually performed by the unit members at issue. This initially involved an

analysis of the "core components" of the job. Exclusivity would be found if the core components of the job were found to have been exclusively performed by unit members.[11] Thus, non-unit employees performing tasks incidental or peripheral to the core components would not destroy the exclusivity of the work.[12] However, in dicta in a non-"core components" case, PERB moved away from the "core component" method of determining a discernible boundary and reverted to its previously used "reasonable relationship"/"past practice" discernible boundary analysis.[13] Under this analysis, PERB looks to whether the job or practice was unequivocal, continued and uninterrupted for such a period of time and under circumstances to create a reasonable expectation among employees that the job or practice would continue.[14]

With regard to the second question in the exclusivity analysis, if the nature of work and/or the qualifications necessary to perform the work are substantially the same both before and after the transfer, PERB will likely deem the work to be protected bargaining unit work and the employer must negotiate any transfer of the work with the union.[15]

On the other hand, if the transfer of bargaining unit work results in a significant modification of the way the entity actually "does business," PERB would likely hold that such a decision would be a managerial decision that does not have to be bargained with the union.[16] If a significant modification in the nature of the work is found, PERB utilizes a balancing test first laid out in *Niagara*, which weighs the interests of the impacted employee(s) against the legitimate managerial concerns of the employer.[17] Under the balancing test, the extent of the changes in qualifications and services weighs heavily in making the necessary determination. The greater the change in qualifications and services, the more the balance shifts towards the decision being a nonmandatory subject of bargaining.[18] Further, if the transfer causes a significant detriment (*i.e.,* loss of employment) to the employees having work transferred away from them, such a factor would be significant in the balancing test.[19] Where the transfer of bargaining unit work (typically from police officers or firefighters to civilians) does not result in a loss of employment by the police officers or firefighters (known as "civilianization" cases), the balancing test will likely favor the employers over the union and the transfer will not likely be held to be an improper practice.[20]

Impact Bargaining

Under the Taylor Law, public employers have the right to take unilateral action with regard to nonmandatory subjects of bargaining. However, if that action has an impact on the terms and conditions of employment of its employees, the employer is generally obligated to negotiate the impact of its unilateral action with the union.[21] A union's demand to bargain the impact of an employer's unilateral decision involving a nonmandatory subject *is* a mandatory subject of bargaining.[22]

For example, if some of a public employer's employees were to be laid off as part of a consolidation or dissolution, although the employer may not have to negotiate the actual layoffs, the union for those employees would be able to bargain the impact on those employees, such as severance benefits and accrued time payouts.

When considering whether impact bargaining is required, public employers should be aware that impact bargaining can be avoided if:

1. The union waives its rights to impact bargaining; or
2. Under the "duty satisfaction" concept, during past negotiations the employer and union have previously negotiated the impact of the employer's unilateral action.[23]

When evaluating such situations, public employers should closely scrutinize their existing collective bargaining agreements to determine whether they contain a previously negotiated (and thus agreed upon) "Management Rights" clause or a specific subcontracting and/or transfer of bargaining unit work clause that may constitute a waiver to impact bargaining or may demonstrate that the employer has satisfied the "duty satisfaction" option by previously having negotiated the right to subcontract and/or transfer bargaining unit work.[24] However, PERB narrowly interprets management rights clauses. Thus, if the right at issue is not specifically addressed in a management rights clause (*e.g.*, consolidation and/or merger), PERB may rule that a union has not waived its right to negotiate the issue.[25]

In the context of a municipal dissolution, the Taylor Law impediments are typically not as onerous as during a consolidation. For instance, an employer's decision to curtail or cease to provide a service does not require bargaining provided that the employer is completely and genuinely "out of the business."[26] Thus, it is within the employer's management prerogative to abolish a service.

> The decision to curtail services and eliminate jobs is not a mandatory subject of negotiations, although the employer is obligated to negotiate on the impact of such a decision on the terms and conditions of the employees affected. In considering whether a service has been abolished or merely transferred for performance by an agent, PERB looks at the level of control exercised by the public employer.[27]

For instance, recently the residents of the Village of Seneca Falls voted to dissolve their Village and thus have the Village "go out of business" effective December 31, 2011. On that date, all of the Village's employees were laid off and the Village was dissolved. Prior to the dissolution, our firm completed impact bargaining with the Village's PBA and DPW units over the impact of the layoffs. The agreements established how, upon their layoffs, the Village's employees would be compensated for their accrued compensatory time. The agreements also implemented a new sick leave policy and accrued sick leave payout procedure designed to avoid the potential for excessive absenteeism during the last year of the Village's existence.[28]

Successorship Under the Taylor Law

A successor employer is a new employer that takes over the business of another operation that was unionized. A successor employer is established when the new employer elects to retain a *representative and substantial* complement of the other operation's (former) bargaining unit members, a majority of which were similarly employed by the prior operation. The issue is, does a successor public employer have a duty to bargain with the union that represented the employer's "inherited" employees when they were employed by the other, now defunct public employer? To answer the question, PERB has turned to private sector successorship law for guidance, particularly the Supreme Court decision in *NLRB v. Burns International Detective Agency, Inc.*[29] Using a totality of the circumstances examination, *Burns* and its progeny hold that when a successor employer announces that it plans to retain *all or nearly all* of the predecessor's employees and a majority of those employees had been similarly employed by the predecessor, although the successor is not necessarily bound by the predecessor's CBA, the successor is obligated to recognize and bargain in good faith with the predecessor's union. It must also consult with the predecessor's union prior to making any changes in the initial terms and conditions of employment of the inherited employees.[30] However, due to the public policies often involved in public sector successorship cases, a 1984 PERB Advisory Opinion cautioned that:

> [w]hile it is likely that…the work force will remain largely the same, there is certainly a possibility that the individual negotiating units will no longer be appropriate, particularly in light of the fact that this Board deems most appropriate the largest unit which is consistent with the standards set out in C.S.L. § 207.1. Thus, were the Board to adopt the private sector case law in this area, it may well be that, if the consolidated entity did not wish to bargain on the basis of the former uniting arrangement, it could, at the outset of its existence, require its employees and their employee organizations to seek new recognition or certification.[31]

Of PERB's successorship cases, perhaps the most disturbing for public employers is *City of Amsterdam*.[32] In *Amsterdam*, city voters decided to eliminate the city's Water Board and create a new Water and Sanitary Sewer Department that performed the combined water and sewage operations. The two impacted units, one representing nineteen water workers and the other representing the thirteen sewer workers, filed an improper practice charge against the city. PERB upheld the Director's decision which held that both units should be continued because of the respective units' "undisputed history of effective representation of the employees in both units over an extended period of time."[33] Thus, despite the administrative inconvenience, as a successor employer, the city had to recognize and bargain with two small, similarly situated units.

However, in *State of New York Olympic Regional Development Authority ("ORDA")* PERB came to a very different conclusion on very similar facts.[34] In *ORDA*, a public ski facility, which employed PEF-unionized ski instructors, was transferred to ORDA, a public-benefit corporation that was also a public employer employing its own unionized ski instructors. ORDA sought to merge the PEF members into its existing unit. PEF filed an improper practice charge against ORDA. PERB held that because ORDA had recognized a unit of all of its employees at its various facilities—including the seasonal ski instructors at issue—there was no basis for finding that the PEF unit at the transferred facility was the "most appropriate" unit. Thus, ORDA was not required to recognize, bargain with, or adhere to the existing collective bargaining agreement involving PEF. PERB distinguished its holding in *Amsterdam* by pointing out that in *Amsterdam*, the transfer of complete, discrete units taken over in whole by the city was the most appropriate unit. It distinguished the issue in ORDA by stating that PEF merely sought to follow its forty ski instructors to the successor employer, and was asking PERB to ignore its longstanding interpretation of N.Y. Civ. Serv. Law § 207.1, which required PERB to certify only the "most appropriate" unit, which is typically the largest unit consistent with the Taylor Law's standards.[35]

Although school district consolidations, mergers and/or annexations are governed by different laws than other public employers, in the context of successorship cases PERB has issued decisions favorable to public employers. For instance, in *Monroe-Woodbury Central School District*,[36] a teachers' union submitted a demand to fact finding that would require that "[a]s a condition of any merger or consolidation, all teachers presently employed by the district shall retain their position in any merged or consolidated district if they so desire," and also required that the clause be

binding on the new district as well as any district into which the district may be merged or consolidated.[37] The district filed a scope charge against the union, arguing that it was an improper practice to submit the above nonmandatory subject of bargaining to fact finding. PERB agreed with the District and held that both segments of the demand were nonmandatory subjects of bargaining. In so holding, the Board stated that both PERB and the Court of Appeals had previously held that public employers need not negotiate its decision to lay off employees.[38] Thus, the district did not have to negotiate about a guarantee of employment for a possible successor employer.[39]

Further, in *Cuba-Rushford Central School District*,[40] residents in both the Cuba and Rushford School Districts voted to reorganize their districts, with the Cuba Central School District annexing the Rushford Central School District, forming the Cuba-Rushford Central School District. Prior to the annexation, the teachers in each district were each represented by their respective teachers' unions and had entered into CBAs with their respective Boards of Education. After the annexation was complete, the Rushford Faculty Association (the "Association") filed a grievance and demand for arbitration against the reorganized district, seeking to have the "new" district continue all of the contractual benefits due to them under the CBA between the Association and the (now defunct) Rushford Central School District. In Supreme Court, the district moved for a stay of the arbitration. The Association argued that the CBA in question, like an individual employment contract, was a "property right" which the district was obligated to assume by operation of N.Y. EDUC. LAW § 1804(5)(b) which stated that "the central school district, of which any such district shall have become a part, shall succeed to all the property rights of such…."[41] The Supreme Court held, and the Fourth Department affirmed, that in the context of the reorganization of a central school district, the annexing district is not obligated to honor the CBA of those teachers previously employed by the dissolved school district who are now employed by the annexing district. In addition, the Association failed to demonstrate that, by any measure, it could be fairly characterized as the present "most appropriate" bargaining unit for the teachers now employed by the consolidated district.[42]

Additional Hurdles or Questions to Consider

Self-Preservation. Due to the nature of a consolidation or dissolution, those charged with pursuing and/or planning mergers or consolidations are often the ones who may end up having their positions eliminated as a result of the merger/consolidation.[43] Thus, as a means of "self-preservation," municipal authorities often do not have much, if any, incentive to push for a consolidation or dissolution.[44]

Overlapping Services. Look for them, as they are ripe targets for consolidations or mergers. For instance, a small town with a small geographic footprint does not necessarily need to have three fire districts within it.

Is Service Sharing an Option? What services can be shared amongst existing municipalities? Examine: police and fire; water and sewer districts; Code Inspection, Building Inspection and Fire Inspection; purchasing; human resources, etc. Service sharing can be accomplished by intermunicipal agreement[45] or by an intergovernmental relations council.[46]

What Level of Consolidation Works Best for Your Municipality? A local government can decide to combine two existing departments (*e.g.*, Building Department and Code Enforcement Department); two or more governments can merge departments in a particular area (*e.g.*, merge a town and village's Department of Public Works); or entire governmental entities (towns, villages, etc.) can merge with each other, resulting in the consolidation or dissolution of one or more entities.

Dealing with Unions. To the extent they are able to, unions will likely fight to protect the jobs/rights of their workers. At a minimum, this likely involves impact bargaining. However, in the worst case scenario, a consolidation process can get bogged down in (potentially) years of litigation at PERB and/or the courts. It would be best to communicate with the impacted unions early and often and attempt to negotiate resolutions to all potential labor issues prior to acting unilaterally and inviting improper practice charges.

Conclusion

Despite the State's laudable goal of promoting municipal consolidation and dissolution and the Act's streamlining of the involved processes, the Act's failure to specifically address the Taylor Law issues requires state and local governments to be wary of, and proactively deal with, issues that unionized public employees and their respective collective bargaining agreements can pose to municipal consolidations and dissolutions.[47] The unaddressed issues of subcontracting, the transfer of bargaining unit work, and successorship are very fact specific and *may* compel municipalities to negotiate their efforts to consolidate (less likely in a dissolution) with public employee unions in order to avoid costly and time consuming litigation before PERB. Such negotiations have at times concluded with the "leveling up" of benefits, where employees of the new or surviving unit receive the best of the benefits that previously existed in the two separate units. In addition, public employers may also have been compelled to recognize and negotiate with two distinct unions representing similarly situated employees. These results fly in the face of the cost-saving goals of consolidation and dissolution.

Thus, when considering the Taylor Law implications of whether a municipal consolidation and/or dissolution is appropriate and/or feasible for a public employer, consider taking the following steps:

1. **ALWAYS** start by closely reviewing all collective bargaining agreements for clauses about allowing for subcontracting or the unilateral transfer of bargaining unit work;
2. Review all relevant statutes applicable to your particular governmental entity and review all applicable PERB and state court case law regarding consolidations or dissolutions involving your particular governmental entity; and
3. Consult with labor counsel regarding mandatory subjects of bargaining, impact bargaining, and the best strategic approach to dealing with the Taylor Law issues that will arise during your consolidation and/or dissolution.

Endnotes

1. Parts of this article were originally included in a paper presented on Jan. 26, 2012 at N.Y. St. Bar Ass'n Annual Meeting, Municipal Law Section, in New York City.
2. National Bureau of Economic Research, *Business Cycle Dating Committee* (Sept. 20, 2010), *available at* http://www.nber.org/cycles/sept2010.html (last visited March 22, 2012).
3. N.Y. Gen. Mun. Law §§ 750–793.
4. Memo to N.Y. Assembly Bill A.08501 (2009).
5. The Act does not apply to school districts, city districts or special purpose districts created under county law. For other relevant statutes *see, e.g.*, N.Y. Educ. Law § 1950(4)(d)(1) (permitting school districts to contract with BOCES for provision of certain services) and N.Y. Civ. Serv. Law § 70 (governing transfers of public employees from one public employer to another).
6. Summary adapted from http://www.reformnygov.com/proposal.html (last visited Jan. 3, 2012).
7. N.Y. Civ. Serv. Law §§ 200–214. For a forty-year history of the Taylor Law, *see* Terry O'Neil and E.J. McMahon, *Taylor Made, The Cost and Consequences of New York's Public-Sector Labor Laws* (Oct. 2007), *available at* http://www.empirecenter.org/Documents/PDF/TaylorLaw_report_v21.pdf (last visited March 22, 2012).
8. *See, e.g.,* Niagara Frontier Transp. Auth., 18 PERB ¶ 3083 (1985); Manhasset Union Free Sch. Dist., 41 PERB ¶ 3005 (2008), *aff'd*, Manhasset Union Free Sch. Dist. v. PERB, 61 A.D.3d 1231 (3d Dep't 2009).
9. *See, e.g.*, East Hampton Police Benevolent Ass'n v. Town of East Hampton, 29 PERB ¶ 3043 (1996).
10. County of Nassau, 21 PERB ¶ 3038 (1998) (emphasis added). *See, e.g.*, City of Rome, 32 PERB ¶ 3058 (1999).
11. *See, e.g.*, City of Rome, 32 PERB ¶ 3058 (1999).
12. *Id.*
13. Manhasset Union Free Sch. Dist., 41 PERB ¶ 3005 (2008), *aff'd*, Manhasset Union Free Sch. Dist. v. PERB, 61 A.D.3d 1231 (3d Dep't 2009); *see also* City of Canandaigua, 43 PERB ¶ 4585 (on appeal, PERB deferred the improper practice charge to the parties' contractual grievance procedure, *see* Case No. U-29660, November 30, 2011) (ALJ adopted dicta from *Manhasset* and rejected the "core component" analysis that a firefighter's job is being ready to respond to fire and fire-related emergencies. Rather, following *Manhasset*, the ALJ held that the Union had established exclusivity over activities such as driving and operating city-owned fire department vehicles, testing fire hydrants and routine maintenance of fire houses, grounds and equipment. Thus, the ALJ found the City committed an improper practice when it transferred such work from the City's paid firefighters to the City's civilian volunteer firefighters).
14. Manhasset Union Free Sch. Dist., 41 PERB ¶ 3005 (2008), *aff'd*, Manhasset Union Free Sch. Dist. v. PERB, 61 A.D.3d 1231 (3d Dep't 2009).
15. *Niagara*, 18 PERB, at 3182.
16. *See, e.g.,* West Irondequoit Central Sch. Dist., 41 PERB ¶ 4581 (2008) (because evidence showed that qualifications for the position had changed substantially in terms of education and experience, the employer's interest outweighed the unit's loss of duties which had been performed by unit members); North Shore Union Free Sch. Dist., 11 PERB ¶ 3011 (1978) (substantial change in nature of job assignment permitted district to replace abolished position with non-unit position); Hewlett-Woodmere Union Free Sch. Dist., 29 PERB ¶ 4617 (1996) (changed nature of program and its targeted participants allowed district to act unilaterally in assigning supervision of program to persons outside of the bargaining unit).
17. *Niagara*, 18 PERB, ¶ 3083.
18. *See, e.g.*, Fairview Fire Dist., 28 PERB ¶ 4608 (1995) (holding that although transfer of dispatching duties from firefighters (uniformed personnel) to dispatchers (civilian personnel) was a transfer of exclusive unit work, it was permissible because it constituted a per se change in job qualifications and, thus, change in level of service).
19. *Id.* (holding that transfer of dispatching duties from firefighters to civilian dispatchers was within management's prerogative because the transfer resulted in a change in the level of service and, balancing the interests of the parties, any impact on firefighters was de minimis because the transfer did not result in the loss of employment by the firefighters).
20. *Id.*
21. *See, e.g.,* City Sch. Dist. of New Rochelle, 4 PERB ¶ 3060 (1970) (holding that district had to negotiate the impact of its decision to eliminate positions and curtail services).
22. Burke v. Bowen, 49 A.D.2d 904, 373 N.Y.S.2d 387 (2d Dep't 1975), *aff'd*, 40 N.Y.2d 264, 386 N.Y.S.2d 654 (1996).
23. *See, e.g.*, Baldwinsville Cent. Sch. Dist., 15 PERB ¶ 3032 (1982).
24. *See, e.g.*, County of Allegany, 33 PERB ¶ 3019 (200) (holding that the duty to bargain may be satisfied through the negotiation of a management rights clause granting the employer the right to determine "when and to what extent" work is to be performed by unit members); Mattituck-Cutchogue Union Free Sch. Dist., 40 PERB ¶ 4577 (2007) ("While the transfer of exclusively performed bargaining unit work constitutes a mandatory subject of bargaining and a union has the right to bargain concerning such a subject…the management rights clause in this matter constitutes a clear and unmistakable waiver of that right."); Garden City Union Free Sch. Dist., 27 PERB ¶ 3029 (1993) (dismissing a charge protesting the transfer of cafeteria services to a private corporation because the relevant management rights clause constituted a waiver of the right to bargain the transfer of unit work); City of Batavia, 28 PERB ¶ 4599, (1995) (finding that union waived right to negotiate over subcontracting of work through agreement to a clause which granted employer the sole right to determine whether and to what extent the work shall be performed by employees).
25. *See, e.g., County of Nassau*, 24 PERB ¶ 4523, *aff'd*, 26 PERB ¶ 3029 (1991) (holding that provision of management rights clause allowing employer to regulate work schedules did not encompass employer's reduction in the length of its employees'

meal periods); *County of Nassau*, 26 PERB ¶ 4574, *aff'd*, 26 PERB ¶ 3083 (1993) (holding that management rights clause providing employer authority to regulate work schedules—but not specifically work hours—did not permit employer to unilaterally increase its employees' weekly work hours).

26. Town of Brookhaven, 28 PERB ¶ 3010 (1995).

27. PERB Opinion of Counsel, 29 PERB ¶ 5005 (2002).

28. However, note that during impact bargaining with police and fire units, if public employers are not able to reach an agreement with the units, the Taylor Law calls for the issue to be resolved through binding interest arbitration.

29. NLRB v. Burns International Detective Agency, Inc., 406 U.S. 272 (1972).

30. *Id.*

31. Advisory Opinion, 18 PERB ¶ 5002, 5004 (1984).

32. City of Amsterdam. 17 PERB ¶3045 (1984), *aff'd*, 17 PERB ¶ 7015 (Sup. Ct. Albany Co. 1984).

33. *Id.*

34. State of New York Olympic Regional Development Authority, 20 PERB ¶ 3046 (1987).

35. *See also* City of Schenectady, 25 PERB ¶ 3043 (1992) (PERB dismissed an IPC brought by a unit of twelve city-employed nurses that were transferred to a county-owned facility. PERB held that because the county already had a unit that included every nurse employed by the county, the existing county unit was the most appropriate unit for the twelve transferred nurses.).

36. Monroe-Woodbury Cent. School Dist., 10 PERB ¶ 3029 (1977).

37. *Id*.

38. *Id.*

39. PERB also held that under the Education Law, if the district were consolidated into another district, it would dissolve and the successor employer would be a separate entity. Thus, the union was not permitted to compel the district to negotiate over a demand which would bind an entity that was not a party to the instant negotiations.

40. Cuba-Rushford Central Sch. Dist., 24 PERB ¶ 7538 (1991), *aff'd*, 25 PERB ¶ 7531, 182 A.D.2d 127 (4th Dep't 1992).

41. *Id.*

42. *Id.*

43. *E.g.*, Mayors, Managers, Supervisors, Board members.

44. For instance, in May of 2011 Senator Jack Martins (R) proposed a bill that would make it harder for municipalities to consolidate by imposing time limits on voter-initiated petitions and adding additional steps to the consolidation/dissolution process. The bill was passed in the Senate but died in the Assembly. Senator Martin's bill was drafted and proposed at the request of the New York Conference of Mayors, the Association of Towns, the Fireman's Association of the State of New York and the Association of Fire Districts of the State of New York—all entities that have a vested interest in making mergers/consolidations more difficult.

45. *See, e.g.*, N.Y. Gen. Mun. Law § 119-o (stating that "municipal corporations and district shall have power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint water, sewage or drainage project.").

46. *See* N.Y. Gen. Mun. LAw § 239-n. (Intended to "unite governmental entities," provide a forum for discussion of municipal problems/solutions and foster pooling of services for any combination of counties, towns, villages, school districts, BOCES or fire district).

47. Note that despite the Act's failure to address the Taylor Law, there is an argument to be made that the Act *does* pre-empt the Taylor Law, and that a municipality's decision to consolidate or dissolve does not require it to negotiate with its employee unions. This argument stems from PERB's interpretation of other merger and/or consolidation-related statutes, such as N.Y. Educ. Law § 1950(4)(d)(1) which allows school districts to contract with BOCES for certain services without negotiating that decision with their unions. *See, e.g.*, Webster Cent. Sch. v. PERB, 75 N.Y.2d 619, 624 (1990) (holding that in § 1950(4) "the Legislature clearly manifested its intention that school districts' decisions to participate in such…programs not be subject to mandatory collective bargaining with teachers' unions"); Matter of Hellner v. BOCES, 78 A.D.3d 1649, 911 N.Y.S.2d 749 (4th Dep't 2010) (holding that District had the authority to subcontract with BOCES for occupational therapy services, and that the District's occupational therapist had Civil Service Law Section 70(2) transfer rights at BOCES); Vestal Employees Ass'n v. PERB, 175 Misc.2d 98, 667 N.Y.S.2d 658 (Sup. Ct. Albany Cnty 1997) (holding that school district's transfer of printing services to BOCES was not subject to mandatory collective bargaining). This argument has not yet been attempted in connection with the Act.

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Municipal Bonding, the Constitution and the New Tax Levy Limitation Law

By Douglas E. Goodfriend

On June 24, 2011, Chapter 97 of the Laws of 2011 was signed into law by the Governor (the "Tax Levy Limitation Law" or "Chapter 97"). The Tax Levy Limitation Law applies to all cities, counties, towns and villages (except New York City and its counties) as well as all fire districts and school districts.[1]

Chapter 97 restricts, among other things, the amount of real property taxes that may be levied by or on behalf of a municipality in a particular year, beginning with fiscal years commencing on or after January 1, 2012. It expires on June 15, 2016 unless other legislation is extended. Pursuant to Chapter 97, the tax levy of a municipality cannot increase by more than the lesser of (i) two percent or (ii) the annual increase in the consumer price index ("CPI"), over the amount of the prior year's tax levy. Certain adjustments would be permitted for taxable real property full valuation increases due to changes in physical or quantity growth in the real property base as defined in Section 1220 of the Real Property Tax Law. A municipality may exceed the tax levy limitation for the coming fiscal year only if the governing body first enacts, by at least a sixty percent vote of the total voting strength of the board, a local law to override such limitation.[2] There are permissible exceptions to the tax levy limitation provided in Chapter 97, including expenditures made on account of large tort settlements and certain increases in the average actuarial contribution rates of the New York State and Local Employees' Retirement System, the Police and Fire Retirement System, and the Teachers' Retirement System. Municipalities are also permitted to carry forward a certain portion of their unused levy limitation from a prior year. Each municipality, prior to adoption of each fiscal year budget, must submit to the State Comptroller its calculation of the tax levy for each fiscal year.

The Tax Levy Limitation Law does not contain an exception from the levy limitation for the payment of debt service on either outstanding general obligation debt (notes or bonds) of municipalities or such debt incurred after the effective date of the tax levy limitation provisions (June 24, 2011).

There is also no exception for: debt service on projects completed under an order on consent, debt issued to pay judgments or settled claims including tax certioraris and torts (except debt service on obligations issued to finance a tort settlement may be an exception to the tax levy limit to the extent annual debt service exceeds 5% of the prior year tax levy, this remains unclear), debt service on obligations issued to pay for extraordinary works necessitated by public emergency, storm damage or other unpredictable one-time events, or debt service on borrowings for cashflow purposes.

Let us begin with the Constitutional framework within which Chapter 97's provisions must operate.

The Constitutional Context

Article VIII Section 2 of the State Constitution requires every municipal issuer of general obligation notes and bonds in the State to unconditionally pledge its faith and credit for the payment of the principal thereof and the interest thereon. Article VIII Section 2 reads:

> No indebtedness shall be contracted by any county, city, town, village or school district unless such county, city, town, village or school district shall have pledged its faith and credit for the payment of the principal thereof and the interest thereon.

This has been interpreted by the Court of Appeals, the State's highest court, in *Flushing National Bank v. Municipal Assistance Corporation for the City of New York*,[3] as follows:

> Moreover, the term "faith and credit" in its context is not qualified in any way…. A pledge of the city's faith and credit is both a commitment to pay and a commitment of the city's revenue generating powers to produce the funds to pay. Hence, an obligation containing a pledge of the City's "faith and credit" is secured by a promise both to pay and to use in good faith the city's general revenue powers to produce sufficient funds to pay the principal and interest of the obligation as it becomes due. That is why both words, "faith" and "credit," are used and they are not tautological. That is what the words say and that is what courts have held they mean….So, too, although the Legislature is given the duty to restrict municipalities in order

> to prevent abuses in taxation, assessment, and in contracting of indebtedness, it may not constrict the city's power to levy taxes on real estate for the payment of interest on or principal of indebtedness previously contracted…. While phrased in permissive language, these provisions, when read together with the requirement of the pledge of faith and credit, express a constitutional imperative: debt obligations must be paid, even if tax limits be exceeded.[4]

The pledge has historically been understood as a promise to levy property taxes *without limitation as to rate or amount* to the extent necessary to cover debt service due to language in Article VIII Section 10 of the Constitution, discussed below, which provides an exclusion for debt service from Constitutional limitations on the amount of a real property tax levy, insuring the availability of the levy of property tax revenues to pay debt service. As the *Flushing National Bank* (1976) Court noted, the term "faith and credit" in its context "not qualified in any way." Indeed, in *Flushing National Bank v. Municipal Assistance Corp.*,[5] the Court of Appeals described the pledge as a direct constitutional mandate. In *Quirk v. Municipal Assistance Corp.*,[6] the Court of Appeals stated that, while holders of general obligation debt did not have a right to particular revenues such as sales tax, "with respect to traditional real estate tax levies, the bondholders are constitutionally protected against an attempt by the State to deprive the city of those revenues to meet its obligation." According to the Court in *Quirk*, the State Constitution "requires the city to raise real estate taxes, and without specification other revenues, if such a levy be necessary to repay indebtness."

Article VIII Section 2 of the Constitution also specifically provides:

> If at any time the respective appropriating authorities shall fail to make such appropriations, a sufficient sum shall be set apart from the first revenues thereafter received and shall be applied to such purposes. The fiscal officer of any county, city, town, village or school district may be required to set apart and apply such revenues as aforesaid at the suit of any holder of obligations issued for any such indebtedness.

Other sections of Article VIII support this pledge. Sections 10, 10-a, 11(b) and 12 of Article VIII are of a single integrated cloth designed to insulate the treatment of the portion of the tax levy relating to capital expenditures, including debt service for capital expenditures, from the portion of the tax levy relating to operating expenditures, "a unified and interdependent plan to control the taxing and debt-contracting power of the subdivisions of the State" whose "overall purpose is evident from within the four corners of the Constitution as well as the Constitutional history which brought them into being."[7]

Article VIII Section 10 of the Constitution provides the quantitative constitutional limitations on the amount of the tax levy of any county, city, village or school district described therein, which amount is *"in addition to providing for the interest on and the principal of all indebtedness,"* which is not subject to the limitation. This is the foundation for the pledge. However, there is a deduction from the maximum permissible amount for the amount to be raised for the payment of interest on and for the redemption of non-capital financing obligations.[8] The Constitutional Convention history states:

> The existing tax limitation does not apply to taxes levied for debt service. It is intended that debt service on short-term borrowings, which are in the nature of current operating costs, should be treated as if within the tax limitation, while at the same time placing no limit on the full faith and credit pledged behind all borrowings.

Note: The levy for capital debt service is *separate from* the general tax levy limitation in this Constitutional provision. There are two boxes conceptually:

The Tax Levy (Other Than Debt Service)	The Tax Levy For Debt Service

It should be noted that Section 10 does include a provision that "[n]othing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this Constitution to further restrict the powers of any county, city, town, village or school district to levy taxes on real estate."

However, as the Constitutional Convention report on Section 10 shows, in commenting upon proposals for an overlapping tax levy limitation to take into account multiple jurisdictions taxing a parcel of land:

> The committees have given careful consideration to the proposals for an overlapping tax limitation, but although exceedingly sympathetic with the problems faced by real estate throughout the state, they have reluctantly reached the conclusion that the imposition of an overlapping tax limitation would be impractical and

> that any further curb, under existing conditions, would greatly impair the ability of localities to perform essential governmental services. Furthermore, any drastic curtailment of local taxing power would of necessity require not only an immediate rearrangement of the tax structure of the state, but would clearly result in a fundamental revision of the relationship of state and local governments the effects of which cannot be predicted. The committees believe that the question of further limitations upon taxation on real estate, other than the extension here made, is one of legislative policy to be determined in conjunction with other tax problems of the state. In proposed Section 12, the power of the legislature to impose further limitations is expressly reserved.

Section 10-a provides that while the tax levy raised for capital debt service is outside the tax levy limitations of Section 10, with regard to self-sustaining capital improvements, if the project generates revenues in excess of operating expenditures, the excess is annually first to go to pay debt service on the obligations issued for that project. Therefore, the tax levy is not to include that amount so as prevent, according to the legislative history, the diversion of funds from the capital debt service exception to the tax levy limitation over to the operating expenditure side of the tax levy through raising limitation-free monies for debt service otherwise covered. All such revenues must be applied to debt service if not consumed in operational expenses *before* taxes for such debt service may be levied. Again, indebtedness for capital purposes is treated as wholly separate from the operating budget levy, outside the tax levy limitation.

Section 11(b) provides that to the extent that a county, city (other than New York City), village or certain school districts provide a direct budgetary appropriation to pay all or a part of the cost of capital project that has a period of probable usefulness for which it could have borrowed, the taxes required for that capital appropriation are to be excluded from the Section 10 tax levy limitation. Indeed, prior to a 1951 amendment, such appropriation was treated as a charge against the debt limitation even though debt was not to be issued if the capital expenditure could have been financed or was mandated.[9] The reports of Constitutional Convention state:

> The proposed section provides that taxes required by law to be levied for capital improvements may be exempted from the tax limit, provided that the entire cost of any capital improvement financed in whole or in part by taxes so exempt shall be included, within the debt limit. This will insure that, as taxes for the direct payment of capital improvements increase, there is a corresponding decrease in taxes for the debt service on bonds issued for capital improvements. Under the provisions of this section there will be a close correlation between the taxes for capital improvements exempted hereunder and those which, but for the transition policy, would have been required for debt service and which would, of course, have been exempt in any event.

Thus, today the cost of a capital improvement for which a financing is permissible, *even though not borrowed*, is wholly outside the tax levy limitation. This provision also states that such pay-as-you-go expenditures are excluded "unless the legislature otherwise provides," this concept being part of a broader policy at the time to transition from greater reliance on debt to greater reliance on pay-as-you-go financing. Again, the levy for capital purposes is treated as wholly separate from that for operating expenses.

Finally, let us look at Section 12. Section 12 provides the general duty of the State Legislature, *subject to* the other provisions of the Constitution, to restrict the power of taxation, assessment, borrowing money, contracting indebtedness and loaning the credit of counties, cities, towns and villages.[10] It also specifically authorizes the State Legislature to further restrict their powers to contract indebtedness or to levy taxes on real estate. *However, this authority, itself more generally qualified by the Constitutional grants of authority to municipalities and school districts provided in the other relevant sections, is also specifically restricted*: "The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted."[11] The records of the Constitutional Convention state:

> Note: This section, which is new, expressly reserves the right of the legislature at any time to further restrict the power of any locality to incur debt or impose taxes on real estate, except of course the right to further restrict the imposition of taxes for debt service for obligations which were sold to the public with the understanding that the debt service thereon would not be included within the tax limit.

Article VIII Section 12 of the State Constitution specifically provides as follows:

> It shall be the duty of the legislature, *subject to the provisions of this constitution*, to restrict the power of taxation, assessment, borrowing money, contracting indebtedness, and loaning the credit of counties, cities, towns and villages, so as to prevent abuses in taxation and assessments and in contracting of indebtedness by them. Nothing in this article shall be construed to prevent the legislature from further restricting the powers herein specified of any county, city, town, village or school district to contract indebtedness or to levy taxes on real estate. The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted.[12]

On the relationship of the Article VIII Section 2 requirement to pledge the faith and credit and the Article VIII Section 12 protection of the levy of real property taxes to pay debt service on outstanding bonds and notes subject to that general obligation pledge, recall again what the Court of Appeals in the 1976 *Flushing National Bank* case stated:

> So, too, although the Legislature is given the duty to restrict municipalities in order to prevent abuses in taxation, assessment, and in contracting of indebtedness, it may not constrict the city's power to levy taxes on real estate for the payment of interest on or principal of indebtedness previously contracted…. While phrased in permissive language, these provisions, when read together with the requirement of the pledge of faith and credit, express a constitutional imperative: debt obligations must be paid, even if tax limits be exceeded.[13]

In addition, the Court of Appeals in the *Flushing National Bank* case has held that the payment of debt service on outstanding general obligation bonds and notes takes precedence over fiscal emergencies and the police power of municipalities. As the Court noted, "The Constitutional prescription of a pledge of the faith and credit is designed, among other things, to protect rights vulnerable in the event of economic circumstances."[14]

Taken together, Sections 10, 10-a, 11(b) and 12 of Article VIII offer the clear, consistent and unambiguous intent of the drafters *to exclude* the cost of appropriations either to directly pay for a capital project, or to pay indebtedness contracted to pay for a capital project, and due in a fiscal year, from the constitutional limitations upon the tax levy. There is not even the slightest doubt on this point. Any authority which the Constitution may grant to the State Legislature in this regard therefore excludes legislative limitation upon the tax levy for capital debt service. No provision of the Constitution grants powers to the State Legislature to convert a Constitutional exception to a real property tax limitation into a further limitation.

The type of limitations the Constitutional drafters intended to permit the State Legislature to impose, as matters of legislative policy, were those such as the multi-jurisdiction tax issue discussed with regard to Section 10 and the pay-as-you-go exclusion of Section 11(b). They did not intend to delegate to the State Legislature authority to erode the fundamental structure as a matter of legislative policy.

The Article VIII Section 2 requirement of the pledge of the faith and credit, unconditional and without restriction, rests firmly upon this unrestricted and untouchable foundation for capital indebtedness.

Therefore, it is not a question of whether the State Legislature has the authority to impose limitations upon the tax levy as long as it does not impinge upon the ability of a local unit of government to levy *enough* taxes to cover debt service; rather, it is a question of whether the State Legislature has the authority *to not exclude* the portion of the tax levy raised to pay debt service on obligations issued to finance capital improvements from any such limitations imposed.

The only question which remains thereafter is this: Does the phrase "theretofore contracted" in Article VIII Section 12 constitute a Constitutional delegation of authority to the State Legislature to override the debt service exclusion provisions of the Constitution, as to any debt contracted after the effective date of any legislation (but certainly not debt contracted prior thereto) or does the phrase "theretofore contracted" only permit the State Legislature to impose tax levy restrictions of a variety which would not override a debt service exclusion provided in the Constitution for *all* capital debt, on debt thereafter issued? That is the question.

Two Models of Constitutional Compliance

There are thus two fundamentally different models of the relationship of debt service to a tax levy in conflict in Chapter 97. On the one hand, the Constitutional model of two boxes, one the general tax levy, and the other, a separate box of the amount of levy necessary to pay debt service on obligations issued for capital purposes. The first is subject

Debt Service
Pensions
Health Care Costs
Mandates
Other Government Operations

to limitations. The second, not. On the other hand, Chapter 97 takes the view that there is only one box, the tax levy including all debt service.

The argument in favor of the constitutionality of Chapter 97 (which carries a presumption of constitutionality) is that limiting a tax levy which includes capital debt service does not impinge on the ability of a municipality to raise taxes to pay debt service. Why? Proponents of Chapter 97 say that a municipality can either cut expenses other than debt service to the extent necessary or override the limit. Two points are important here.

(1) The drafters of the Constitution, by virtue of the two-box conceptual structure of relevant provisions, specifically established a framework to avoid an end-game of payment of government operations vs. debt service; and

(2) Every dollar in debt service in a one-box view deprives the municipality of that same dollar for government operations absent a special action to override (*i.e.* a limitation) not envisioned in the Constitution.

In the one-box view, as long as the tax levy limitations do not prevent a municipality from raising *enough* taxes to pay debt service, it is not a violation of Constitutional law. Proponents of Chapter 97 would say, "Of course, pay debt service first, you have to do so. Then pay the rest. As a State Legislature, we have the authority in the Constitution to limit levies as long as we don't prevent you from paying debt service." But in that case: Where is the line? The problem with this view of the Constitutional provisions is that it establishes a conflict between debt service and all other governmental expenses (including pension payments which have their own Constitutional protection) and this is precisely what the Constitutional framework seeks to avoid. Because, according to the *Flushing National Bank* case, in that endgame, debt service trumps everything else and that is a very hard decision to make in a financial crisis in which health, safety and welfare issues take center stage.

Even though the tax cap relates to an incremental increase and not to an existing levy amount, it is a *limitation* upon the increase in a context in which outstanding indebtedness may very well have been issued with increasing debt service over time.[15] The increment is part of the levy. The portion relating to capital debt service is a constitutionally-protected exclusion.

What is the solution? A technical correction act to fix this and other less basic yet no less vexing interpretational and procedural problems in Chapter 97.

Some Practical Considerations Until Then

(1) How much of your client's budget was already debt service as of June 24, 2011? It is precisely the treatment of those debt service dollars that is at stake in the Constitutional issue noted above. As far as debt issued *after* June 24, 2011, the State Legislature arguably had the Constitutional authority to use the one-box approach (although a strong argument has been certainly be made here that the intent of the integrated Constitutional provisions was to treat all debt service with the pledge of the faith and credit as separate); for outstanding debt *issued* prior to that date (and maybe even a broader interpretation should be taken of "theretofore contracted" if BANs were outstanding prior to bond issuance, or contracts entered into on reliance on the ability to issue debt with an unlimited pledge of the faith and credit), the State Legislature should have created a debt service exception at a minimum for outstanding debt (as it did for most school district debt outstanding as well as thereafter issued).

(2) Adoption of a bond resolution already takes two-thirds of the voting strength of your board (unless you make a bond resolution which is subject to permissive referendum, subject to a referendum on your board's own motion by a majority vote which does not, in any event, create a levy exception). For 5, 7 or 9 member boards, if your board approves adoption of a bond resolution, it has the votes to annually override the tax levy limitation. At least until the board changes. Unfortunately, under Chapter 97 a current board cannot establish an override for the life of a bond financing.

(3) The tax cap override is for one year only, although it builds the increase into the base for the next year. The implication for debt service is this: rising debt service could require an annual tax cap override, all other expenses and exceptions being unchanged. The solution is to utilize a substantially level or declining debt service amortization structure. Although level debt service does cost more in interest expenses over the life of a bond issue because principal is amortized more slowly than by the traditional "50% rule," it does provide constancy year to year. It is one less budget item that might go up.[16] And in cases in which a municipality has outstanding debt and must now issue new debt for a new capital project, it is important to study the contours of the existing debt load over time, and layer any new debt in a manner that maintains constancy through time.

(4) Is there any way to reduce debt service for previously issued bonds? If they were issued with an early redemption feature, yes. Such debt can be advance refunded for debt service savings, and in some cases, for restructuring the contour of the existing debt.

(5) Finally, should we counsel our municipal clients to go ahead and take a full exclusion for capital debt service in their annual calculation of their tax caps? No, that is an exceptionally high risk approach which on audit, well before any legislative (or judicial) resolution, would put them in difficult circumstances. This is a matter best solved by quiet negotiation in the State Legislature. It is appropriate to remind our clients that what the State Legislature giveth in authority to municipalities to bond finance capital needs in the first place, the State Legislature is entitled to restrict in many regards.

Endnotes

1. Except the big five, four of which are indirectly affected by the limitation imposed upon their city. Fire and school districts will not be discussed here.
2. For such coming fiscal year only. A local law cannot authorize exceeding the two percent for multiple years, e.g. the years that a bond might be outstanding.
3. Flushing National Bank v. Municipal Assistance Corporation for the City of New York, 40 N.Y.2d 731 (1976).
4. *Id.*
5. Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 1088 (1977).
6. 41 N.Y.2d 644 (1977).
7. Hurd v. City of Buffalo, 34 N.Y.2d 628 (1974).
8. E.g., RANs and TANs and certain specified debt for pension systems existing in 1939 to be made solvent and current.
9. This was amended to remove such "phantom debt" and free up debt borrowing capacities in 1951.
10. This general duty goes back to amendments to the then existing Constitution by the Constitutional Convention of 1846 to authorize the State Legislature to curb significant fiscal evils of the times since regulated in later Constitutions. The restriction on the duty, by other Constitutional provisions, originated in a 1963 Constitutional amendment which also adopted a new Article IX on the home rule powers of municipalities but the Section 12 restriction was not written as "subject to Article IX," but rather subject to the provisions of the entire Constitution. The broad intent of the restriction is thus clear.
11. N.Y. CONST. art. VIII § 12.
12. N.Y. CONST. art. VIII § 12 (emphasis added).
13. *Flushing National Bank*, 40 N.Y.2d at 737.
14. *Id.* at 736.
15. Particularly in the case of debt amortizing on the traditional "50% Rule" basis which permits such increases over the life of a bond issue.
16. 50% rule amortizing debt can include increases year over year.

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Appendix A
Some Questions and Some Answers

Q: Isn't the Article VIII Section 2 pledge of the faith and credit of a municipality a non-specific pledge of all revenues, not simply real property tax revenues?

A: Yes, it is, but the real property tax levy is paramount because its inclusion in the pledge is as a revenue without limitation as to rate or amount, due to Article VIII § 10. Article VIII § 2 and Article VIII § 12 in combination therewith is a constitutional requirement to raise real property taxes as and if necessary. *See* Quirk v. Municipal Assistance Corp., 41 N.Y.2d 644 (1977), *cert. denied,* 434 U.S. 808 (1977).

Q: What about Chapter 97 as compelling an impairment of contractual obligations under U.S. Constitution Article I § 10 as to debt outstanding on its effective date?

A: Perhaps, yes. However, if there is no Constitutional guarantee as to particular revenues to be used to repay bonds, then this argument would be difficult to make. *See* Quirk v. Municipal Assistance Corporation, 41 N.Y.2d 644 (1977), *cert. denied,* 434 U.S. 808 (1977), but note it concerned sales tax revenues and stock transfer tax revenues. The court in *Quirk* did hold that what protected city bondholders in the State Constitution was the authority "to exceed normal real estate tax limitations in order to raise the necessary moneys" in combination with the faith and credit pledge.

Q: Does the fact that a municipality can vote to override the tax cap mean that the State Legislature has not impinged on a State Constitutional provision?

A: No, if the State Legislature was without authority to not exclude capital debt service, then including it in the levy and then providing an "out" doesn't make it constitutionally ok.

An override throws the mandatory payment of capital debt service into the political process to achieve the necessary supermajority override votes for the levy to cover both operating expenses and capital debt. Debt payment, particularly an increase in debt service year over year, even for debt already outstanding, is now held hostage to political negotiation regarding the use of taxes whereas before it was outside the tax levy limit. This is quite the opposite of the intent of the Constitutional provisions.

Q: The tax cap is only about the incremental increase; the basic levy is untouched, so what is the problem?

A: The increment is part of the levy. The Constitutional capital debt service exclusion is about the levy.

Q: Article VIII Section 10, 10-a and 11(b) all do not include towns. What's with that?

A: This has roots in the historically limited functions of towns (at the time of the drafting of the 1938 Constitution), and the district method of paying for certain basic infrastructure. It makes the Constitutional arguments more difficult for towns since the tax levy limit rules were not Constitutionalized but the basic principles should be uniformly applied.

Q: Section 12 clearly states the State Legislature can adopt tax levy laws which affect debt service on bonds issued after such laws' effective date, doesn't it?

A: If the State Legislature did not have authority to include capital debt service within the levy, theretofore or thereafter is irrelevant.

Q: TANs and RANs are not protected from tax levy limitations, so isn't the debt service exception not as sancosant as you claim?

A: Cash flow borrowings were and are seen as stand-ins for the operating expenses they temporarily finance and were therefore assigned to the operations side of the tax levy rather than the debt service side. The debt service exclusion to the tax levy is about capital, not cash flow.

Q: But didn't Bank of Rome v. Village of Rome, 18 N.Y. 38 (1858) hold that the predecessor provision to the current Constitution's Article VIII Section 12 with the same basic language constituted a broad grant of legislative power?

A: Yes, it did, noting as to the provision that "the direction is neither to abrogate existing powers, nor to abstain from creating new ones, but only to restrict them so as to prevent abuses in assessments and contracting debts. Indefinite as is the rule of restriction prescribed in this provision, and ill-suited in its terms to be judicially applied, it is still both salutary and well-suited to be the guide of legislative discretion." However, the court went on to consider that as the provision did not itself "set forth any rule by which a court can adjudge an act of the legislature to be void… whether any other Constitutional ground exists for invalidating this law." Then, in 1963, the specific limiting phrase "subject to the provisions of this Constitution" was added. And as to Chapter 97 of the Laws of 2011, there is, indeed, another Constitutional ground.

Q: Aren't state statutes presumed to be constitutional?

A: Yes, until proven otherwise. "Although every statute carries a strong presumption of Constitutionality, the courts may nevertheless inquire as to whether its enactment was permissible under the Constitution," Hurd v. City of Buffalo, 41 A.D.2d 402 (4th Dep't 1973). "By the same token, we may not disregard the threat to constitutional government that lurks in a piecemeal whittling away of constitutional mandates." Salzman v. Impellitteri, 305 N.Y. 414 (1953). As the *Flushing* case describes the Article VIII Section 2 pledge, it is a "direct constitutional mandate." The solution: a quiet technical amendment act.

What's Your Wireless Plan? Federal Law, Local Review and Wireless Facilities

By Anthony B. Gioffre III, Lucia Chiocchio and Daniel M. Laub

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Wireless technology in the United States has experienced an unprecedented period of exponential growth in both its abilities and its number of users over the past two decades.[1] The ability to connect with one another in a mobile environment has proven essential to our health, safety and welfare. It is well established that wireless communications and wireless services are critical to America's economy and are vital to America's global competitiveness. However, while quickly evolving federal law and policy over the last three-plus years supports and stresses the need for the expeditious build-out of critical wireless infrastructure, local siting regulations have not kept pace. This article examines the recent developments in federal law and policy designed to promote the expeditious deployment of wireless infrastructure and includes some recommendations and suggestions to bring local wireless regulations and processes "up-to-speed" with the current federal regulatory framework.

The critical public need for wireless services is evidenced by the numbers. As of June 2011, there were an estimated 322.9 million wireless subscriber connections in the United States, surpassing the population of the United States and its territories.[2] At the same time, wireless network data traffic was reported at 341.2 billion megabytes, which represents a 111% increase from the prior year.[3] These data came in the form of over an annualized 2.25 trillion minutes of use and 2.12 trillion text messages.[4] In June 2006, approximately 10.5% of households in the United States were wireless-only.[5] Five years later, the number of wireless-only American households more than tripled to 31.6%,[6] a trend that is expected to continue at the same rapid rate. Notably, more than 396,000 wireless 911 and distress calls are made daily.[7] Economically, the wireless industry is directly or indirectly responsible for the employment of 2.4 million Americans[8] and it is projected that wireless broadband investment alone will create as many as 205,000 additional jobs by 2015.[9] U.S. economic productivity from wireless broadband is predicted at $896 billion for the ten-year period ending in 2016.[10]

Recognizing the importance of wireless services for all Americans, the federal government has continually promoted the provision of wireless communications and services. Beginning with the Telecommunications Act of 1996 ("TCA")[11] and in subsequent policy initiatives, administrative rulings, case law and additional statutory action, the federal government has created a regulatory framework that supports the expedited and efficient build out of wireless networks and infrastructure. The federal policy supporting the critical nature of wireless infrastructure and its timely deployment is exemplified by Congress' directive to the Federal Communications Commission (FCC) in 2009 to develop a plan for the advancement of broadband technology in the United States to ensure that every American has "access to broadband capability."[12] In *Connecting America: The National Broadband Plan* (the "Plan"),[13] the FCC notes that

> Broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.[14]

Federal policy direction clearly supports expedited deployment of wireless services as essential for America's safety, welfare, economic success and global competitiveness. Now is an opportune time to review and consider revisions to local laws and processes to reflect the recent changes in the federal regulatory and policy framework.

A. Middle Class Tax Relief and Job Creation Act of 2012 and Wireless Siting

One of the direct results of wireless technology's increased importance to American security and

economy was the inclusion of key wireless technology provisions in the recently passed Middle Class Tax Relief and Job Creation Act of 2012 (the "Act").[15] Portions of the law address spectrum management, wireless infrastructure siting on federal land, as well as the location of public emergency technology. As declared by Congressman James Upton of Michigan on the House floor presenting the conference committee report on the Act:

> Like the JOBS Act, Title VI, Subtitle D, of the Middle Class Tax Relief and Job Creation Act of 2012 is designed to spur the next generation of wireless investment and innovation, to bring in federal revenue in the form of auction proceeds, and to promote significant new job creation.[16]

From a municipal perspective, one of the most significant sections of the Act is the broadening of wireless carrier pre-emption included in Section 6409. Section 6409 provides in relevant part that:

> *Notwithstanding Section 704 of the Telecommunications Act of 1996 or any other provision of law*, a state or local government *may not deny and shall approve* any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.[17]

In essence, Section 6409 creates a new category of modification subject to only a limited scope of review and requires that a jurisdiction get to "yes." Section 6409 effectively creates a two- pronged test which limits the review of an application to modify a wireless facility to the determination: (1) that the proposal is an "eligible facility"; and (2) the modification does not constitute a "substantial change." If an application meets these two criteria, the modification ***must*** be approved.

B. What Is an Eligible Facility?

The Act defines an "eligible facilities request," or this new category of modification, as a request for modification of an existing wireless tower or base station that involves:

- Collocation of new transmission equipment;
- Removal of transmission equipment; or
- Replacement of transmission equipment.

1. What Is a Substantial Change?

Previously, the FCC itself defined a substantial increase as:[18]

- Increasing the height of a tower by more than 10%, or by the addition of an antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater;[19] or
- The width of the tower will be increased by more than the greater of: (a) 20 feet in any direction from the edge of the tower; or (b) the width of the tower structure at the level of the appurtenance;[20] or
- The installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter;[21] or
- Requiring excavation outside of the existing tower site defined as the boundaries of the leased or owned property surrounding the tower at the time of the proposed collocation and any access or utility easements already related to the site.[22]

2. The Implications of Section 6409 for Local Wireless Provisions and Processes

The language of Section 6409 clearly establishes that this new law applies *regardless of any other provision of law*, including local wireless provisions. Many municipalities have no doubt encountered applications by licensed wireless carriers that fit within the Section 6409 two-pronged criteria noted above, including, but not limited to, the addition of antennas on an existing tower with associated equipment at grade. However, some local codes do not treat this scenario differently than an application for an entirely new tower or otherwise require exhaustive site plan and special permit review processes even though such modification does not substantively alter a facility as it exists or was originally evaluated and approved. Section 6409 clearly preempts the use of a discretionary approval process for such "eligible facilities requests" and disallows additive discretionary approvals for an existing facility so that critical wireless infrastructure can be timely deployed. Indeed, in the conference report on the Act, Congressman James Upton of Michigan explained that Section 6409 of the Act "streamlines the process for siting of wireless facilities by *preempting* the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment."[23]

Accordingly, in some cases, significant changes to local wireless provisions will be required for compliance with Section 6409, particularly for municipalities that have not reviewed wireless provisions within the last five years. Indeed, for many local jurisdictions, the wireless provisions and processes have remained largely unchanged since adoption, which likely occurred as a reaction to the Telecommunications Act of 1996. In many instances, even jurisdictions that have updated

their Comprehensive Plans within the last few years have not included revised wireless provisions in those updates. Consequently, local jurisdictions will likely need to revisit their wireless provisions and processes now to ensure compliance with Section 6409 and federal policy direction to expedite critical wireless infrastructure deployment.

C. Shot Clock Revisited

The importance of expedited deployment of wireless infrastructure was reinforced by the FCC's Declaratory Ruling of November 9, 2010, which interprets §332(c)(7)(B) of the TCA and establishes specific time limits for decisions on wireless land use and zoning permit applications (the "Shot Clock" ruling). As discussed in detail in last year's article, *Wireless Services, Infrastructure & Zoning: A Time for Local Regulatory Change in New York?*,[24] state and local governments have 90 days to act on a complete application to collocate wireless facilities on existing structures.[25] The Act, together with the Shot Clock ruling, mean that state and local governments must approve within 90 days any eligible facilities requests for collocation or replacement of transmission equipment on existing towers that do not substantially change the physical dimensions of such tower. Two decisions of interest provide guidance in this area.

1. FCC's Wireless Deployment "Shot Clock" Upheld

The Fifth Circuit recently upheld the validity of the Shot Clock ruling in response to a challenge by the Cities of Arlington and San Antonio, Texas (the "Cities"). In *City of Arlington v. FCC*[26] the Cities sought review of the Shot Clock ruling issued in response to a petition for a declaratory ruling by CTIA, a trade association of wireless telephone service providers. The Court considered five claims raised on appeal by the Cities: (1) violation of the Administrative Procedure Act (APA) because the FCC's action was in fact a rulemaking action and required notice and comment; (2) violation of due process because CTIA did not provide notice of the adjudication to state and local governments, CTIA sought to challenge such inaction by adjudication before the FCC; (3) violation of the FCC's statutory authority because the FCC did not have the authority to interpret the text of Section 332; (4) the FCC's interpretation of Section 332(c)(7)(B) is unreasonable; and (5) violation of the APA because the FCC's Declaratory Ruling is arbitrary, capricious and an abuse of discretion. The Cities sought an order from the Court granting its petition for review.

The Court held that the FCC's Declaratory Ruling (the Shot Clock) did not violate the APA because not only was it a proper adjudication, any error that resulted in the FCC proceeding by adjudication and not rulemaking was harmless error. Ultimately, the Court found the FCC's notice process adequate and not violative of the appellants' due process rights. The Court held that the FCC is entitled to *Chevron*[27] deference in interpreting Section 332(c)(7)(B) and *Chevron* deference applies when agencies determine the extent of their own jurisdiction.

In *dicta* the Court noted that there was a window between a state or local government's violation of the "shot-clock rule" and a "reasonable period of time," as contemplated by Section 332(c)(7)(B)(ii). Indeed, the Court noted that a state or local government which fails to act within the time frames established by the Shot Clock ruling can seek to rebut the presumption of unreasonableness by pointing to reasons why the delay was in fact reasonable.[28]

Notably, however, issuance of this decision preceded the Act. As the Court ultimately held the FCC's Shot Clock ruling was not arbitrary, capricious, or an abuse of the FCC's discretion, it must then be read together with the new provisions of the Act. Under the terms of the Act, there is no applicable discretionary approval process so long as the facility and the request meet the Section 6409 two-prong test. Where this is the case, the window for any reasonable delay is likely narrowed as contemplated by the Court in *Arlington*.

2. SEQRA May Not Be Used to Circumvent the Shot Clock

A recent Western District of New York case also concerned the Shot Clock and in finding unreasonableness, provided an analysis of State Environmental Quality Review Act ("SEQRA")[29] procedure as applied. In *Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit*,[30] Plaintiff, Bell Atlantic Mobile of Rochester (doing business as "Verizon"), proposed a 120-foot cell tower to replace an existing 84-foot emergency communications tower located on a fire district site.[31] The replacement tower was being proposed for Verizon and emergency communications equipment, as well as to provide collocation opportunities for additional wireless carriers in the future. Verizon submitted its special permit application for the proposed replacement facility only after it reviewed a number of alternate locations and found them inadequate for the provision of its service. As part of the required special use permit process, the Planning Board reviewed the application and issued a favorable recommendation in its referral back to the Town Board, which had final approval authority. The Town Board, after a number of hearings on the matter, then issued a positive declaration under SEQRA and suggested a different site be located. Verizon filed suit thereafter claiming two violations of the TCA: unreasonable delay (47 U.S.C. § 332(c)(7)(B)(ii)), and unlawful prohibition of the provision of wireless services (47 U.S.C. § 332(c)(7)(B)(i)(II)).

With respect to the unreasonable delay claim, the Court found that the invocation of a positive declaration under SEQRA was pretextual and constituted an unreasonable delay in contravention of the TCA and the Shot Clock ruling.[32] Since SEQRA mandates an initial determination regarding the likelihood of significant impact to the environment as early as possible, and the record was devoid of potential impacts indicating a significant potential impact, the Court held the positive declaration pretextual, dilatory, and without evidentiary support. The Court found that there were no other available sites to provide the needed coverage, that there were no impact or safety concerns and that radio frequency emissions were not within the Town's consideration. The Court found that instead of a "substantial controversy over a potential impact," this was a public controversy which could not justify the invocation of a positive declaration under SEQRA.[33]

While this decision relates specifically to a new tower, the Court clearly required a judicious and appropriate application of SEQRA and noted the limitations of local review as related to wireless sites. Indeed, under Section 6409 of the Act, an eligible facility request for modification that does not propose a substantial change should be classified as an action that should be deemed Type II exempt under SEQRA and not be subject to further environmental review as there is no applicable discretionary action.[34]

D. Expedited and Appropriate Local Review

Federal policy priorities, the provisions of the new Act, the FCC Shot Clock ruling, and recent case law together establish a regulatory framework requiring expedited and appropriate local review for the provision of critical wireless infrastructure. As discussed herein, compliance with this regulatory framework may require updates to local zoning or wireless law requirements and changes in how applications are reviewed and processed on a local level. Included below are some suggestions for balancing legitimate zoning objectives with respect to wireless facility siting in a manner that complies with the regulatory framework of expedited deployment of wireless infrastructure.

1. Administrative Review Provisions

The preemptive effect of Section 6409 of the Act essentially requires an administrative review process for modifications to qualifying proposals. In conjunction with the Shot Clock ruling, Section 6409 of the Act mandates that review of eligible facilities *is not a discretionary act* by a state or local government and any review is subject to a reasonable time frame. A helpful example of a wireless provision that complies with Section 6409 of the Act can be found in the Model Wireless Telecommunications Facility Siting Ordinance (the "Model Ordinance") developed by the New York State Wireless Association ("NYSWA").[35] The Model Ordinance provides unambiguous and specific definitions that can be easily applied to modifications of existing facilities. The administrative review provision of the Model Ordinance provides a non-discretionary review process for the deployment of essential wireless facilities that includes use of existing infrastructure including collocations and minor modifications.

2. Efficient Use of Qualified Municipal Consultants

A commonplace part of many municipal review processes is the use of outside consultants to review a wireless facility application. However, administrative proceedings, which are not subject to SEQRA and are not discretionary, should not require and do not justify the use of an outside consultant. Such collocations and minor modifications to existing wireless facilities should be treated like any other minor modification to an existing development. The review and approval process for the existing facility was likely comprehensive. Therefore, a proposed modification that qualifies with Section 6409's two-prong test should not require the same level of review as an application for a new tower facility. Such minor modifications do not raise any issues that require the review of a wireless consultant and analysis of this two-prong test can be done by existing municipal staff such as the Building Inspector.

For other types of proposed wireless facilities, such as a new tower site, which may warrant the use of a consultant, the scope of work should be crafted such that the consultant's role does not overlap with that of any other consultants or professionals already retained or on staff who are reviewing the same aspects of the application. In other words, the wireless consultant should not be tasked with review of aspects of the application that are typically reviewed by municipal staff, such as building, engineering and/or planning or aspects which are not within the consultant's expertise. Thus, it is important during the hiring process to review a consultant's scope of work and credentials carefully. If a consultant is retained, activities performed on behalf of the municipality must be closely monitored by the municipality.

A cautionary tale regarding wireless consultants is found in *MetroPCS v. Village of East Hills*,[36] where a municipal zoning board denied a wireless carrier's application for a special exception permit and variances to install a rooftop wireless facility. Through its consultant, the zoning board required the applicant wireless carrier to provide additional information as to need and emissions and also investigate alternate technologies and screening of the proposed antennas. MetroPCS provided supplemental submissions and hearing testimony from its professional consultants. A licensed architect testified that the municipality

requested screening (which was materially different from approved facilities on the same building) required significant structural changes to the building to accommodate added wind load and was not practicable.[37] A planner versed in evaluating aesthetic impacts indicated that the proposed antennas in addition to existing facilities would have a *de minimus* visual impact.[38] Additional materials regarding the need for the site as well as testimony of FCC emissions compliance was provided by a radio frequency engineer.[39]

Despite the evidence provided in support of the application, the board denied the application, relying largely on the testimony of its hired consultant. In overturning the zoning board denial, the Court found that the consultant lacked expertise in the field and was not a licensed architect, engineer, certified appraiser or planner, had not tested the MetroPCS signal in the Village and did not even possess a MetroPCS phone.[40] The Court held that "a finding which relies on [a consultant's]…unsupported opinion to the exclusion of all other witnesses is not based on substantial evidence" and the Village was compelled to issue the special permit and variances.[41] The *East Hills* decision reminds communities to retain professionals who are specifically trained or licensed in the discipline for which they were hired.

Further, while the courts have generally held that there is an authority to impose reasonable fees to carry out the planning and zoning laws, this power is subject to the limitation that the fees charged are reasonably necessary to the accomplishment of that aim.[42] In *MetroPCS, LLC v. City of Mount Vernon*,[43] the Court found that the City repeatedly requested unnecessary information and belabored already resolved issues which resulted in delays and significant consultant fees.[44] The Court noted its concern that there was "no limitation on the amount of consulting fees the applicant could be required to pay" and that the City had "unlimited discretion to charge a wireless carrier prohibitive fees by simply dragging out the process and utilizing consultants for its convenience rather than out of necessity."[45] Because the Court held that unfounded demands for additional information led to unacceptable delay, the related assessment of fees was overstated as well.[46]

Municipalities must be educated consumers of consultant services both as to the realm of content and expertise as well as the fees passed through to applicants. A useful guide to help educate municipalities in interviewing potential wireless consultants with questions to ask and answers to look for is available through NYSWA.[47] The guideline aids the municipal consumer in ensuring that the wireless consultant is not only technically qualified, but also understands the regulatory framework to make certain that the review process complies with all applicable requirements.

Moreover, consultant contracts should ensure compliance with applicable laws and foster a smooth zoning process by establishing goals and deadlines with an end to a given process in mind. The contract should also account for a consultant liaison with the applicant to encourage the flow of information and keep the process transparent. Provisions should also be included whereby the municipality reviews the process and progress of the consultant review and the application process as a whole. Indeed, municipalities are required by New York State Town Law §§ 118 and 119 to monitor consultant contracts and also require the Town Controller or Clerk to review and, where requested, audit payments under a consultant contract.[48]

Conclusion—Need for Local Code Reform and Model Ordinance

There is no doubt that access to wireless services is vital for America's health, safety, welfare, economic success, and global competitiveness. The leaps in federal policy and law recognizing the importance of the provision of wireless services mean that many local laws addressing wireless siting are likely out of date. Mandatory review time frames, administrative review for eligible facility modifications and the use of consultants are just a few of the areas which have evolved significantly since many municipalities first adopted wireless provisions fifteen to twenty years ago. Accordingly, updates and revisions of existing local code provisions and review processes may be in order to ensure compliance with the current regulatory framework.

Endnotes

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5. *Id.*
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11. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

12. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).
13. Connecting America: The National Broadband Plan, Federal Communications Commission (2010) [*hereinafter National Broadband Plan*], *available at* http://www.broadband.gov/plan/.
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15. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §6409 (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630enr/pdf/BILLS-112hr3630enr.pdf; *see also* H.R. Rep. No. 112-399 at 132-33 (2012) (Conf. Rep.), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt399/pdf/CRPT-112hrpt399.pdf.
16. *See* 158 CONG. REC. E237-239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf.
17. Middle Class Tax Relief and Job Creation Act of 2012, § 6409 (2012) (emphasis added).
18. Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), *available at* 47 C.F.R. Part I, Appendix B (Collocation Agreement); *see also* Fact Sheet: Antennas Collocation Programmatic Agreement, Federal Communications Commission Wireless Telecommunications and Mass Media Bureau, January 10, 2002; Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, 24 FCC Rcd 13994, 14021, para. 71 (2009) ("Shot Clock Ruling"), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd*, City of Arlington, Tex., et al. v. FCC, 2012 U.S. App. LEXIS 1252 (5th Cir. 2012).
19. *Id.* Except that the mounting of the proposed antenna may exceed the size limits set forth if necessary to avoid interference with existing antennas.
20. *Id.* Except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.
21. *Id.*
22. The FCC has also given treatment to the terms "tower" and "base station." The FCC defines a "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." *See Collocation Agreement*, Stipulation I(B). In addition, "base station" is defined as "[a] station at a specified site authorized to communicate with mobile stations"; or "[a] land station in the land mobile service." *See, e.g.*, 47 CFR 24.5, 90.7.
23. Conference Report on Middle Class Tax Relief and Job Creation Act of 2012, 158 Cong. Rec. E237-04, E239, 2012. (emphasis added).
24. Christopher B. Fisher, Anthony B. Gioffre III, Daniel M. Laub and Troy D. Lipp, *Wireless Services, Infrastructure & Zoning: A Time For Local Regulatory Change in New York?*, 12 N.Y. Zoning L. and Practice Report, July/August 2011 (West Group), *available at* http://www.cfwlaw.com/documents/ChrisFisherArticleBWWirelessServicesInfrastructureZoning.pdf.
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26. *City of Arlington*, 668 F.3d 229.
27. *See generally* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that if a "statute is silent or ambiguous with respect to [a] specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute.") *Id.* at 842–843.
28. *City of Arlington*, 668 F.3d 229.
29. 6 NYCRR §§ 617.1-20(2). *See also* N.Y. ENVTL. CONSERV. LAW §§ 3-0301(1)(b), 3-0301(2)(m) and 8-0113.
30. Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit, No. 11-CV-6141-CJS-MWP, 2012 WL 289963 (W.D.N.Y. 2012).
31. *Id.* at 5.
32. *Id.* at 20.
33. *Id.* at 18.
34. This is in keeping with current guidance on wireless matters. *See* 6 NYCRR § 617.5(c)(7) and NYSDEC guidance in the Department's SEQRA Handbook indicating that while "[r]adio and microwave transmission towers or other stand-alone facilities constructed specifically for radio or microwave transmission are specifically not included in the exemption for construction of small non-residential structures…if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II." NYSDEC SEQRA Handbook, 31–33 (3rd Ed., 2010).
35. NYSWA Model Ordinance, *available at* http://www.newyorkstatewireless.org/Tools/BroadCaster/Upload/Project124/Docs/Sharp5111_cuddyfeder_com_20120222_120949.pdf.
36. MetroPCS v. Village of East Hills, 764 F.Supp.2d 441 (E.D.N.Y. 2011).
37. *Id.* at 450.
38. *Id.* at 450-451.
39. *Id.* at 446.
40. *Id.* at 454.
41. *Id.* at 455.
42. *See* Opinion of the New York State Comptroller, No. 90-14, citing *Jewish Constructionist Synagogue v. Village of Roslyn*, 40 N.Y.2d 158, 386 N.Y.Supp.2d 198 (1976).
43. MetroPCS, LLC v. City of Mount Vernon, 739 F.Supp.2d 409 (S.D.N.Y. 2010).
44. *Id.* at 424.
45. *Id.* at 425–426.
46. *Id.*
47. NYSWA consultant questionnaire, *available at* http://www.newyorkstatewireless.org/Tools/BroadCaster/ Upload/Project124/Docs/consultant_questions.pdf.
48. N.Y. TOWN LAW §§ 118 (Form of Claims) & 119 (Audit of Claims and Issuance of Warrants).

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Open Meetings Law Compliance: What to Expect When You're (Not) Expecting (Large Crowds)

By Daniel Gross

The legislative intent of New York's Open Meetings Law holds that "[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that citizens of this state be fully aware of and able to observe the performance of public officials *and attend and listen to the deliberations and decisions that go into the making of public policy*."[1]

Regardless, the Open Meetings Law[2] does not expressly instruct local boards where to conduct meetings. There are only two statutory requirements on the siting of meetings, both of which complement the legislative intent of the law. First, Public Officers Law § 103(b) requires local boards to make "all reasonable efforts to ensure" that the chosen site "permit[s] barrier-free physical access to the physically handicapped."[3] Second, under Public Officers Law § 103(d), the board must similarly make "all reasonable efforts to ensure" that the chosen site of the meeting "can adequately accommodate members of the public who wish to attend such meetings."[4]

Public Officers Law § 103(d)

The second provision addressing the siting of meetings, § 103(d), was passed by the legislature relatively recently, in 2010,[5] and codified the seemingly wide understanding that local board meetings needed to be sited in venues that could accommodate the expected attendance for that meeting. Still, as the bill jacket of § 103(d) explained: "[c]urrent law does not stipulate that [open] meetings must be held in an adequately sizeable room…. This bill explicitly requires that the room be of ample size to accommodate those who wish to attend an 'open' meeting."[6]

Regardless, it should have already been widely understood that to comply with the spirit of the Open Meetings Law, reasonable efforts to accommodate an expectedly large crowd had to be made. After all, the Committee on Open Government had long issued a number of advisory opinions that opined if a board knew in advance that a larger crowd than normal was likely to attend a meeting, and a larger facility for the meeting was available, it was reasonable for it to hold the meeting at the larger facility.[7] Opinions by the Committee given after the codification of § 103(d) are consistent with this original position, finding that "if a public body can reasonably expect one or two hundred people to attend the meeting…, based on information from various media outlets and communications with the public, it would have a responsibility to take reasonable efforts to hold the meeting in a location that could reasonably accommodate the attendees."[8]

This interpretation of requiring reasonable efforts to find an accommodating meeting site was also endorsed by the courts well before the codification of § 103(d). In *Crain v. Reynolds*,[9] an aggrieved professor alleged an Open Meetings violation by the CUNY Board of Trustees. The Board of Trustees traditionally held meetings in a room which had a fire capacity of 125 people: seating for forty-eight university officials at a large table, additional public seating for fifty-one people, and standing room for another twenty-six.[10] While conducting a series of public hearings, the board began to address an issue "of great interest and important to the CUNY community and to members of the general public," which elicited an overwhelming response from the community.[11] Subsequent meetings drew overflow crowds, with numerous people requesting to speak and submit comments on the issue. The issue received such a response that police barricades were erected to control the crowd, and 350 police officers were stationed in the area of the meeting. Despite all this, the board not only held the meetings in this room, but "exacerbated the problem by reserving a significant portion of the public area for their staff and for the press, after having been warned against such action by their own Director of Public Safety," and ignoring the past practice of boards to move meetings of significant interest to a larger available facility. Not surprisingly, the court found the board to have "improperly limited public access by holding the meeting in a room which they knew to be too small to accommodate the expected audience." The court went on to note "[t]his behavior was unreasonable, designed to deny public access to the meeting and inconsistent with the fundamental principles of the Open Meetings Law…."[12]

Likewise, in *Windsor Owners Corp. v. City Council of the City of New York*,[13] the New York City Planning Commission considered an application to amend the zoning map to rezone an industrial zone to permit the development of high density residential, commercial, and community facility uses. While considering the application, the Commission met at its usual place, a

venue which provided seating for sixty-five members of the public, additional standing room, and thirty-five additional seats in the lobby which contained a television and sound system to allow overflow attendees to view and hear the meeting.[14] The Commission anticipated a large public crowd to attend, and although it was unable to change the location of the meeting, it accommodated members of the public who wished to participate by fulfilling its promise to sit, without recess, until all speakers who signed up were allowed to comment. The court, despite the plaintiff's complaints about the size of the venue, ultimately found no violation of the Open Meetings Law. Further, the court distinguished the *Crain* decision, noting that the Commission did not "intentionally or knowingly discourage[] anyone from attending. Thus the time and location of the…public hearing were proper."[15]

Unexpected Crowds: Do You Have to Move?

The text of § 103(d), in addition to the cases and advisory opinions cited above, should make it fairly obvious that local boards must make all reasonable efforts to hold meetings at facilities that can accommodate the expected number of attendees. However, that still leaves the question of what a local board should do when faced with an unexpectedly large crowd at a public meeting. Do boards have to move to—or worse yet, build—a larger facility to accommodate a large crowd?

Critics of the legislation which codified § 103(d) envisioned as much, fearing that local boards would need to erect new facilities to accommodate large, expected crowds. Some groups, including the State Office of Real Property Services (ORPTS), expressed this concern in the bill jacket for § 103(d), questioning whether this law would essentially become an unfunded mandate for local municipal boards, especially for rural policy-making bodies, "where adequate meeting room space may simply not be available for the occasional meeting where the topic is controversial enough to attract a crowd."[16]

However, as the Committee on Open Government's Memorandum noted, the new legislation does "not require a public body to construct a new facility or renovate an existing facility to permit access to the largest number of attendees that could be imagined, but to make reasonable efforts to accommodate those interested in attending, when necessary."[17] In addition to the language of the statute, the Committee pointed out that the other statutory provision that affects the siting of meetings, § 103(b),[18] also required local boards to make "all reasonable efforts" to accommodate the physically handicapped, but did not mandate that a local board construct or renovate a new, compliant facility for holding public meetings.[19]

As of publication, there does not appear to be a New York decision or opinion which directly addresses whether local boards need to move when unexpectedly large crowds attend public meetings. Additionally, only a few other states have touched on the issue of unexpected crowds at open meetings and, like New York, many of them take a "reasonableness" approach when interpreting their open meetings laws.[20]

For example, the Kansas Attorney General found that where no request to move was made before the meeting, and "prior to the meeting, members of the [local board] had no reason to believe the number of interested citizens would be too large for the regular meeting room[,]" there was no violation when the board refused to move.[21] The Attorney General relied on the Kansas Open Meetings Law, which, like New York's, does not state where meetings must be held, only that "meetings of government bodies subject to the act be held in the open."[22]

The Arizona Supreme Court also considered meeting overflow in *Gutierrez v. City of Albuquerque*.[23] There, the court found no violation when a local board denied a request to move a meeting to a larger room when crowd overflow occurred. The court justified this holding on the facts of the case: the meeting was held in a room designed for large crowds; loudspeakers were set up outside the room when overflow occurred; members of the public were allowed to comment for over two hours; the sound system at the larger facility was inadequate; and the meeting received extensive media coverage, including a radio broadcast.[24] As the court put it, the board "went beyond the requirements of the Open Meetings Act and allowed members of the public to address the Council and present their views for over two hours. A meeting could hardly have been more open or more public."[25] Subsequently, and relying largely on the *Gutierrez* decision, the Delaware Attorney General has held that if an unexpected crowd attends an open meeting, the public body need only consider adjourning the meeting to another facility to accommodate the crowd.[26]

Additionally, the Wisconsin Supreme Court dealt with the issue of room size in *State ex rel. Badke v. Village Board of Village of Greendale*.[27] Ultimately the court found no violation, relying on Wisconsin's Open Meetings Law which requires all meetings to "be publicly held in places *reasonably accessible* to members of the public."[28] Relying on this language, the court found it proper to look at alleged violations on a case-by-case basis, and take a balancing approach when deciding whether the venue for a public meeting was in violation of the open meetings laws. The court went on to conclude "a governmental body must meet in a facility which gives reasonable public access, not total access, and that it may not systematically exclude or arbitrarily refuse admittance to any individual."[29]

What can local boards learn from other states? Most local boards should point to the opinion of the Kansas Attorney General, which relied on a statutory scheme that, like New York's, does not explicitly state where meetings must be held. However, the other decisions and opinions are also instructive as they judge the actions of local boards, faced with large crowds, on their reasonableness. This approach seems to comply with the long-standing advice of the Committee on Open Government, which points out the need for boards to only make "reasonable efforts" to accommodate their crowds. So do you have to move your meeting? The short answer is, only if staying would be unreasonable.

Acceptable Alternative Venues

Whether to move the venue of a meeting to accommodate an unexpectedly large crowd is only the first question; the second is where to move the meeting, as the new venue may just as easily offend the Open Meetings Laws. Two considerations become immediately apparent: first, what is an acceptable alternate facility; and second, how far away can that alternate facility be?[30]

We know from above that the Open Meetings Law does not specify the venue for a meeting so long as business is performed "in an open and public manner" and citizens have the opportunity to attend.[31] Still, the Committee on Open Government has issued guidance on venues that may not comply with the spirit of the law. First, meetings should not be held "where those who attend are expected to make a purchase."[32] This would make restaurants and taverns inappropriate locales, unless a room was rented only for the meeting, and no one was expected to buy anything. Second, meetings should not be held where the venue "involves a sense of intrusion or intimidation."[33] Although the Committee was addressing a board member's home in this context, it would not to be a stretch to apply the same rationale to places like a house of worship.

A second consideration is the distance to the alternate meeting facility. Again, this is judged under a scale of reasonableness. The Committee has held that although local boards are not required to meet within the boundaries of their jurisdiction, a location that was two hours away was unreasonable, while a location that was less than a half-hour away was not unreasonable.[34]

Conclusion

Local boards and their attorneys should already be cognizant of the venue for their open meetings and how that will accommodate the expected crowd. However, for unexpectedly large crowds, boards must make a reasonable effort to find a suitable alternate location. This does not mean that they must move the meeting, only that they use a reasonable effort to find a new venue, should one exist.

If litigation ultimately ensues, boards should remember they will largely be judged on the underlying facts of the case, and will probably be given more favorable treatment if they make a noticeable effort to accommodate the crowd. The *Windsor* decision is instructive on this point, as the court ultimately found no open meetings violation because although an overflow crowd came to the meeting with a small venue, there was "no evidence that the [public body] denied anyone who wished to speak an opportunity to do so. Nor does the record reveal that the [public body] intentionally or knowingly discouraged anyone from attending."[35]

If the board ultimately decides that it should move the location of the meeting, it should be aware that the new venue should not be too far away, nor should the new venue be in a place where the public may feel intimidated or expected to buy something. Additionally, boards should be aware of the new notice requirements they may face if they move a meeting.[36]

Endnotes

1. N.Y. Pub. Off. Law § 100 (McKinney 2012) (emphasis added). The rest of the statute reads: "The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."
2. *Id.* §§ 100–111.
3. *Id.* § 103(b).
4. *Id.* § 103(d).
5. *Id.* as added by L. 2010, ch. 40.
6. Mem. in Support, Bill Jacket, L. 2010, ch. 40. Interestingly, some groups, including the State Office of Real Property Services, expressed concern that the bill would become a source of trouble for rural, local governments, "where adequate meeting room space may simply not be available for the occasional meeting where the topic is controversial enough to attract a crowd." Mem. of Real Property Services, Bill Jacket, L. 2010, ch. 40. However, as the Committee on Open Government's Memorandum noted, the new legislation does "not require a public body to construct a new facility or renovate an existing facility to permit access to the largest number of attendees that could be imagined, but to make reasonable efforts to accommodate those interested in attending, when necessary." Mem. of Comm. on Open Govt., Bill Jacket, L. 2010, ch. 40.
7. *See*, Comm. on Open Govt. OML–AO–4573 (2008); Comm. on Open Govt. OML–AO–3403 (2002); Comm. on Open Govt. OML–AO–3227 (2000); Comm. on Open Govt. OML–AO–3084 (1999); Comm. on Open Govt. OML–AO–2767 (1997).
8. Comm. on Open Govt. OML–AO–5118 (2011). The Committee further provides an illustrative example to highlight this kind of situation in this opinion: "For example, if a typical board meeting attracts twenty attendees, and meetings are held in

a meeting room which accommodates approximately thirty people, there is adequate room for all to attend, listen and observe. But in the event that there is a contentious issue on the agenda and there are indications of substantial public interest, numerous letters to the editor, phone calls or emails regarding the topic, or perhaps a petition asking officials to take action, the new provision would require the public body to consider the number of people who might attend the meeting and take appropriate action to hold the meeting at a location that would accommodate those interested in attending, such as a school facility, a fire hall or other site." *Id.*

9. N.Y. L.J., Aug. 12, 1998, at 27, col. 1 (Sup. Ct. N.Y. Cnty, Wilk, J.), *appeal denied*, 260 A.D.2d 153 (1st Dep't), *appeal dismissed*, 92 N.Y.2d 1043 (1999).
10. *Id.*
11. *Id.*
12. *Id.*
13. 23 Misc.3d 490 (Sup. Ct. N.Y. Cnty, 2009).
14. *Id.* at 497.
15. *Id.* at 498.
16. Mem. of Real Property Services, Bill Jacket, L. 2010, ch. 40. In another memorandum in the bill jacket, ORPTS similarly noted that this bill "imposes a responsibility without any resultant benefit." Mem. of Real Property Services, Bill Jacket, L. 2010, ch. 40. Other opponents of the legislation included the New York State Conference of Mayors and Municipal Officials, who characterized the law as "redundant and unnecessary." Mem. of N.Y.S. Conf. of Mayors and Municipal Officials, Bill Jacket, L. 2010, ch. 40.
17. Mem. of Comm. on Open Govt., Bill Jacket, L. 2010, ch. 40.
18. N.Y. PUB. OFF. LAW § 103(b) (McKinney 2012) (local boards must make "all reasonable efforts to ensure" that the chosen site "permit[s] barrier-free physical access to the physically handicapped").
19. Mem. of Comm. on Open Govt., Bill Jacket, L. 2010, ch. 40. *See also* Comm. on Open Govt. OML–AO–3084 (1999).
20. Garlock v. Wake Cnty. Bd. of Education, 712 S.E.2d 158, 174 (N.C. Ct. App. 2011) ("no state has ever determined that *any* or *all* persons who wish to attend a meeting must be permitted to do so to be in compliance with the Open Meetings Law, where the meeting is held in a room of reasonable size for the particular meeting").
21. Kan. Atty. Gen. Op. 79-253 (1979), *available at* 1979 WL 39632.
22. *Id.*
23. 631 P.2d 304 (N.M. 1981).
24. *Id.* at 305.
25. *Id.* at 307. *See also* Gibson v. Talbot County Bd. of Zoning Appeals, 242 A.2d 137, 141-42 (Md. 1968) (Board, which ordinarily met in small room, did not violate due process rights of appellants because the board, anticipating a larger crowd, made arrangements for larger hearing room and made a tape recording available for all persons unable to attend when a larger-than-anticipated crowd turned up; additionally, subsequent hearings were held in a venue which could accommodate entire crowd).
26. Del. Atty. Gen. Op. 02-IB09 (2002), *available at* 2002 WL 970060.
27. 494 N.W.2d 408 (Wis. 1993).
28. WIS. STAT. § 19.81(2) (2012) (emphasis added).
29. 494 N.W.2d 408, 418 (Wis. 1993). Although the dissent agreed that a balancing approach was required in circumstances like these, she disagreed with the majority and found that a violation of the open meetings law did occur because "from the facts available to the Board prior to the…meeting it was only reasonable to conclude that more than [the meeting room capacity] could be expected to attend." *Id*. at 420 (Abrahamson, J., *dissenting*).
30. A third consideration, and one that is outside the scope of this article, is the possible notice violation that a board may find itself with if it decides to immediately up and move a meeting. Under N.Y. PUB. OFF. LAW § 104 (McKinney 2012), a board must give notice at least 72 hours in advance for meetings scheduled a week in advance, and "to the extent practicable" all other meetings. Notice, under the Open Meetings Law, merely requires notifying the news media and posting notice conspicuously. *Id*.; *see also* N.Y. TOWN LAW § 62(2). Courts have found that "[w]hether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity" of the abbreviated notice. Previdi v. Hirsch, 138 Misc.2d 436, 437 (Sup. Ct. Westchester Cnty, 1988). Providing adequate notice is important, as courts may void actions taken by a public body if "good cause [is] shown," including those notice violations which are "calculated to minimize public awareness of… sensitive political decision[s]." *Id.* at 440.
31. N.Y. PUB. OFF. LAW § 100 (McKinney 2012).
32. Comm. on Open Govt. OML–AO–4641 (2008); Comm. on Open Govt. OML–AO–2560 (1996).
33. Comm. on Open Govt. OML–AO–4035 (2005); Comm. on Open Govt. OML–AO–3019 (1999).
34. Comm. on Open Govt. OML–AO–2764 (1997).
35. 23 Misc.3d 490, 498 (Sup. Ct. N.Y. Cnty, 2009).
36. *See supra* note 30.

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An Update on Hydraulic Fracturing in New York

By Charles Gottlieb

The questions remains, should the process of high volume hydraulic fracturing (HVHF) for the extraction of natural gas be permitted in the State of New York? While New York has come a long way in answering that question, uncertainties still exist. Current questions being posed are based on the premise that HVHF will be permitted in New York. Such questions include what regulations will be set in place, and what scope of authority local governments will have to zone and plan for HVHF.[1] This article serves to update municipal lawyers and officials on HVHF in New York. First, the article will briefly describe the process of HVHF. Then the article will examine recent steps taken by the New York State Department of Environmental Conservation (DEC) during its environmental review of the HVHF process and promulgation of regulations. Switching branches, the article will discuss proposed legislation circulating through the New York legislature. Lastly, the article will provide an analysis of recent court decisions in New York upholding local governments' authority under the Municipal Home Rule Law to ban the use of land for HVHF.

The Process of Hydraulic Fracturing

The current debate is over HVHF occurring in a specific rock formation known as the Marcellus Shale, located in parts of New York. The process includes drilling a vertical well down to the shale formation then continuing to drill horizontally.[2] Fracturing the well begins when drilling is complete and involves injecting fracking fluid (known as "slick water") at high pressures into the shale.[3] Slick water contains a mixture of large amounts of water, sand, and a cocktail of chemicals to efficiently extract the natural gas.[4] The fracking process cracks the rock formation creating fissures that release the natural gas into the well, allowing it to travel to the surface for collection.[5] At this point, pipelines will transport the gas to various destinations for processing.

Most of the ongoing debate is over the environmental impacts of HVHF. One environmental concern is water contamination from gas migrating into the aquifer, or from recycled slick water that may seep into the aquifer from the surface.[6] The enormous amount of water used during the HVHF process is a concern because water is not an infinite resource and its withdrawal can impact the ecosystem and affect ground water recharge.[7] In addition, the recycled slick water that travels back to the surface is a concern because it cannot be treated at a local water treatment plant due to its chemical consistency.[8] Other concerns include the heavy industrial use of local roads, fragmentation of wildlife habitats, air pollution and an increase of greenhouse gases emissions.[9]

The Department of Environmental Conservation Update

Currently, the DEC is going through the environmental review process pursuant to the State Environmental Quality Review Act (SEQRA).[10] As a result of the SEQRA review process, the DEC has drafted a Supplemental Generic Environmental Impact Statement (SGEIS) to assess the potential environmental impacts of the HVHF process, and to explore how those environmental impacts can be mitigated.[11] This process has proved to be daunting for the reason that it invites public comment, inevitably leading to delay.

Many are unaware that in the past both horizontal drilling and the hydraulic fracturing of wells have been permitted in New York but on a smaller scale then HVHF. A look at the 1992 Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (1992 GEIS) will shed light on smaller scale hydraulic fracturing, as well as horizontal drilling in New York.[12] The SGEIS for HVHF will supplement the 1992 GEIS and address the additional environmental impacts associated with HVHF.[13] The first draft SGEIS was released in September 2009; however, Executive Order 41 directed the DEC to complete a revised draft SGEIS to contemplate the public comments received.[14] As a result, the revised draft SGEIS was issued in September 2011 with several public hearings, and an extended public comment period ending on January 11, 2012.[15] This ninety day (plus) public comment period was extended by the DEC to accommodate the massive amounts of public participation.[16] It will take time for the DEC to individually review tens of thousands of public comments and permits will not be issued until each comment is addressed.

In its capacity as a state agency the DEC is mandated with promulgating HVHF regulations and enforcing those regulations. Such regulations will implement the mitigation measures identified in the SGEIS in an effort to curb the environmental impacts.[17] The proposed draft regulations focus on three crucial areas of the HVHF process. Parts 52 and 190 of the proposed regulations prohibit certain surface activities of HVHF on state-owned lands.[18] Parts 550-560 revise the implementing regulations for the Oil, Gas,

and Solution Mining Law and address the application requirements, permit condition requirements, and all technical aspects of the HVHF process.[19] Lastly, Part 750 of the regulations will address water resources and include regulations on stormwater requirements and permits.[20]

The state has decided to require State Pollutant Discharge Elimination System (SPDES) permits for HVHF, which will authorize point source discharges.[21] As a part of the SPDES general permit, all applicants are required to prepare a Stormwater Pollution Prevention Plan (SWPP) for the construction phase, as well as the actual HVHF process.[22] The general permit is a five-year permit and the DEC retains the authority to require any HVHF applicant to apply for an individual SPDES permit.[23] The general permit covers the construction phase of HVHF, which includes the building of access roads.[24] Further, the general permit covers the phase where equipment, chemical additives, vehicles and all other equipment and supplies are present at the well pad.[25] Finally, the general permit covers the production phase where natural gas is extracted from the subsurface.[26]

Currently, the DEC is in the rule-making process and no permits will be issued until the regulations are finalized. The proposed rules were released for public comment on September 28, 2011.[27] Public hearings on the proposed rules were combined with the SEQRA hearings for the SGEIS. As such, the public comment period for the draft regulations ended January 11, 2012.[28] All proposed regulations and the draft SGEIS are available on the DEC website.[29]

High Volume Hydrofracking and the New York Legislature

The New York legislature has introduced several bills affecting HVHF. The bills include a plethora of different policies including: prohibitions, moratoriums, proposed permit conditions, definitions, slick water treatment regulations, inspection requirements for water treatment plants, clarification of local government authority, increased environmental review for each well pad, disclosure of chemical additives used in slick water, revenue contributions to the state, mandated technology standards, emergency response standards, health impact assessments, monitoring, liability, water use and withdrawal standards, areas excluded from drilling, creation of commissions, amendments to the compulsory integration laws of New York, the distribution of royalties, etc.[30] The large amount of bills circulating the Capitol is a testament to the amount of focus the state is placing on HVHF. Many of these bills affect local governments and, as such, municipal officials should be aware of the authority they grant or take away from localities with regard to HVHF.

High Volume Hydraulic Fracturing and the Courts

Even in the absence of state permitting, HVHF is being discussed in the courts. Two cases have presented a question of first impression to the lower courts in Otsego and Tompkins counties. *Anschutz Exploration Corp. v. Town of Dryden*[31] and *Cooperstown Holstein Corp. v. Town of Middlefield*[32] have asked the courts to decide whether local governments have the ability to enact land use ordinances that effectively prohibit the use of land for HVHF pursuant to their Municipal Home Rule power, or whether that authority is preempted by the state pursuant to language in the Environmental Conservation Law (ECL). The debated section of the ECL is located in the Oil, Gas, and Solution Mining Law (OGSML) and states:

> The provisions of this article [Mineral Resources Article 23 of the ECL] *shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.[33]

From this language it is clear that local governments maintain the authority to enact ordinances dealing with the regulation of local roads and real property taxes; however, it is unclear what type of local laws "relate to the regulation of the regulation of the oil, gas and solution mining industries[,]" and are therefore preempted by state law.

Defending towns have enacted local land use laws that effectively ban the use of land for HVHF. Plaintiffs assert that the local laws relate to the regulation of the oil, gas and solution mining industry because they ban the HVHF process within the town. The respective defendants assert that they have enacted land use laws of general applicability and as such are not regulating the oil, gas and solution mining industry. They claim that such a land use law incidentally impacts the industry and is not a direct regulation of the industry. Therefore, the local law is not preempted by state law.

Envirogas, Inc. v. Town of Kiantone is the only case interpreting ECL § 23-0303(2). The *Envirogas* court held that a local law requiring financial bonding before permitting a gas well was preempted by state law because it was a direct regulation of the industry, and in direct conflict with already existing state regulations.[34] Defendants point to *Frew Run Gravel Prods. v. Town of Carroll*,[35] which interpreted a section of the Mined Land Reclamation Law (MLRL) that has similar preemption language, "[f]or the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry."[36] The *Frew Run Gravel*

court held that the local law banning the mining process in some zones was not a direct regulation of the industry, but a local land use law that incidentally impacted the industry.[37] Therefore, because the local law was of general applicability, and not a direct regulation of the industry, it was not preempted by the supersession language in the MLRL, which is almost identical to the language in the OGSML at issue in *Dryden* and *Middlefield*.

In each case, *Dryden* and *Middlefield,* the lower courts held that local government can enact laws of general applicability even though they may have an incidental impact on the oil, gas and solution mining industry in accordance with the Municipal Home Rule Law. Therefore, the court held that each municipality can enact local land use laws that effectively ban the use of land for the process of HVHF. To reach this conclusion the cases took similar, yet slightly different, approaches. In *Dryden* the court heavily relied on the precedent of *Frew Run Gravel,* as well as the lack of legislative history suggesting preemption, laws of statutory construction, and case law from other states (Pennsylvania and Colorado).

The *Middlefield* court thoroughly examined the legislative history going back to the original Conservation Laws of New York, which predate the ECL. In addition, the *Middlefield* court relied on *Frew Run Gravel* and *Gernatt Asphalt Prods. v. Town of Sardinia*, and stated that this type of exclusionary zoning is lawful if in furtherance of the local government's police power.[38] Interestingly, both cases note that the land use law is not a regulation of the industry because it controls "where" the drilling can occur and not "how" the drilling should occur, referencing the technical standards controlling the process of oil, gas and solution mining located in the ECL and its implementing regulations.

Both cases lie within the jurisdiction of the Third Department of the Appellate Division and will most likely be heard by Court of Appeals. The preemption challenge is not the only legal obstacle in the way of local governments using their home rule authority to ban the process of HVHF. It seems to be inevitable that a regulatory takings claim will be brought by the plaintiffs (gas companies and land owners) against the towns. The basis of a takings claim would be that by enacting local prohibitions on HVHF, the town has taken away a property interest held by gas companies and land owners without just compensation.

Recent News

Not long ago, Gov. Cuomo announced a new plan for hydraulic fracturing in New York. If the drilling process is ultimately approved, it will only be conducted in five Southern Tier counties: Broome, Chemung, Chenango, Steuben and Tioga, where the Marcellus Shale formation is deepest. Within these counties, drilling will only be allowed in approving communities and would still be banned in the Catskill Park and historic districts.[39]

With the Governor's proposed plan in mind, many local governments are seeking to ban or place a moratorium on the drilling practice.[40] As of June 26, 2012, over 100 municipalities have enacted local gas drilling bans.[41] The Albany Times Union notes that recently this number continues to increase and some environmental groups are keeping track of local bans through mapping systems.[42] On the other hand, 41 towns and villages within the chosen southern tier counties have enacted resolutions in support of the local practice, in accordance with Gov. Cuomo's plan.[43]

Conclusion

New York is thought to be in the later stages of the approval process; however, officials remain uncertain as to when permits will be granted. When the review process is finalized the next question is how many permits will be granted. The DEC has stated that it will not grant more permits than it is feasible to regulate properly.[44] Municipal officials should stay informed about the Marcellus Shale debate because it is an area that is constantly changing. Municipalities that remain up to date and educated on HVHF will be the most prepared.

Endnotes

1. *See* Charles Gottlieb, *Regulating Natural Gas Development Through Local Planning and Land Use Controls*, New York Zoning Law and Practice Report, Vol. 12, No. 6 (May/June 2012) *available at* http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/NY%20ZONING%20HYDROFRACKING%20FINAL.pdf (last visited June 28, 2012).
2. New York State Dep't of Envtl. Conserv., Marcellus Shale, *available at* http://www.dec.ny.gov/energy/46288.html (last visited March 26, 2012) (hereinafter DEC, *Marcellus Website*).
3. *Id.*
4. *Id.*
5. *Id.*
6. New York State Bar Association, Environmental Law Section Annual Meeting, 135 N.Y. State Bar Ass'n R. 7 (2012) [hereinafter *NYSBA Proceedings*].
7. *Id. See also* Hannah Coman, *Balancing the Need for Energy and Clean Water: The Case for Applying Strict Liability in Hydraulic Fracturing Suits*, 39 B.C. Envtl. Aff. L. Rev. 131, 135 (2012) (hereinafter Coman, *Balancing the Need for Energy*).
8. *NYSBA Proceedings*, *supra* note 5, at 7. *See also* Coman, *Balancing the Need for Energy*, *supra* note 6, at 135.
9. *NYSBA Proceedings*, *supra* note 5, at 7.
10. N.Y. Envtl. Conserv. Law §§ 8-0101 to 8-0117.
11. *Id.* at 17.
12. *Id.* at 5–6.
13. *Id.* at 5.

14. DEC, *Marcellus Website*, *supra* note 1 *citing* N.Y. Exec. Order No. 41 (2010), http://www.governor.ny.gov/archive/paterson/executiveorders/EO41.html.
15. *NYSBA Proceedings*, *supra* note 5, at 17.
16. *Id.*
17. *Id.* at 10.
18. *Id.* (the proposed regulations are located on the DEC's website at http://www.dec.ny.gov/regulations/77353.html).
19. *Id.*
20. *Id.* at 12. The State Pollutant Discharge Elimination System (SPDES) general permit for High Volume Hydraulic Fracturing is *available at* http://www.dec.ny.gov/permits/77251.html.
21. N.Y. Dep't of Envtl. Conserv., SPDES General Permit for Stormwater Discharges from High Volume Hydraulic Fracturing, *available at* http://www.dec.ny.gov/permits/77251.html (last visited March 28, 2012).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *NYSBA Proceedings*, *supra note* 5, at 10.
28. *Id.* at 12.
29. The proposed regulations are *available at* http://www.dec.ny.gov/regulations/77353.html. In addition, the SPDES General Permit is *available at* http://www.dec.ny.gov/permits/77251.html.
30. Government Law Center, *Hydrofracking—Balancing the 3 E's: Energy, Environment, and Economic Development* (2012), *available at* http://www.governmentlaw.org (also on file with author).
31. Anschutz Exploration Corp. v. Town of Dryden, 2012 N.Y. Slip Op. 22037 (Sup. Ct. Tompkins Cnty 2012), also *available at* http://blog.timesunion.com/green/files/2012/02/Dryden-Case.pdf (last visited March 28, 2012).
32. Cooperstown Holstein Corp. v. Town of Middlefield, 2012 N.Y. Slip Op. 22080, at 8 (Sup. Ct. Otsego Cnty 2012), also *available at* http://switchboard.nrdc.org/blogs/draichel/middlefield%20opinion.pdf (last visited March 28, 2012).
33. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (emphasis added).
34. Envirogas, Inc. v. Town of Kiantone, 112 Misc.2d 432 (Sup. Ct. Erie Cnty 1982).
35. Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126 (1987).
36. N.Y. ENVTL. CONSERV. LAW § 23-2703(2). The preemption language in this ECL provision is similar to the preemption language in ECL § 23-0303(2).
37. *See Frew Run Gravel Prods.*, 71 N.Y.2d 126 (1987).
38. Matter of Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d. 668, 684 (1996).
39. Danny Hakim, *Hydrofracking Under Cuomo Plan Would be Restricted to a few Counties*, N.Y.Times, June 13, 2012, at A1, *available at* http://www.nytimes.com/2012/06/14/nyregion/hydrofracking-under-cuomo-plan-would-be-restricted-to-a-few-counties.html.
40. For information on how municipalities can plan and zone for hydrofracking *see* Charles Gottlieb, *Regulating Natural Gas Development Through Local Planning and Land Use Controls*, New York Zoning Law and Practice Report, Vol. 12, No. 6, (May/June 2012), *available at* http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/NY%20ZONING%20HYDROFRACKING%20FINAL.pdf (last visited June 28, 2012).
41. Jon Campbell, *New York Fracking Plan Could Create Conflict for Town Boards*, Democrat and Chronicle (Rochester, N.Y.), June 26, 2012, *available at* http://www.democratandchronicle.com/article/20120625/NEWS01/306250031/New-York-fracking-conflicts-interest?odyssey=tab%7Ctopnews%7Ctext%7CHome&nclick_check=1 (last visited June 29, 2012).
42. Anti-Frackers Point to Local Moratoriums, Capital Confidential, Times Union, *available at* http://blog.timesunion.com/capitol/archives/136086/anti-frackers-point-to-local-moratoriums (last visited June 28, 2012).
43. Jon Campbell, *New York Fracking Plan Could Create Conflict for Town Boards*, Democrat and Chronicle (Rochester, N.Y.), June 26, 2012.
44. *See* Casey Seiler, *DEC Commissioner: No Staff for Hydrofracking Enforcement*, TIMES UNION, Feb. 7, 2012, *available at* http://www.timesunion.com/default/article/DEC-commissioner-No-staff-funds-for-3125842.php (last visited March 29, 2012).

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Communicating with Members of the Public—Ethical Guidance for Municipal Lawyers

By Lisa Fleming Grumet

Some municipal lawyers have frequent interactions with members of the public. Attorneys at social services agencies may answer questions for applicants or recipients of public benefits, or interact with families involved in child welfare proceedings. School board attorneys may have contact with parents seeking special education or other services for their children. Lawyers at civil rights or consumer protection agencies may work with individuals seeking relief under civil rights or consumer rights laws. Attorneys at any administrative agency may answer questions about the agency's rules and procedures.

Municipal lawyers may represent a city, town, county and/or other municipal entities, and may also represent individual municipal employees.[1] However, individual members of the public are not "clients" of the municipal lawyer in any sense contemplated by the New York Rules of Professional Conduct, even in situations in which the municipal lawyer may be acting on their behalf. The relationship between municipal lawyers and individual members of the public can be complex and a source of confusion.

While there are few provisions in the Rules that specifically concern government lawyers, Rules 4.2 and 4.3 govern interactions with represented and unrepresented individuals who are not clients. This article provides guidance for municipal lawyers in handling communications with members of the public consistent with these Rules.[2]

I. Communicating with Unrepresented Individuals

At times, members of the public who are not represented by counsel may view a municipal lawyer as "their" lawyer, or at least expect that a municipal lawyer will provide legal advice relating to their personal circumstances. In some situations an individual member of the public may be confused about the municipal lawyer's role, and ask for advice or assistance that the lawyer is not in a position to give. Consider these hypotheticals:

A. A small business owner who has been fined for failure to comply with a municipal recycling law calls a municipal attorney's office to ask for information about the law and advice in challenging the fine.

B. A municipal attorney makes an appearance in litigation brought by an inmate who is proceeding *pro se* and who challenges conditions at a municipal jail. The inmate writes the municipal lawyer, expresses excitement that she will be his attorney, and requests a meeting to discuss the case.

C. A public assistance recipient's benefits were terminated and the recipient requests a fair hearing. A municipal lawyer determines that the benefits were wrongly terminated but should be reduced. Before the fair hearing begins, the lawyer advises the recipient that the agency will restore the benefits at a reduced level. The recipient thanks the lawyer but wants the benefits level to remain the same, and asks the lawyer for advice.

In these situations, providing direct assistance to the individual could conflict with the municipal lawyer's responsibilities to the agency. On the other hand, trying to dissuade the individual from proceeding could unfairly disadvantage someone who has a legitimate claim, particularly if the individual views the lawyer as an objective authority.

Interactions of this nature are governed by Rule 4.3 of the Rules of Professional Conduct, which broadly concerns "Communicating with Unrepresented Persons." The Rule provides that "[i]n communicating on behalf of a client with a person who is not represented by counsel, a lawyer *shall not state or imply that the lawyer is disinterested*."[3] In addition, the Rule gives lawyers an affirmative duty to "make reasonable efforts to correct" a misunderstanding, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter."[4] The commentary describes how to "avoid a misunderstanding": "a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."[5]

Finally, the Rule provides that a lawyer "shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in

conflict with the interests of the client."[6] A comment to the Rule notes that this specific prohibition focuses on situations where an individual's interest "may be adverse to those of the lawyer's client."[7]

In summary, as a general matter, municipal lawyers working with unrepresented parties should identify whom they represent, explain their role as appropriate, and avoid possible conflicts of interest.[8] In addition, municipal lawyers can advise an individual to seek other counsel, or refer someone to a court office that assists *pro se* litigants.[9] This is not to say that municipal lawyers cannot negotiate with unrepresented parties. A municipal lawyer may inform an unrepresented party who understands the lawyer's role "of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain that lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations."[10]

Concerning the municipal lawyer hypotheticals above, in hypothetical A, the small business owner may not realize that the municipal law office may represent the agency that imposed the fine. In this scenario, it may be enough to make that clear to the person making the inquiry. In hypothetical B, the inmate clearly misunderstands the role of the municipal attorney. In order to correct this misunderstanding, the attorney could write the inmate to explain her role in the proceeding; it may also be appropriate to notify the Court of this correspondence. In hypothetical C, the public assistance recipient may believe that the lawyer had provided help in getting the benefits partially restored and would be able to provide other assistance. The lawyer could explain to the public assistance recipient that the fair hearing is still pending and the agency's position is adverse to that of the recipient, and refer the recipient to a legal services organization.

II. Communicating with Represented Individuals

Individual members of the public as well as private organizations may have multiple contacts with lawyers and non-lawyers at local government agencies on different matters. For example:

A. An organization has counsel with respect to a number of goods and services contracts between the organization and the municipality. A non-legal representative from the organization calls a municipal lawyer to discuss the terms of a new contract.

B. A landlord with multiple properties is represented by counsel in a proceeding brought by a municipal civil rights agency to enforce a local fair housing law. The proceeding concerns discriminatory rental practices at several properties. The local civil rights agency has received a new complaint concerning a different property owned by the same landlord, and asks a municipal attorney for advice on how to investigate the new complaint. Can the municipal attorney advise the civil rights agency to use undercover "testers" to investigate the complaint without notice to the landlord's counsel?

C. A class action is brought challenging school district practices in providing special education services. The parents of a named plaintiff will be meeting with a school principal to discuss special education services for their child at the school. The principal asks an attorney for the school board for legal advice in preparation for this meeting.

Rule 4.2 of the Rules, often called the "no-contact" rule, generally prohibits a lawyer representing a client from communicating with, or causing someone else to communicate with, a party about "the subject of the representation" if the lawyer knows that the party is represented by counsel in the matter.[11] There are two exceptions: if the attorney has "prior consent of the other lawyer," or the attorney is "authorized to do so by law."[12] In addition, a lawyer may "cause a client to communicate" with someone who is represented by counsel, and provide legal advice relating to the communications, "provided the lawyer gives reasonable advance notice" about the communications to counsel for the represented party.[13]

With respect to hypothetical A, as a technical matter, a contractor could be represented by counsel for some contractual negotiations and not for others, and in these circumstances it would be appropriate for the municipal lawyer to speak with the contractor directly.[14] However, it may be appropriate to ask the contractor about counsel representation, and if the contractor is represented, to end the conversation and contact counsel. While the Rule only bars communications with a party who a lawyer knows is represented by counsel, the comments to the Rule note that "actual knowledge may be inferred from the circumstances," and "the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious."[15]

Hypothetical B raises complicated issues concerning government investigations. Rule 4.2 allows a lawyer to "cause" communications with a represented party where authorized by law. The comments to the Rule indicate that this exception may apply to government investigations prior to the commencement of civil or criminal enforcement proceedings, although communications in criminal matters are also subject to

constitutional law restrictions.[16] There is some flexibility under the Rules for investigating civil rights and consumer rights matters in this manner, but these investigations should be handled with care in order to ensure that any evidence obtained is admissible in an enforcement proceeding.[17]

As for hypothetical C, consistent with the Rule, on notice to counsel for the class, the principal could meet with the plaintiff without any lawyers present, and could obtain legal advice in preparation for this meeting. However, pending class actions raise complicated issues with respect to the "no-contact rule."[18] Class action litigation can cover a wide range of subjects. Class members can be students, parents, public assistance recipients, inmates, children or parents involved with the child welfare system, or recipients of mental health services, among others. Class members may have regular contact with municipal employees about matters that may or may not relate to the subject of the litigation, and these contacts may not always be anticipated or planned. In light of the potential for frequent interactions between class members and municipal employees, and in some cases ambiguity about who might be a class member, in some cases it may be advisable to work out a protocol with class counsel that addresses such issues as the amount of notice that should be provided and in what circumstances.

III. Conclusion

The Rules concerning communications with unrepresented persons and persons represented by counsel are in essence about fairness, and have special force in the government context. By clarifying their role for unrepresented parties and avoiding improper contacts with represented parties, municipal lawyers can avoid conflicts of interest or other complicated ethical situations while continuing to serve the public.

Endnotes

1. The question of who is the client for a municipal lawyer is an issue of state or local law. *See* Rule 1.13 (Organization as Client), Comment 9 ("The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole…. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules.").
2. Municipal lawyer contacts with members of the public may vary, and some municipal law offices may have internal policies that specifically govern these contacts. This article discusses the Rules and does not address policies that may be specific to any particular municipal law office.
3. Rules of Professional Conduct rule 4.3 (emphasis added). Unless otherwise stated, all "Rules" cited in this article are found in the New York Rules of Professional Conduct, N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0 (2012) *available at* http://www.nysba.org/AM/Template.cfm?Section=Professional_Standards_for_Attorneys&Template=/CM/ContentDisplay.cfm&ContentID=53625 (last visited July 2, 2012).
4. *Id.*
5. Rule 4.3 cmt. 1.
6. Rule 4.3. In addition, The New York State Bar Association Committee on Professional Ethics has found that a municipal lawyer may, but is not required to, advise a *pro se* civil claimant of the risk of self-incrimination in some circumstances. Opinion 728 (May 10, 2000). That Opinion concerned an individual who had brought a civil claim related to pending criminal charges, and who was facing a hearing under section 50-h of the General Municipal Law.
7. Rule 4.3 cmt. 2.
8. For extensive discussion of lawyer interactions with unrepresented individuals generally, *see* Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Opinion 2009-2: Ethical Duties Concerning Self-represented Persons.
9. *See id*. at 5.
10. Rule 4.3 cmt. 2.
11. Rule 4.2(a).
12. *Id.*
13. Rule 4.2(b).
14. *See* Rule 4.2 cmt. 4 ("[T]he existence of a controversy between a government agency and a private party or person…does not prohibit a lawyer…from communicating with nonlawyer representatives…regarding a separate matter.").
15. Rule 4.2 cmt. 8.
16. Rule 4.2 cmt. 5.
17. For extensive discussion of this issue, *see* Gidatex v. Campaniello Imports, Ltd., 82 F. Supp.2d 119 (S.D.N.Y. 1999).
18. *See* Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2004-01: Lawyers in Class Actions, at 5 (noting that once a class is certified, the "no-contact rule" bars a lawyer opposing a class from communicating with individual class members about the subject of the representation, but does not bar communications about other matters).

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Governmental Exemptions from Municipal Zoning: Application of the Balancing of Public Interests Test

By Alita J. Giuda

Introduction

When a state agency, public authority, county or neighboring municipality needs to site a project within a municipality's borders, a potential conflict is created with respect to compliance with zoning requirements, as governmental entities may wish to assert exemption from zoning for their projects because of their governmental entity status, or because the entity may not have the time or funds to comply fully. Courts have often had to determine the rights and obligations between these competing governmental entities, and have historically applied a number of legal theories when doing so. One such theory, the "balancing of public interests" test, currently controls under New York law. Under its framework, courts will examine the facts specific to each governmental entity and project when determining whether compliance is required.[1]

The purpose of this article is to describe the development of the balancing of public interests test, its use and application, and the types of facts that should be marshaled in developing a public project in the event a governmental entity seeks to be exempt from municipal zoning requirements. From the perspective of a project sponsor, this article will provide guidance on what requirements must be satisfied if a zoning exemption is sought. For municipalities enforcing zoning requirements, it will demonstrate the factors that a court will consider to weigh in favor of mandating zoning compliance. For the benefit of both sides, this article will demonstrate how a public project can be sited within a municipal border and still satisfy, at a minimum, the spirit of municipal zoning even if strict compliance is not possible.

Legal Standard before *County of Monroe*

In the past, courts used various tests to determine whether a governmental project was subject to municipal zoning. One of the commonly used tests was the "governmental/proprietary" test. Under this test, courts would look at whether the project at issue was "governmental" in nature, meaning the project was being pursued in furtherance of obligations imposed by legislative mandate,[2] or whether it was proprietary, i.e. where the project was being pursued under authority granted to the governmental entity, but not pursuant to a duty to perform a specific function.[3] If the project was governmental in nature, it would be exempt from zoning.[4] If the project was proprietary, compliance with zoning was required.

Problems arose with this approach, however, because while some projects could clearly be labeled governmental (i.e. providing schools, fire houses, and courthouses[5]) and some are often interpreted as proprietary (i.e. digging subway tunnels or acting as a landlord[6]), courts reached differing results in close cases involving the same type of activity. For example, New York courts applying the governmental/proprietary test held that providing water for public consumption, and providing landfill and garbage disposal services, were governmental in some cases, and that they were proprietary in others.[7]

Another test historically applied by the courts was the "eminent domain" test, which determined whether a project was exempt from zoning based on the grant of statutory eminent domain authority; finding that if the project sponsor was operating within the scope of its eminent domain authority, such authority was superior to the municipal zoning power, regardless of whether or not eminent domain was actually used in relation to the project. Yet other courts have determined whether a governmental agency is immune from local zoning requirements by examining the sovereignty of the project sponsor compared to that of the host municipality in enforcing its zoning, allowing entities with superior sovereignty to trump the zoning regulations of their lesser counterparts.[8]

New York relied upon a number of these tests to determine whether governmental entities were subject to local zoning ordinances until *In re County of Monroe*, where the governmental/proprietary test specifically was retired, and "[i]n its place, a 'balancing of public interests' analytic approach [was] substituted."[9] This remains the standard used today in determining compliance with zoning when a governmental entity sites a project within a particular municipality.

The *County of Monroe* Balancing of Public Interests Test

The balancing of public interests test provides that, in the absence of express statutory authority on the subject,[10] a governmental entity is to be considered subject to local zoning in the first instance, but may be deemed

exempt based on the court's application of "sundry related factors" including "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests."[11]

Additional factors that have been specifically noted by the court include "the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, and alternative methods of providing the needed improvement."[12] A particularly critical "factor is intergovernmental participation in the project development process and an opportunity to be heard."[13] While in some cases "one factor…could 'be more influential than another,…' no element should be 'thought of as ritualistically required or controlling.'"[14]

In *County of Monroe*, the court found that the legislative grant of authority and the scope of the proposed airport project favored an exemption from zoning, particularly since the project spanned more than one municipality, and "competing land use restrictions and policy choices among these various municipalities could otherwise foil the fulfillment of the greater public purpose of promoting intra- and interstate air commerce."[15] Additionally, the court found that the balancing of public interests weighed in favor of the county because there was no other practical location for the expansion of the airport, the project had been subject of public hearings and comment, and no detriment to adjoining landowners would be experienced.[16] Therefore, the project was found to be exempt from local zoning.

The Application of *County of Monroe*

Since *County of Monroe* was decided, numerous other New York courts have engaged in the "balancing of public interests test" when deciding disputes between governmental entities relating to whether zoning compliance is required. Most notably, the Court of Appeals revisited the test in *In re Crown Communication New York, Inc. v. Department of Transportation*, in which a state agency challenged the applicability of local zoning requirements.[17] The court held that the state was exempt in constructing two communications towers on state lands, and emphasized in support of its decision that the state "submitted evidence of numerous benefits the government's use of the towers would afford the public," including use of the tower for communications between fire, police, and EMS providers, traffic and weather monitoring antennas, as well as antennas for New York State Department of Transportation communications for road crews.[18]

In addition, the court held that even the private wireless antennas proposed to be collocated on the subject towers served important public purposes, such as reducing the proliferation of towers and improving the availability of 911 emergency cellular calls made by the public and thereby increasing public safety.[19] Therefore, the court held that the construction of the towers, including placement of the private equipment thereon, "does not subvert the underlying public interests served by the enhancement of wireless telecommunication, and such equipment is therefore embraced within the immunity already afforded to the state-owned towers pursuant to the balancing test."[20]

Other examples of projects held to be exempt from local zoning requirements under the balancing of public interests test include construction of a paper sludge landfill, a sewage outfall pipe, construction of water tanks,[21] leasing property for an ambulance facility,[22] and county public service buildings. Specific examples include *King v. Saratoga County Industrial Development Agency*, in which the Third Department held that a county IDA's proposed landfill project was exempt from the town's ordinance regulating landfills because of the legislative grant of authority given the IDA to develop industries which will enhance the economic well-being of the county, which was deemed to outweigh the interest of the municipality in banning the land fill.[23]

Further, in a heavily litigated dispute between neighboring municipalities, the Supreme Court, Broome County found that that the Town of Chenango's outfall pipe for its sewerage system was exempt from compliance with the Town of Fenton's aquifer ordinance as "all of the factors weigh in favor of granting Chenango immunity."[24] In that case, the fact that the host municipality had numerous opportunities to comment on permitting the sewage outfall, as well as the dire need for a sewage outfall upgrade, was critical to the holding that exemption from local zoning requirements was appropriate.[25]

In *Town of Caroline v. County of Tompkins*, the Court applied the balancing of public interests test to a proposed public works building, finding that, among other factors, because of the minor size of the addition compared to the existing structure, the county's demonstrated need for the building, with no competing local interest demonstrated, "the paramount interest of the County excuses it from any need to secure Town land use approvals for the project."[26]

There have also been instances where the balancing of public interests weighed in favor of zoning compliance. For example, where no opportunity for public comment or comparable land use approval process was provided, the court found that the balancing of public interests favored the municipality.[27] One court

found that the municipality seeking exemption from zoning, in that case, its own, was not entitled to the exemption.[28] In *In re Kastan*, the town was not permitted immunity from its own zoning because it had failed to consider other sites for the project (a cellular tower), and because of inadequate environmental review that nullified the town's approving resolution.[29]

In other instances, the court found that it did not have a sufficient factual record to make the determination. For example, the Supreme Court, Rockland County, remanded the issue of balancing of public interests to the municipality, noting that it was the town's obligation, "in the first instance, to determine, after an opportunity to be heard is afforded other intergovernmental agencies and legitimate local interests, to apply the balancing test set forth in *County of Monroe*."[30] While no other court has similarly found that the municipality decides in the first instance, at least one other court has refused to apply the balancing of public interests test because there was "no developed record nor any establishment of the several enumerated factors necessary for the application of the balancing of public interests approach."[31]

Application to Project Sponsors and Municipal Hosts

It is evident that many types of public projects have been reviewed by the courts using the balancing of public interests test; however, as the Court of Appeals stated in *County of Monroe*, the courts' application of the standard is generally case by case, with no one factor being determinative. Some courts will review each and every factor, such as *Town of Fenton*, where the court made legal findings based on the factual record before it in a methodical fashion. Other courts seem to focus on one or a few of the factors in particular in reaching their decision, such as *King v. County of Saratoga*, where the decision was based on the legislative grant of authority given to Saratoga County. Similarly, the Court of Appeals focused primarily on the public purposes to be served by the projects at issue in *County of Monroe* and *Crown Communication*, as well as the difficulties presented if zoning compliance was required.

Most important is that a fully developed record be submitted to the court. As discussed above, courts have refused to decide whether a project is subject to zoning in its absence. The project sponsor may wish to develop a factual record while reviewing the project, whether as part of its environmental review under the State Environmental Quality Review Act, or otherwise.

From the perspective of the municipality seeking an exemption from another municipality's zoning, courts are mixed. The court in *Town of Fenton* found that all factors weighed in favor of the Town of Chenango being exempt.[32] On the other hand, the *In re Kastan* decision found against a town being exempt from its own zoning, noting that the town could have amended its own zoning ordinance to make the proposed project compliant; but a key take-away from this case is that courts may not be willing to use the balancing of public interests test to exempt a municipality from its own zoning.

Finally, a municipality that seeks to compel a project sponsor to comply with zoning requirements should develop a full record relating to the factors demonstrating the importance of enforcing zoning requirements. Better yet, before litigation ensues, municipalities should encourage discussion with governmental project sponsors about the expectations of each entity with regard to project location (and corresponding zoning requirements), schedule, and the necessity of zoning compliance and construction of the project respectively.

Endnotes

1. The law firm of Gilberti, Stinziano, Heintz & Smith, P.C. recently represented a governmental project sponsor in an Article 78 proceeding brought by nearby residents challenging a zoning approval where the balancing of public interests test was successfully asserted on behalf of the governmental project sponsor, resulting in a zoning exemption for the project. In that instance, the project sponsor and the municipality agreed that a zoning exemption was appropriate, and argued that each of the respective factors relating to their interests favored the exemption. The project sponsor based its argument on a number of factors developed during the environmental review process supporting an exemption from zoning.
2. *See* Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 194-96 (1957) (holding that the operation of a landfill is an exempt governmental function).
3. Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 742 (1977) (holding that the operation of an asphalt plant for commercial benefit only, and not for sale or use by a municipality, is proprietary).
4. Peters v. New York State Urban Dev. Corp., 41 A.D.2d 1008, 1009 (3d Dep't 1973) (finding that providing homes for New York residents, a governmental function, was exempt from zoning.)
5. Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 194 (1957) ("Certain functions, such as the maintenance of public schools, of a fire department and of a courthouse, are clearly governmental. And within the same category is the village's furnishing of a police force, as well as its maintaining and repairing its roads and highways.").
6. New York City Tunnel Auth. v. Consolidated Edison Co. of N.Y., Inc., 269 A.D. 449 (1st Dep't 1945) (holding that the digging, construction, and operation of subway tunnels is a proprietary function). *See also* Diaz v. State of New York, 18 Misc.3d 1108(A) (Ct. Cl. 2004) ("Acting as a landlord, the State agency…was clearly exercising a proprietary function."). The court cites to a 4th Dep't case, Dempsey v. Manhattan & Bronx Surface Tr. Operating Auth., 214 A.D.2d 334 (4th Dep't 1995) which similarly holds that an agency is engaged in a proprietary function when acting as a landlord.

7. In Caravan v. City of Mechanicville, 229 N.Y. 473, 476 (1920) the Court of Appeals held—in a tort context—that a municipality providing water for public supply "acts in its private or proprietary capacity." *Id.* Nonetheless, and largely because of changing times, the Second Department held that it is an "inevitable conclusion that the supplying of water by the municipal water district for consumption must be treated… as a governmental, rather than a proprietary, function of a municipality." County of Nassau v. South Farmingdale Water Dist., 62 A.D.2d 380, 390 (2d Dep't 1978). Regarding garbage disposal, the Second Department once held that it was a proprietary function. O'Brien v. Town of Greenburgh, 239 A.D. 555 (2d Dep't 1933). However, by 1957, changing times led the Court of Appeals to proclaim that the "disposition of refuse and rubbish…must today be stamped a governmental function." *Nehrbas*, 2 N.Y.2d at 194-95.

8. *See* County of Westchester v. Village of Mamaroneck, 22 A.D.2d 143, 148 (2d Dep't 1964) ("In our opinion, broad principles of sovereignty require that a State or its agency or subdivision performing a governmental function be free of local control."); City of Rochester v. Town of Rush, 71 Misc.2d 451, 451-52 (Sup. Ct. Monroe Cnty 1972) (holding, based "on broad principles of sovereignty" that "the EFC must be able to perform its governmental functions free of local control, applies to any local zoning regulation, and the town is without power to require EFC to apply for or obtain a permit under any of its regulations").

9. In re County of Monroe, 72 N.Y.2d 338, 341 (1988).

10. In some instances, statutes expressly exempt a particular governmental entity from zoning compliance, rendering the balancing of factors unnecessary. See, e.g., N.Y. Pub. Auth. Law § 2053-e(3) (stating that the Rockland County Solid Waste Management Authority shall be "exempt from the zoning laws or regulations, if any, otherwise generally applicable to such area to the same extent that the county is subject to and exempt from the zoning laws or regulations otherwise generally applicable to such area" when acquiring real property); N.Y. Pub. Auth. Law § 2655(12) (stating that the Schenectady Metroplex Development Authority shall have the ability, "[u]pon the resolution of a municipality, to avoid, and be exempt from, zoning and/or planning requirements, laws and/or regulations established, created or enacted by the municipality"). The Supreme Court Broome County also interpreted this requirement to include examining statutory intent to determine if the project sponsor is required under State law to comply with local zoning. Town of Fenton v. Town of Chenango, 31 Misc.3d 1206(A) 1, 8 (Sup. Ct. Broome Cnty 2011).

11. *County of Monroe*, 72 N.Y.2d at 343.

12. *Id*.

13. *Id*. at 343.

14. *Id*. at 344 (*quoting* Rutgers State Univ. v. Piluso, 60 N.J. 142, 153 (1972)).

15. *Id*.

16. *Id*.

17. In re Crown Communication N.Y., Inc. v. Dep't of Transp., 4 N.Y.3d 159 (2005).

18. *Id.* at 166-67.

19. *Id*. at 167.

20. *Id*. at 169. Other courts have considered wireless communications towers for governmental use, including Town of Hempstead v. State of New York, 42 A.D.3d 527 (2d Dep't 2007), and Port Washington Police District v. Town of North Hempstead, 2009 NY Slip Op. 51758(U), Index No. 013319/09, 1 (Sup. Ct. Nassau Cnty 2009). *See Town of Hempstead*, 42 A.D.3d at 529-30 (finding that a State-owned communications tower was exempt from Town zoning because of the significant pubic benefits provided by the tower, including increased cellular coverage in the area, as well as the location of the tower and rationale supporting its proposed locations versus alternatives, despite concerns about neighboring residents); *Port Washington Police District*, 2009 NY Slip Op. 51758(U) at 11-12 (finding that a proposed installation of a radio antenna for use by a local police district was exempt from zoning pursuant to *County of Monroe* analysis, because of the public purposes served in "enhance[ing] the safety of the public and [police department] officers, which is now at some risk because of the gaps in coverage from the old antenna," while delayed zoning proceedings and litigation that "could take many months, or even years, during which time the communication problems would remain…this poses a continuing risk to the public and police alike").

21. In re Town of Queensbury v. City of Glens Falls, 217 A.D.2d 789 (3d Dep't 1995) (finding that Supreme Court properly used balancing of public interest test to find the City exempt from Town of Queensbury zoning requirements in its construction of water tanks on land within the Town).

22. In re Corrini v. Village of Scarsdale, 1 Misc.3d 907(A) (Sup. Ct. Westchester Cnty 2003) (finding that lease of property for Village ambulance facility was exempt from compliance with zoning).

23. In re King v. County of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 199-200 (3d Dep't 1995).

24. Town of Fenton v. Town of Chenango, 2011 NY Slip Op. 50508(U), Index No. 2008-2886, 1, 11 (Sup. Ct. Broome Cnty 2011); In re Town of Chenango, 29 Misc.3d 1216A (Sup. Ct. Broome Cnty 2010); Town of Fenton v. Town of Chenango, 23 Misc.3d 1140A (Sup. Ct. Broome Cnty 2009).

25. Town of Fenton, 2011 NY Slip Op. 50508U at 9-11.

26. Town of Caroline v. County of Tompkins, 2001 N.Y. Slip Op. 40205(U) (Sup. Ct. Tomkins Cnty 2001) at 3, 11. 14-15.

27. Volunteer Fire Ass'n. of Tappan, Inc. v. Town of Orangetown, 54 A.D.3d 850, 851 (2d Dep't 2008).

28. In re Kastan v. Town of Gardiner Town Bd., 25 Misc.3d 1225(A) (Sup. Ct. Ulster Cnty 2009).

29. *Id.* at 7.

30. Nanuet Fire Engine Co. No. 1, Inc. v. Amster, 177 Misc.2d 296, 301 (Sup. Ct. Rockland Cnty 1998).

31. Town of Southampton v. County of Suffolk, 27 Misc.3d 1235(A) 1, 6 (Sup. Ct. Suffolk Cnty 2010).

32. *Id.*, 31 Misc.3d 1206(A) at 11.

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When Is a Police Officer's Knowledge Actual Notice to a Municipality?

By Karen M. Richards

When petitioning a court for leave to serve a late notice of claim, one of the key factors for the court to consider is whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days of its accrual or within a reasonable time thereafter.[1] To satisfy this key factor, a petitioner must demonstrate not that the municipality had knowledge of the occurrence or had knowledge that a wrong had been committed, but rather that the municipality had actual knowledge of the nature of the specific claim against it.[2]

A police report of an incident does not automatically satisfy the "actual knowledge" requirement. Courts recognize that police officers "are generally required to prepare and file reports of such incidents with their departments. To hold that the existence of such a report relieves a claimant of the necessity of complying with the statutory requirements of section 50-e of the General Municipal Law would effectively vitiate the protections afforded public corporations by such statutory provisions."[3]

Unless the police report contains a logical nexus between the occurrence causing the petitioner's injury and the negligence of the municipality, no actual knowledge is imputed to the municipality.[4] Without that nexus, the municipality may not be able to defend itself on the merits because it was not aware that it needed to conduct a timely and thorough investigation into the matter.[5]

In *Fox v. City of New York*, the police report did not contain a nexus between the accident and the city's alleged negligence.[6] In *Fox*, the petitioner, a police officer, was assigned to detour traffic from an oil spill caused by an earlier accident. While he was performing this assignment, the petitioner was injured when a vehicle driven by another party collided with the patrol car in which he was sitting. The petitioner moved for leave to serve a late notice of claim, alleging in support of the motion that the accident was caused, in part, by the failure of the city's sanitation, police, and fire departments to respond quickly to clean up the oil spill. The court found that the police accident report did not furnish the city with actual knowledge of the petitioner's claim, as it merely described the collision between the privately owned vehicle and the patrol car and made no connection between the accident and the handling of the oil spill by the responsible city departments.

In another case, the nexus was also missing where the police report contained information as to how the petitioner's boat, which had been moored at the village's dock, was damaged, but it did not suggest any connection to the damage and any alleged negligence by the village in its ownership, operation, security, and maintenance of the dock.[7] The court therefore rejected the petitioner's contention that the police report gave the village actual knowledge of the claim.

Often a police report fails to provide notice of the claim because the investigation was "geared toward finding the [perpetrators] and not toward the preparation of the possible claim for pain and suffering on the basis of the alleged negligence of the [municipality]."[8] For example, in *Kliment v. City of Syracuse*, the city's investigation was limited to apprehending the suspect in a hit and run accident and did not include investigating any potential civil liability on the part of the city.[9] The petitioner was injured when, while crossing at a busy intersection following a Syracuse University football game, he was struck by a car and injured. He claimed that the city was negligent in failing to provide a safe crossing for pedestrians. The petitioner contended, in filing a motion for leave to serve a late notice of claim, that the city had notice of the essential facts constituting the claim as a result of the police report of the accident in which he was injured. The Supreme Court granted the petitioner's motion, finding that the city undertook an "extensive investigation" and thus had knowledge of the claim against it. The Fourth Department reversed the Supreme Court, noting that although the city's police department investigated the accident and apprehended the driver of the vehicle that struck the petitioner and charged him with failing to stop at a red light and driving while intoxicated, the report made no connection between the accident and any alleged negligence on the part of the city. Thus, the appellate court found that the police report did not provide the city with notice of the essential facts constituting the claim against the city.

Petitioners seeking leave to serve a late notice of claim for police misconduct often argue that the municipality had knowledge of the facts because its police department had the records and reports related to the criminal charges in its possession.[10] However, a mere assertion that the municipality had "numerous

documents" which gave it the requisite knowledge is not enough, for "[i]f that were the case, in every action where there is an allegation of misconduct against police officers, the need to have a Notice of Claim filed would be eviscerated."[11] Some reports, however, may provide the municipality with knowledge of a petitioner's claim of police misconduct.[12] For example, "[a] report of an investigation by the municipal agency charged with tortious conduct may constitute proof that the municipality and its agency did in fact have actual notice of the facts constituting the claim."[13]

In *Figueroa v. City of New York*, the petitioners' attorney provided the court with the records relating to his clients' arrest and filing of criminal charges and a record of an interview given by the petitioners to the Internal Affairs Bureau ("IAB") of the police department.[14] After carefully reviewing the criminal records, the court was unable to find any information recorded in the records which would have provided the city with facts that underlied the petitioners' theories of negligence or intentional tort. However, in reviewing the IAB report filed by the petitioners, the court found that the IAB report was "a detailed written report of the incident and the facts that underlie the theory of [the petitioners'] claims."[15] Thus, the IAB report provided the city with actual knowledge of the essential facts of the claims for false arrest, false imprisonment, defamation, and negligent hiring, training, and supervision within the statutory time frame allowed by Section 50-e of the General Municipal Law.

On the other hand, reports generated by an entity independent from the municipality do not provide the municipality with notice of police misconduct. In *Black v. City of New York*, the petitioner did not provide the court with any records in the possession of the city which provided the city with the "functional equivalent of an investigation."[16] Instead of providing records, he argued that the filing of a complaint with the Civilian Complaint Review Board ("CCRB"), an independent body comprised of members of the public who did not hold public office or employment, within ninety days of the incident constituted notice of the facts to the city. The court found that there was no basis to impute the facts and knowledge obtained by an independent entity to the city because "[t]o do so would undermine the very purpose of the CCRB, which is to conduct an inquiry, separate, apart and independent of the City bureaucracy."[17]

Just as the mere existence of a police report does not provide notice to a municipality, the mere presence of a police officer on the scene does not provide notice because the courts recognize that police officers "regularly respond to the scene of accidents."[18] However, if the police officer was on the scene of the incident and was directly involved in all aspects of the claim, knowledge may be imputed to the municipality.

For example, in *LaMay v. County of Oswego*, in the hours before the petitioner was found unconscious in her home, a county deputy was dispatched to her home on two occasions to investigate reports that she had overdosed on medication.[19] The petitioner alleged that the municipal agencies, when responding to the 911 calls reporting that she had taken an overdose of medication in an attempt to commit suicide, negligently failed to ascertain whether the petitioner required medical treatment. As a result of the alleged negligence, the petitioner was in a coma for two months and sustained permanent damage to her internal organs. The court found that the county "acquired notice of the essential facts based upon the facts that police were called to the scene and were directly involved in all aspects of the claim."[20] The incident reports created by the county sheriff's department and the county's E-911 records also demonstrated that the county was aware of the essential facts constituting the claim within the statutory time frame.[21]

In conclusion, the contents of a report and a police officer's involvement in the incident must be carefully reviewed by the courts to ascertain if the report or involvement provided the municipality with notice of the essential facts constituting the claim. Mere existence of either will not automatically satisfy the actual knowledge requirement of section 50-e of the General Municipal Law.

Endnotes

1. N.Y. Gen. Mun. Law §50-e[1][a], [5]. Other factors for a court to consider are whether the petitioner was an infant or mentally or physically incapacitated, whether the petitioner had a reasonable excuse for failure to serve a timely notice of claim, and whether the delay would substantially prejudice the municipality in maintaining its defense. *Id.* The presence or absence of any one factor is not necessarily fatal. Jordan v. City of New York, 41 A.D.3d 658 (2nd Dep't 2007).
2. Chattergoon v. New York City Hous. Auth., 161 A.D.2d 141 (1st Dep't 1990), *aff'd*, 78 N.Y.2d 958 (1991); In re Grande v. City of New York, 48 A.D.3d 565 (2nd Dep't 2008); In re Ertel v. Town of Amherst, 267 A.D.2d 1024 (4th Dep't 1999).
3. Casselli v. City of New York, 105 A.D.2d 251, 255 (2nd Dep't 1984).
4. Reaves v. New York City Hous. Auth., 4 Misc.3d 1008(A), 2004 WL 1631164 (Sup. Ct. Queens Cnty. 2004); In re Godwin v. Town of Huntington, 56 A.D.3d 671 (2nd Dep't 2008) (finding that the town did not have notice that the petitioner's claim was premised on the alleged negligent operation of the town vehicle where the police accident report only noted that the accident occurred when the vehicle operated by the petitioner crossed the center line of the roadway on wet pavement and skidded into the town vehicle); In re Portnov v. City of Glen Cove, 50 A.D.3d 1041 (2nd Dep't 2008) (finding that the city did not have notice of the claim where the petitioner tripped and fell on a dangerous or defective portion of the pavement where the police report contained no information to connect the occurrence with any negligence on the part of the city).
5. In re Gilliam v. City of New York, 250 A.D.2d 680 (2nd Dep't 1998); In re Gomez v. City of New York, 250 A.D.2d 443 (2nd Dep't), *lv. to appeal denied*, 92 N.Y.2d 809 (1998).

6. 91 A.D.2d 624 (2nd Dep't 1982).
7. Bridgeview at Babylon Cove Homeowners Assn., Inc. v. Vill. of Babylon, 41 A.D.3d 404 (2nd Dept. 2007).
8. Chattergoon v. New York City Hous. Auth., 161 A.D.2d 141, 142 (1st Dep't 1990), *aff'd*, 78 N.Y.2d 958 (1991).
9. 294 A.D.2d 944 (4th Dep't 2002). Similarly, in Mitchell v. City of New York, 77 A.D.3d 754 (2nd Dep't 2010), the court found that the plaintiff failed to establish that the city had actual timely notice of the essential facts constituting the plaintiff's claim that a defective guardrail caused the accident. Although the police investigation revealed that the accident occurred when the petitioner lost control of his vehicle, while operating it at 100 miles per hour, and broke through the guardrail, the police investigation failed to suggest any connection between the happening of the accident and any negligence by the city in the maintenance of the guardrail.
10. Figueroa v. City of New York, 22 Misc.3d 1111(A), 2009 WL 137076 (Sup. Ct. Kings Cnty. 2009).
11. Charles v. City of New York, 20 Misc.3d 1133(A), 2008 WL 3457019, at *3 (Sup. Ct. Kings Cnty. 2008) (refusing to speculate what those records might demonstrate, as the petitioner failed to provide the court those documents despite every opportunity to do so).
12. Tatum v. City of New York, 161 A.D.2d 580, 581 (2nd Dep't), *appeal denied*, 76 N.Y.2d 709 (1990)("Knowledge from police records and District Attorney investigations may under some circumstances be imputed to a municipality.").
13. Johnson v. City of New York, 302 A.D.2d 463, 464 (2nd Dep't 2003); *see also* Erichson v. City of Poughkeepsie Police Dept., 66 A.D.3d 820 (2nd Dep't 2009) (finding that the city's police department had actual knowledge of the facts underlying the plaintiff's claim because its own employees engaged in the conduct which gave rise to the claim).
14. 22 Misc.3d 1111(A), 2009 WL 137076 (Sup. Ct. Kings Cnty. 2009); *see also* In re Camilleri v. County of Suffolk, 190 A.D.2d 669 (2nd Dep't 1993) (finding that any knowledge obtained through an interview by the police department's department of internal affairs was not actual knowledge of the municipality where the petitioner's application was not made until eight months after the incident, five months after the 90 day period, four months after her attempt to serve the late notice of claim without court authorization, and the petitioner did not adequately explain this delay).
15. *Id*. at *3.
16. 21 Misc.3d 1121(A), 2008 WL 4700544 *3 (Sup. Ct. Kings Cnty. 2008).
17. *Id*. at *4.
18. Casselli v. City of New York, 105 A.D.2d 251, 255 (2nd Dep't 1984).
19. 49 A.D.3d 1351 (4th Dep't), *lv. to appeal denied*, 10 N.Y.3d 715 (2008).
20. *Id*. at 1351.
21. *Id*.; *see also* Dewey v. Town of Colonie, 54 A.D.3d 1142 (3rd Dept. 2008) (finding the town had actual notice of the essential facts underlying the claim against it where the town's police department and emergency medical services were present at the scene and assisted the petitioner after he fell and there was an accident report setting forth details concerning the accident).

Ms. Richards represented the City of Syracuse in *Kliment v. City of Syracuse*. She is an Associate Counsel, Office of General Counsel, The State University of New York. The views expressed are her own and do not necessarily represent the views of The State University of New York or any other institution with which she is or has been affiliated.

Case Update: *Sheeran v. New York State Department of Transportation*

By Harvey Randall

Leaves of Absences for Disability Pursuant to Civil Service Law Sections 71 and 72, which appeared in the Spring 2011 issue of *Municipal Lawyer*,[1] cited the Appellate Division, Third Department's decision of *Sheeran v. New York State Department of Transportation*.[2] The Court of Appeals has reversed the Appellate Division's ruling in *Sheeran*,[3] together with a similar Appellate Division decision, *Matter of Birnbaum v. New York State Dept. of Labor*.[4] Below is a summary of the Court of Appeals ruling:

Procedural Safeguards Set Out in Civil Service Law Section 72 Available to Employee if Employer Bars His or Her Return to Work from Sick Leave

In both the *Sheeran* and *Birnbaum* appeals the issue was whether Civil Service Law § 72, which provides certain procedural safeguards to a public employee to be placed on an involuntary leave of absence due to illness or a disability by the appointing authority, applies to an employee who is prevented from returning to work by the appointing authority from his or her voluntary absence on sick leave. The Court of Appeals,[5] reversing the Appellate Division's rulings to the contrary,[6] said that it does.

Both Thomas Sheeran and Michelle Birnbaum had placed themselves on sick leave due to illness voluntarily. Subsequently they attempted to return to work and submitted certificates from their physician indicating that they were able to return to duty.

However, their respective employers, the NYS Department of Transportation [DOT] and the NYS Department of Labor [DOL], under color of 4 NYCRR § 21.3 (e), elected to have the employees examined by a State-affiliated physician prior to their returning to work. In each case, the physicians found the employees unfit to return to duty and the respective departments placed Sheeran and Birnbaum on "involuntary leave."

When these individuals asked for a hearing pursuant to Civil Service Law § 72 the respective departments rejected their requests, contending that § 72 "only applied to employees being removed from the work site" by the appointing authority.[7]

Ultimately, both Sheeran and Birnbaum were terminated from their positions pursuant to Civil Service Law § 73. Section 73 permits, but does not require, an appointing authority to terminate an employee continuously absent from work on § 72 leave for one year or more and unable to perform the duties of the position.[8]

Sheeran and Birnbaum sued, arguing that their placement on involuntary leave without having been provided a hearing pursuant to Civil Service Law § 72 was unlawful.

The Appellate Division, concluding that § 72 "by its plain language, applies only to employees placed on involuntary leave, whereas the CBA [collective bargaining agreement] and 11 NYCRR § 21.3 apply to employees who have taken voluntary leave," ruled that the determinations of the DOT and DOL to place their respective employees on an involuntary leaves of absence without first providing them with a § 72 hearing was "not arbitrary, capricious, irrational or contrary to law."

The Court of Appeals, however, said that it found "no indication that the Legislature intended to make a distinction between an employee who is placed on involuntary sick leave from the job site and one that is placed on such leave from a voluntary absence."[9] In the words of the court § 72 "simply provides that an employee 'placed on leave of absence' is entitled to its procedural protections."[10]

In addition, the court noted that § 72(5) permits a public employer "to immediately place the employee on involuntary leave when the employee poses potential danger to the work site, applies equally whether the employee is actively working or about to return."[11]

While DOT and DOL argued that "Rule 21.3 (e) and Article 30 of the [controlling] CBA as applying to the [employee's] circumstances," the Court of Appeals pointed out that neither of those provisions affords an immediate opportunity to be heard once a determination is made to place the employee on an involuntary leave status. The court explained that although these provisions provided an opportunity to be reexamined at a later date, they did not provide the procedural protections mandated by § 72.

Essentially the court said that unlike the situation in *Antinore v. State*,[12] where the Court of Appeals held that a union could bargain away the employee's statutory disciplinary rights set out in § 75 of the Civil Service Law in favor of an alternative disciplinary procedure if the alternate procedure provided constitutional due process protections equivalent to those available under the statute it replaced, a collective bargaining agreement may not defeat an individual's statutory rights as was the case in *City of Plattsburgh v. Local 788*.[13]

In *Plattsburgh,* the collective bargaining agreement measured seniority for the purposes of layoff in terms of "initial date of appointment" rather than seniority for the purposes of layoff measured from the initial date of permanent appointment as mandated by §§ 80 and 80-a of the Civil Service Law.

The court said that the legislative history of § 72 indicates the statute has a remedial purpose—"to afford tenured civil servant employees with procedural protections prior to involuntary separation from service." This remedial purpose, said the court, "applies equally here, where an employee is out on sick leave and then seeks to return to work, but is prohibited based on a finding that he or she is unfit."[14] Accordingly, the court concluded that a collective bargaining agreement could not defeat this right to a hearing prior to his or her separation from service except as authorized by § 72(5) of the Civil Service Law.

Further, said the court, "to read the statute otherwise would discourage employees from taking voluntary leave, since they would have greater rights if they remained on the job and waited to be involuntarily removed—a result the Legislature surely did not intend."[15]

Endnotes

1. Harvey Randall, *Leaves of Absences for Disability Pursuant to Civil Service Law Sections 71 and 72*, 25 N.Y. St. B.A. Mun. Law. 16-22 (Spring 2011).
2. Matter of Sheeran v. New York State Dept. of Transp., 68 A.D.3d 1199 (3d Dep't 2011).
3. *Id., rev'd by* Matter of Sheeran v. New York State Dept. of Transp., 18 N.Y.3d 61 (2011).
4. Matter of Birnbaum v. New York State Dept. of Labor, 75 A.D.3d 707 (3d Dep't 2010).
5. *Sheeran*, 18 N.Y.3d 61.
6. *See Sheeran*, 68 A.D.3d 1199 and *Birnbaum*, 75 A.D.3d 707.
7. DOT and DOL both claimed that 4 NYCRR 21.3 and Article 30 of the relevant collective bargaining agreements between the union and the employers in support of their decisions.
8. N.Y. Civ. Serv. Law § 73 permits a public employer to terminate an employee who has been continuously absent from work for one year or longer and is unable to perform the duties of the position. The individual, however, is eligible for reinstatement to his or her position if he or she applies for reemployment within one year after the underlying disability no longer prevents his or her performing his or her duties satisfactorily.
9. *Sheeran*, 18 N.Y.3d at 65.
10. *Id.*
11. *Id.*
12. Antinore v. State, 40 N.Y.2d 921 (N.Y. 1976).
13. City of Plattsburgh v. Local 788, 108 A.D.2d 1045 (3d Dep't 1985).
14. *Sheeran*, 18 N.Y.3d at 65-66.
15. Judge Smith dissented and voted to affirm the Appellate Division's ruling in an opinion.

Harvey Randall served as Principal Attorney, New York State Department of Civil Service. He also served as Director of Personnel for the State University System, as Director of Research, Governor's Office of Employee Relations and Staff Judge Advocate General, New York Guard. He received his MPA from the Maxwell School, Syracuse University, and his J.D. from Albany Law School. He is a co-author of a number of electronic manuals [e-books] focusing on public employment in New York State including *The Discipline Book, Layoff, Preferred Lists and Reinstatement in the Public Service*, and *The Layoff, Preferred List and Reinstatement Manual*. Randall maintains a law blog, *New York Public Personnel Law*, available at http://publicpersonnellaw.blogspot.com.

Land Use Case Law Update

By Noelle Crisalli Wolfson

This quarter's case law update highlights recent cases from the Third and Fourth Departments in a variety of areas of interest to the land use practitioner.

Center of Deposit, Inc. v. Village of Deposit[1] and *Dugan v. Liggan*,[2] both decided by the Third Department on the same day, address the fact-specific question of when a land use determination issued by an administrative agency is ripe for judicial review.

Addressing another threshold question in land use litigation matters, the Fourth Department, in *Young Development, Inc. v. Town of West Seneca*[3] and *Royal Management Inc. v. Town of West Seneca*,[4] held that the statute of limitations applicable to challenges to the determination of a town board on an application for a special use permit is four months, not 30 days as provided in Town Law §274-b(9).

In *Subdivisions, Inc. v. Town of Sullivan*,[5] the Third Department issued a warning to municipalities—carelessness in the drafting of a town zoning ordinance may have unanticipated and undesirable consequences.

Finally, in *Kempisty v. Town of Geddes*,[6] the Fourth Department annulled conditions to a site plan approval apparently imposed because of the respondents' view of the applicant, rather than the use proposed by the application, reinforcing the black letter rule that zoning may only regulate land uses, not users.

I. Ripeness to Review Determinations of Administrative Agencies

Two cases decided by the Appellate Division, Third Department, address the topic of ripeness to challenge a land use determination. Although neither makes new law, this is an often unclear and fact-specific analysis, and thus any new case on this topic can aid practitioners when undertaking a ripeness analysis.

In *Center of Deposit, Inc. v. Village of Deposit*,[7] the Third Department held, among other things, that petitioner's challenge to the Village Planning Board's positive declaration under SEQRA was ripe for review because under the circumstances of the application, the requirement to prepare an environmental impact statement constituted injury to petitioner.

In *Center of Deposit, Inc.*, the petitioner was the owner of a parcel of property improved with two vacant buildings. After several failed attempts at selling the property, it made an application to the Village of Deposit Planning Board for subdivision approval to separate the lot into two lots, each of which would be improved with one of the existing buildings. According to the Third Department's decision, no other improvements were proposed in connection with the subdivision application; its purpose was just the legal division of the property. In response to petitioner's application, the Planning Board classified the action as an unlisted action under SEQRA, adopted a positive declaration of environmental significance, and required the petitioner to submit a Draft Environmental Impact Statement ("DEIS") on the grounds that the application had the potential to negatively impact water quality, air quality, and public health because of, among other things, the probable presence of friable asbestos in at least one of the buildings.[8] Rather than preparing the DEIS, the petitioner commenced this Article 78 proceeding challenging the positive declaration adopted by the Planning Board.

The lower court dismissed the petition, holding that the Planning Board's determination was not ripe for review, and, in any event, it was rational. The Third Department reversed, finding that the case was ripe for review and that the Planning Board's determination was arbitrary and capricious in that it did not provide a reasoned elaboration to support its determination that proposed application had the potential to cause the above-described environmental impacts.[9]

Addressing the ripeness of the proceeding, the Court reminds the reader that there is no bright line rule of ripeness, and that courts must, on a case-by-case basis, determine whether an administrative agency's action

> impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process[,]…[which] inflicts an actual, concrete injury…[that] may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party[.][10]

If, in the facts presented, that question can be answered in the affirmative then the decision is "final" and thus ripe for review.

Although under most circumstances the adoption of a positive declaration is not ripe for review, here, the Court, necessarily intermingling its substantive determination on the reasonableness of the Board's determination and the issue of ripeness, held that the Board's determination inflicted concrete injury in the form of requiring petitioner to spend time and money to prepare a DEIS because the Board's determination was devoid of a reasoned elaboration as to how the proposed action—the legal division of the lot into two lots with no development or other physical improvements proposed—had the potential to cause some or all of the above-referenced environmental impacts. The Court went on to annul the Board's positive declaration on the same grounds.[11]

In *Dugan v. Liggan*,[12] decided on the same day as *Center for Deposit, Inc.*, the Third Department held that the petitioners' challenge to the Ulster County Department of Health-Environmental Sanitation Division's (the "Department") issuance of approval of certain aspects of a residential subdivision was timely since it was commenced within four months of the date the Department's substantive approval was issued.

In *Dugan*, the underlying project was a 21-lot residential subdivision (which also included one existing commercial lot) to be built in three phases in the Town of Rosendale, Ulster County. The Town's Planning Board, lead agency under SEQRA, classified the project as a Type I action. The Department was an involved agency. The Planning Board held public hearings on the application in April and December 2007. In July 2008, the Planning Board adopted a SEQRA negative declaration, finding that the project did not have the potential to generate any significant environmental impacts. The negative declaration was then filed with the Town Clerk. By resolution filed with the Town Clerk on September 4, 2008, the Planning Board granted preliminary plat approval for the project, such approval being extended in February 2009. In September 2009, the Department issued its approval for the subdivision and the Board granted final plat approval, such approval being promptly filed with the Town Clerk. In October 2009, petitioners, neighboring landowners who opposed the project, commenced the instant Article 78 proceeding seeking review of all of the above-referenced approvals.[13]

The lower court dismissed the petition as untimely and the petitioners appealed. The Third Department modified the lower court's determination, finding that the petitioners' challenge to the Department's approval of the sanitary aspects of sewage disposal for the subdivision (which carried with it a four-month statute of limitations) was timely since such determination did not become "final" until the Department issued its substantive approval, such approval being a separate and distinct inquiry from the SEQRA process. Thus, as respects the Department's approval, the negative declaration itself was not a final determination inflicting actual and concrete injury until the substantive approval was issued.[14]

II. Statute of Limitations Within Which to Challenge a Special Use Permit Issued by a Town Board

In *Young Development, Inc. v. Town of West Seneca*[15] and *Royal Management Inc. v. Town of West Seneca*,[16] the Fourth Department held, among other things, that a challenge to the denial of a special use permit by a Town Board is subject to CPLR 217's four-month statute of limitations, not the 30-day statute of limitations set forth in Town Law §274-b(9).

Although *Young Development, Inc.* and *Royal Management, Inc.* are clear in their holdings—that the 30-day statute of limitations set forth in Town Law §274-b(9) does not apply to the decision of a town board on an application for a special use permit—Town Law §274-b(9) could easily be read to provide otherwise. Subsection (9) of Town Law §274-(b)(approval of special use permits), specifically provides that:

> Any person aggrieved by a decision of the planning board *or such other designated body or any officer, department, board or bureau of the town* may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board in the office of the town clerk.[17]

Neither *Young Development, Inc.* nor *Royal Management, Inc.* explains why the italicized language above would not encompass the determination of a town board on an application for a special use permit. However, a 1997 case from the Second Department, *Chernick v. McGowan*,[18] which also held that that the statute of limitations within which to challenge a town board's determination on a special use permit application was four months, not 30 days, indicates that four months is the correct statute of limitations because, in retaining the authority to grant special use permits to itself, the town board "did not delegate its authority to grant the special use permits."[19]

In so much as the plain language of Town Law §274-(b) does not clearly provide that town boards are, in all circumstances, exempt from its 30-day statute of limitations, and many codes do expressly designate the town board as the agency authorized to issue special use permits,[20] there is at least an argument that its terms can apply to the determinations of town boards on special use permit applications. Thus, out of an

abundance of caution, it would be wise for practitioners, when possible, to commence actions challenging special use permit determinations by town boards within 30 days, but to anticipate that approvals that their clients receive (or grant in the case of attorneys representing town boards) may be subject to a four-month statute of limitations.

III. Interpretation of an Ambiguous Provision in a Zoning Code

In *Subdivisions, Inc. v. Town of Sullivan*,[21] the Third Department, interpreting an ambiguous provision of the Town's zoning ordinance in favor of the petitioners, held that a mineral resources use was a permissible use in the Town's agricultural district notwithstanding that it was not expressly listed as such in the Town's code.

In *Subdivisions, Inc.*, petitioner Subdivisions, Inc. was the owner of, among others, a parcel of property in the Town's agricultural district that had historically been used for mining. A mineral resources use was listed as a special permit use in the section of the Town's code setting forth additional requirements for special permit uses, but it was not listed as a permitted (or special permit) use in any district in the Town code's zoning use schedule.

In 2004, petitioner applied for a special use permit for the mining of minerals on its property. The application was tabled by the Town's planning board, and was then apparently "debated" between the planning board and the Town's zoning board of appeals (the "ZBA") for five years for reasons that were not apparent to the Court.[22] As relevant to the instant proceeding, the ZBA ultimately determined that the mineral resource use was prohibited in the Town's agricultural district (and thus on petitioner's property) because such use was not expressly listed in the Town's zoning schedule as a use permitted in the agricultural district. This Article 78 proceeding followed.

The lower court dismissed the proceeding, holding that the ZBA's determination was not irrational or unreasonable. Petitioners appealed, arguing that the town's zoning ordinance was ambiguous as respects the mineral resources use and thus should be interpreted in their favor.[23]

Before addressing the substantive issue before it, the Court set forth the legal framework that is applicable when it must interpret an allegedly ambiguous zoning law. The Court's decision provides that:

> When a reviewing court is confronted with an allegedly ambiguous zoning law, it generally will grant great deference to the ZBA's interpretation thereof—disturbing such interpretation "only if it is irrational or unreasonable"…. If, however, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required…. As zoning regulations are in derogation of the common law, they must be strictly construed against the municipality that enacted them and "any ambiguity in the language employed must be resolved in favor of the property owner"….[24]

Applying these principles to the facts at hand, the Third Department reversed the ZBA's determination, finding that it lacked a rational basis. The Court held that even though the mineral resources use was not specifically listed as a permitted use in any of the Town's zoning districts, including its agricultural district, the mining use was clearly contemplated as a use that would be permitted in the Town because, among other things, such use was included in the special use permit section of the Town's code. Thus, because the Town's code clearly (although, perhaps unintentionally) contemplated such use as permitted in the Town, the use was implicitly permitted in the agricultural district. In so holding, the Court reasoned that:

> Although we appreciate that a municipality cannot be expected—when crafting a zoning ordinance—to anticipate each and every potential use to which a property owner may wish to put his or her property, the zoning law here is, in our view, so poorly written with respect to identifying the zoning district(s) within which mineral resource uses are permitted as to be ambiguous. As such ambiguity must be resolved in favor of petitioners… we conclude that the ZBA's determination that "mineral resource uses are prohibited in agricultural districts under the 1979 [zoning law], either with or without the issuance of a special use permit," is unreasonable and irrational.[25]

However, the Court stopped short of issuing petitioners a permit to mine the subject property, directing that "the Planning Board can (and should) review petitioners' application on the merits and, after due consideration of the relevant standards, approve or deny it."[26]

IV. Conditions to Approvals Must Relate to the Use of the Property, Not the User

In *Kempisty v. Town of Geddes*,[27] the Appellate Division, Fourth Department, annulled six conditions of site plan approval on the grounds, among others, that such conditions were imposed because of the respon-

dents' view of the applicant and not the application before it.

In *Kempisty*, the petitioners were the owner and lessee of two parcels of property in the respondent Town of Geddes. Both properties were located in the town's Commercial C: Heavy Commercial District, in which motor vehicle sales, service and repairs (and uses and structures accessory thereto) were permitted with site plan approval. Notably, such uses were designated as permitted with a special permit in every other district in which they were permitted in the town. One of the petitioners' parcels was developed with an automotive use that was established before the applicable zoning code was adopted. The second parcel, which was contiguous to the first, was vacant. Petitioners sought approval from the town to use the second parcel to reconfigure and expand the existing business.

Petitioners made an application to the Geddes town board for site plan approval for the proposed expansion and reconfiguration of their automotive use. Originally the site plan application pertained to the vacant parcel only; however, at the town's request, but under protest, the petitioners included the developed parcel in the site plan application (its protest argument being that site plan approval was not required for the improved parcel because it was a pre-existing nonconforming use). The town board approved the petitioners' site plan for both parcels subject to twelve conditions. Conditions three through eight imposed the special conditions set forth in the section of the town's code applicable to "motor vehicle service and repair facilities and motor vehicle sales facilities" allowed with a special use permit (collectively, the "Special Permit Conditions").

Petitioners commenced this Article 78 proceeding challenging the town board's determination that both parcels were subject to site plan review and the imposition of the Special Permit Conditions.

The Fourth Department easily held that the entire site—not just the vacant parcel—was subject to site plan review because the applicant sought approval to enlarge its use over the improved and vacant parcels. However, the Fourth Department held that the inclusion of the Special Permit Conditions in petitioners' approval was an abuse of discretion because, in the Commercial C district, the motor vehicle use was a permitted use with site plan approval; it was not a special permit use. Moreover, the proof before the Court demonstrated that the Special Use Conditions were imposed in the context of this particular application because of the town's concerns arising out of *petitioners'* use of the property (apparently one of the petitioners had an acrimonious relationship with the town), rather than the use of the property in and of itself. The Court held that the imposition of the conditions based on the identity of the applicant, rather than to address the impacts of the proposed use, ran "afoul of the 'fundamental principle' that 'conditions imposed on the [approval of a site plan] must relate only to the use of the property that is the subject of the [site plan] without regard to the person who owns or occupies that property."[28]

Endnotes

1. Center of Deposit, Inc. v. Village of Deposit, 90 A.D.3d 1450 (3d Dep't 2011).
2. Dugan v. Liggan, 90 A.D.3d 1445 (3d Dep't 2011).
3. Young Development, Inc. v. Town of West Seneca, 91 A.D.3d 1350 (4th Dep't 2012).
4. Royal Management Inc. v. Town of West Seneca, 93 A.D.3d 1338 (4th Dept. 2012).
5. Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184 (3d Dep't 2012).
6. Kempisty v. Town of Geddes, 93 A.D.3d 1167 (4th Dep't 2012).
7. *Center of Deposit, Inc.*, 90 A.D.3d 1450.
8. *Id.* at 1451-52.
9. *Id.* at 1453.
10. *Id.* at 1451.
11. *Id.* at 1452-53.
12. Dugan v. Liggan, 90 A.D.3d 1445 (3d Dep't 2011).
13. *Id.* at 1446-47.
14. *Id.* at 1447.
15. *Young Development, Inc.*, 91 A.D.3d 1350.
16. *Royal Management Inc.*, 93 A.D.3d 1338.
17. N.Y. Town Law § 274-b(9) (emphasis added).
18. Chernick v. McGowan, 238 A.D.2d 586 (2d Dep't 1997).
19. *Id.* at 587.
20. For example, the West Seneca Code specifically designates the Town Board as the special use permit authority for certain types of uses. *See, e.g.*, West Seneca Code Section 120-22A(6), which specifically designates the town board as the board authorized to grant special permits for, among other things, concrete products manufacture.
21. Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184 (3d Dep't 2012).
22. *Id.* at 1184.
23. *Id.* at 1185.
24. *Id.*
25. *Id.* at 1187.
26. *Id.*
27. Kempisty v. Town of Geddes, 93 A.D.3d 1167 (4th Dep't 2012).
28. *Id.* at 1171.

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The Case for Renaming the Professional Ethics Committee

By Steven G. Leventhal

Effective April 1, 2009, New York became the last state to abandon the format of the old ABA Code of Professional Responsibility and the last except California to adopt the format of the ABA Model Rules of Professional Conduct. Now, the time has come for the New York State Bar Association to join the vanguard by changing the name of its *Professional Ethics* Committee to the *Professional Conduct* Committee. This name would more accurately describe the function of the committee and, for the reasons that follow, would better promote its goals.

Logic and experience indicate that the vast majority of attorneys are honest, and genuinely wish to do the right thing. The goal of the Professional Ethics Committee is to assist honest attorneys in avoiding ethical missteps before they occur by providing advice concerning their obligations under the New York Rules of Professional Conduct (the "Rules").[1]

Many people use the words "morality" and "ethics" as if they had the same meaning. This is understandable, because the two words have similar meanings. Morality comes from the Latin word *mores*, for the customs and conventions of a community. Ethics comes from the Greek word *ethos*, for the characteristic spirit or tone of a community. But in the applied context of professional ethics, it is inaccurate and unhelpful to think of morality and ethics as having the same meanings.

To illustrate the difference between morality and ethics in the professional context, suppose that you represent the seller at a real estate closing, and that your client asks you to distribute the balance of escrow funds in a check payable to cash. If you were to comply with this request would you have acted immorally? Certainly not; but the Rules of Professional Conduct require that all withdrawals of escrow funds be made only to a named payee and not to cash.[2]

Similarly, the Rules regulate attorney advertising in ways that are not always intuitive. For example, an attorney advertisement must include the name, principal law office address and telephone number of the lawyer or firm whose services are being offered.[3]

Further consider that your accountant, insurance agent or stock broker might propose to refer clients to you in exchange for discounted legal services to the referring non-legal professional. Certainly, such an arrangement would not be immoral. In fact, the Rules do not forbid non-exclusive reciprocal referral arrangements with non-legal professionals.[4] But referrals made in exchange for a *quid pro quo*—"anything of value," in the words of Rule 7.2(a)—are prohibited.

The Rules are not exclusively or even primarily a statement of the moral obligations owed by an attorney. Rather, many of the Rules prioritize an attorney's conflicting obligations or regulate commercial aspects of the practice of law. The Rules provide an *ethical framework* for the practice of law.[5]

The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of representation.[6]

A lawyer's responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.[7]

It is unhelpful to think of professional ethics in moral terms, because doing so implies a moral failure among attorneys and tends to alienate honest members of the bar, who take rightful pride in their personal integrity. Further, the blurring of the distinction between morality and ethics suggests to unsuspecting attorneys that they may reason out an ethical issue using common sense, and simply take the action that seems to them, by their own personal standards of morality, to be the right thing to do. However, many of a lawyer's professional obligations are not self-evident, and a lawyer who relies on his or her own moral instincts rather than on the Rules of Professional Conduct does so at the risk of engaging in unintended misconduct. The Rules set forth the minimum level of conduct be-

low which no lawyer can fall without being subject to disciplinary action.[8]

Some laws prohibit conduct that is inherently immoral, such as murder and larceny. This type of misconduct is known as a *malum in se*. It is prohibited because it is wrong. But some laws prohibit and even criminalize conduct that would otherwise be perfectly moral because we find it a safer, more economical or more efficient way to organize our society. The Vehicle and Traffic Law and the Internal Revenue Code are examples of laws that prohibit many kinds of conduct that are not inherently immoral. This type of misconduct is known as a *malum prohibitum*. It is wrong because it is illegal. Similarly, the Rules prohibit many kinds of professional conduct that is not inherently wrong.[9] The Rules of Professional Conduct are the rules of the road for the practice of law.

In today's modern, pluralistic society, collective moral values are more difficult to discern than they were in 1908, when the ABA Canons of Professional Ethics were first adopted and the profession was less diverse. Today, collective moral values are obscured by constant changes brought about by successive waves of immigration, progressive social movements, and the increased mobility of modern life. In some ways, the communications revolution has reduced the world to a single, multi-cultural community where disparate values are no longer blended into a single ethical consensus. Our philosophical differences are not just cultural in origin. Religious ethicists follow the doctrine of their faith. Social activities are guided by their particular views of social justice. Bar associations have come to realize that diversity in membership enriches an organization by introducing new perspectives, and is essential if bar associations are to attract new members and remain relevant as our society and profession continue to evolve.

To be sure, an attorney may, in some instances, violate the Rules by engaging in morally culpable misconduct such as the misappropriation of escrow funds or the subornation of perjury. But such infractions are the business of the grievance committee and, where appropriate, the district attorney's office. They are not the business of the Professional Ethics Committee. Rather, the Professional Ethics Committee is engaged in providing assistance to honest attorneys in avoiding ethical missteps before they occur. This is accomplished through advisory opinions about an inquiring attorney's proposed future conduct and educational programs about the Rules of Professional conduct and the body of law that has grown up around them. These efforts by the Professional Ethics Committee advance the goal of the Association expressed in its statement of purpose, to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession.[10]

"Professionalism" in the practice of law is a goal to which we should all aspire. But attorney professionalism is broader in concept than the minimum standards of professional conduct established by the Rules of Professional Conduct. In its mission statement, the New York State Bar Association Committee on Attorney Professionalism defines "attorney professionalism" as "dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity and civility."[11]

To some, it may seem heretical to suggest that there is a distinction to be made between morality and ethics or between professionalism and ethics; and certainly attorneys have moral and professional duties that may sometimes transcend their obligations under the Rules of Professional Conduct. In appropriate cases, courts may look beyond the Rules in determining the professional obligations of an attorney.[12] However, by adopting the Rules effective April 1, 2009, New York joined nearly all other states in moving away from a value based system having its origin in the 1908 ABA Canons of Professional Ethics, to a more modern system based on policy choices, embodied in the 2009 rules of Professional Conduct, as amended in 2010.

Some have argued that a change in the name of the Professional Ethics Committee would leave practitioners unable to find it. Needless to say, this concern may be addressed by a listing in the Association directory under "Professional Ethics Committee" that refers members to the newly renamed "Professional Conduct Committee."

Others have expressed reluctance to abandon a descriptive term that is used by other bar associations, law schools, the bar exam, and continuing legal education programs. However, progress in the use of more accurate nomenclature is not a revolutionary concept. Five state bar associations have adopted names that better reflect the function of their ethics committees (e.g. Arizona (Committee on the Rules of Professional Conduct ("Ethics Committee")), California (Committee on Professional Responsibility and Conduct), Illinois (Standing Committee on Professional Conduct), Vermont (Professional Responsibility Committee) and Washington (Rules of Professional Conduct Committee)).[13] Here, our Association should proudly join those bar associations leading the way to a modern understanding of a lawyer's professional obligations by adopting a more accurate and more helpful name for its Professional Ethics Committee—a name that promotes the mission of the committee and better describes its function—the "Professional Conduct Committee."

Endnotes

1. The New York State Bar Association web site describes the function of the Professional Ethics Committee as follows:

> The Committee on Professional Ethics is charged with the duty of observing the ethical standards of the members of the profession. With the approval of the Executive Committee, it may take original action and may cooperate with other bar associations and federations in taking action to maintain high ethical standards among the members of the profession. In its discretion it shall make answer to inquiries as to proper conduct for a member of the legal profession in any given case if such answer shall have been adopted or authorized at a meeting of the committee and concurred in by a majority of the committee; provided that between meetings of the committee any such answer may be adopted or authorized if it be concurred in by a majority of the committee, and nonconcurring member shall have requested discussion of the question and answer at a meeting of the committee. It may publish such questions and answers in the Journal if, in its opinion, such publication would not violate the confidence of the inquiries. The terms "members of the profession" and "member of the legal profession" as used in the preceding paragraph, shall be deemed to include members of the judiciary; and the jurisdiction of the Committee on Professional Ethics shall extend to the canons of judicial ethics as well as to the code of professional responsibility.

See, New York State Bar Association, Committee on Professional Ethics: Stated Purpose, http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Professional_Ethics_Home&Template=/CM/HTMLDisplay.cfm&ContentID=53017.

2. *See,* Rules of Professional Conduct rule 1.15(e). Unless otherwise stated, all "Rules" cited in this article are found in the New York Rules of Professional Conduct, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2012).

3. *See,* Rule 7.1(h).

4. *See,* Rule 5.8(c); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 765 (2003) ("A lawyer or law firm may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent…with appropriate disclosure of the relationship.")

5. *See* Rules of Professional Conduct Scope, ¶ 8.

6. *See* Rules of Professional Conduct Preamble, ¶ 2. The Appellate Division has not adopted the Preamble, Scope and Comments, which are published by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.

7. *See* Preamble, ¶ 3.

8. *See* Scope, Comment ¶ 6.

9. For example, the purposes of the "No Contact Rule" (Rule 4.2) are to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 652 (1993); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 650 (1993); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 607 (1990).

10. For the full text of the New York State Bar Association Mission Statement, see http://www.nysba.org/Content/NavigationMenu/NewsCenter/VitalStatistics/Vital_Statistics.htm.

11. The NYSBA Committee on Attorney Professionalism was established in 1989. The Committee's mission statement was last revised in 2009. *See,* New York State Bar Association Committee on Attorney Professionalism, *Mission Statement*, http://www.nysba.org/Content/NavigationMenu26/CommitteeonAttorneyProfessionalismHome/AttorneyProfessionalismMissionStatement.pdf.

12. *See* Niesig v. Team I et al., 76 N.Y.2d 363, 369–70 (N.Y. 1990).

> In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State… [the Court is] of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules of professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law.
>
> That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorney, implicates the interests of nonlawyers. In such instances…[the Court is] not constrained to effectuate the intent of the drafters, but look[s] to the rules as guidelines to be applied with due regard for the broad range of interests at stake. When…[the Court] find[s] that the Code applies in an equitable manner to a matter before… [it, the Court] should not hesitate to enforce it with vigor. When…[the Court] find[s] an area of uncertainty, however,…[it] must use…[its] judicial process to make…[its] own decision in the interests of justice to all concerned.

(citations omitted).

13. Similarly, the City of New York calls its government ethics agency the "Conflicts of Interest Board."

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From the Public Authorities Blog: New York's PIT (Personal Income Tax) Bonds[1]

By Amy Lavine

Public authorities were created, in part, to circumvent provisions in the state constitution that limit the issuance of "state debt"—particularly the requirement of voter approval, which can be an arduous and unpredictable process. Because public authorities don't have to comply with these debt restrictions, they can borrow money and complete projects faster, and they never have to worry about whether the voters will see fit to approve a new bridge, public housing complex, wastewater system, etc.

The state, of course, still finances a lot of public authority debt, but so long as the state never promises to pay a public authority's debts for more than a year, it's never considered "state debt" and doesn't have to comply with the constitution's debt restrictions. It's a little gimmicky, but the Court of Appeals approved these back-door borrowing schemes long ago.[2] It's enough that the state could *theoretically* decide not to make an annual appropriation, even if there's no realistic chance of that happening.

If there's a point where this sort of constitutional evasion becomes too blatant to ignore, the New York courts haven't found it yet. They've never considered personal income tax bonds, however….

Personal income tax bonds—or PIT bonds, as they're known—are essentially loans guaranteed by the state's income tax revenues (yes, your tax dollars). Of course, it's not that simple, because bonds backed by personal income taxes would seem to qualify pretty easily as "state debt."

PIT bonds get around this problem because they're not *technically* backed by personal income taxes. Instead, they're backed by annual appropriations connected to a bond fund that's made up of 25% of the state's annual personal income tax revenues, and if the legislature doesn't make an annual appropriation, then it can't access this money. Additionally, if the amount of money in the bond fund ever falls below what's needed to pay the debt service on outstanding PIT bonds, the comptroller is required to transfer enough money to cover the difference from the state's general fund, without the need for further appropriations.

PIT bonds haven't been around for very long. They were envisioned by former governor George Pataki as a way to lower interest rates and reduce the cost of borrowing, and legislation authorizing them was enacted in 2001.[3] Since then, about $29 billion in PIT bonds have been issued by the five public authorities that are permitted to use them (the Environmental Facilities Corporation, the Dormitory Authority, the Housing Finance Agency, the Thruway, and the Empire State Development Corporation).[4] This works out to about forty percent of the state's outstanding securities.[5]

Because they're backed by personal income taxes, PIT bonds have been given AAA ratings by Standard & Poor's—higher than the AA rating given to the state's own general obligation debt[6] and higher even than for U.S. Treasuries.[7] These ratings reflect the safety of PIT bonds, which were backed by about $9 billion held in the revenue fund last year, an amount equal to nearly 15% of the state's total tax receipts.[8]

But tax revenues are subject to some fluctuation, as evidenced by recent declines in the debt coverage ratio for PIT bonds caused by the recession. Former Assemblyman Richard Brodsky, who helped get important public authorities reforms enacted in 2005 and 2009, has noted that this could cause serious problems: "If things were to go wrong—for example, if the economy suffers, or demands for services go out of whack—the statute essentially gives bondholders a priority over taxpayers and citizens." Similarly, former Lieutenant Governor Richard Ravitch explained that "if the state pledges all of its income tax revenue as payment to debt then there will be nothing left to pay for everything else. That's why we have to strike the right median…."

Endnotes

1. This post appeared on February 21, 2012 on the Public Authorities Blog maintained by the Government Law Center of Albany Law School. The blog is a free resource and is available at www.publicauthorities.wordpress.com.
2. Amy Lavine, *Why Public Authority Debt Isn't Covered by the State Constitution, as Explained by the NY Court of Appeals*, PUB. AUTHS. BLOG (Oct. 27, 2011), http://publicauthorities.wordpress.com/2011/10/27/why-public-authority-debt-isnt-covered-by-the-state-constitution-as-explained-by-the-ny-court-of-appeals/ (*citing* Schulz v. State, 84 N.Y.2d 231 (1994).
3. N.Y. STATE FIN. LAW §§ 68-a to 68-c, and 92-z. *See also* E.J. McMahon, *A Risky Debt "Reform,"* N.Y. POST, Feb. 11, 2001, *available at*: http://www.manhattan-institute.org/html/_nypost-a_risky_debt.htm.

4. Pei Shan Hoe, *How New York State Borrows Billions against Your Paycheck, Out of Public View*, N.Y. World, Dec. 23, 2011, *available at*: http://www.thenewyorkworld.com/2011/12/23/how-new-york-borrows-billions-against-your-paycheck/; Alexandra Lebenthal, *Never Follow a Disclaimer with Yes, But…*, "Lebenthal's Municipal Bond Educ. Center, http://lebenthal.com/lebenthal/newsletter.html.
5. Martin Z. Braun, *Cuomo Budget Fixes Prolong New York Tax Debt's Biggest Rally: Muni Credit*, Bloomberg (Jan. 6, 2012), available at http://mobile.bloomberg.com/news/2012-01-06/cuomo-budget-fixes-prolong-new-york-tax-debt-s-biggest-rally-muni-credit.
6. Credit Ratings on New York State Bonds, New York Bonds, http://www.bonds.ny.gov/bonds/BYNB_bondsCredit.html.
7. Braun, *supra* note 5.
8. Pei Shan Hoe, *supra* note 4.

Amy Lavine was formerly a senior staff attorney at the Government Law Center of Albany School. She is currently a small business owner in Hudson, New York.

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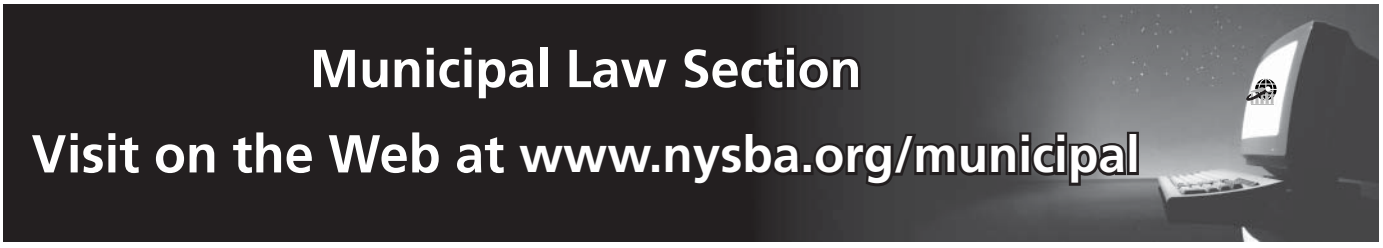

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