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Municipal Lawyer

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A Message from the Chair

Greetings from Ottawa!

The Section was treated to such a wonderful Fall Meeting in Ottawa, Canada, that I feel compelled to write my column on location. Our Section had originally planned to meet in Ottawa in September 2001. The September 11, 2001 attacks on the Twin Towers and the Pentagon and the downed plane in that Pennsylvania field, in combination with the specter of war in the Middle East, caused our members and their clients to reconsider travel arrangements in the immediate aftermath of the devastation. When we approached the hotel and various entertainment entities we had contracted with about canceling our meeting, they responded immediately with grace, sympathy and generosity, refunding every dollar deposited—no penalties or assessments were levied. We had no contractual obligation to rebook a conference in Ottawa. However, I felt a moral obligation to return and I am so very glad we did finally come to Ottawa for a Section Meeting.

We were welcomed with open arms by the Chateau Laurier staff. The hotel itself is grand and has a European feeling at a neighborly Canadian price. Every staff person you meet is eager to assist you with directions or advice, all with a smile. The rooms were spacious and elegantly appointed. Our meeting space was magnificent, our technological needs met competently, and the food, well suffice it to say, we ate well.

We welcomed Canadian speakers from Toronto and the City of Ottawa. We shared information about the importation of Canadian drugs and about telecommunications on both sides of the border. It appears we are not so different from our northern neighbors. Presentations on ethics and brownfields rounded out our program.

Due to the generosity of the Phillips Lytle law firm, members and their guests enjoyed a magnificent reception at the Canadian Museum of Civilization, specifically Canada Hall. The food and music were interspersed throughout this unique exhibit that memorializes the settlement, growth and cultural diversity of Canada. As you wind your way through the immense exhibit, you walk through a whaling ship and whale oil rendering "plant," through a late 1600s village and then on to the salt marshes of the Bay of Fundy. You learn about the Acadians and the genesis of Cajun culture in our own country, then on to the Canada of Queen Victoria. We traveled west to the frontiers that were, actually are, the provinces of Alberta and Saskatchewan, as well as the wilderness that is the Northwest Territory. The Museum's docents and serving staff were

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gracious and concerned about us having a good time. They did not have to worry; we did.

The hotel is across the Rideau Canal from the Canadian Parliament. We offered two tours and each individual that took advantage of the opportunity was suitably impressed. The influence of Great Britain is palpable and accepted without rancor (as far as I could tell). The buildings themselves contain magnificent stone carvings and are gothic in architectural style. They are stunningly beautiful.

If you were there, I was happy to share the experience with you. If you missed it, certainly consider a vacation in this beautiful city. Otherwise, look for a future Section Meeting at the Chateau Laurier in Ottawa—we will be coming back.

Renee Forgensi Minarik

From the Editor

Reading the articles published in the *Municipal Lawyer* and attending continuing legal education programs are two excellent ways for attorneys to keep apprised of the developments, trends and nuances attendant to the multifaceted practice of municipal law. As described below, the Municipal Law Section's upcoming Annual Meeting seminar and the current issue of this publication offer expert analysis, training and guidance on cutting-edge issues in a broad spectrum of practice areas.

Closely following upon the heels of our Section's wonderful meeting in Ottawa, Canada ("A Message from the Chair" by the Honorable Renee Forgensi Minarik), an outstanding program has been planned for the Annual Meeting at the New York Marriott Marquis on January 27, 2005. Presentations on Public Sector Employment Law, Civil Rights, Ethics, Land Use and the Open Meetings Law and the Freedom of Information Law will highlight the program.

For example, over the past few years, the New York Court of Appeals and other appellate tribunals have addressed numerous issues fundamental to the practice of land use and zoning law in New York. John M. Armentano of Farrell, Fritz, P.C., Uniondale, New York, will examine these decisions as part of a "Land Use Law Update: Recent Judicial Trends."

"Public Sector Employment Law Basics—From Prehire to Termination" will be reviewed by Sharon N. Berlin and Richard M. Zuckerman of Lamb & Barnosky, Melville, New York, and Peter A. Bee of Bee, Ready, Fishbein, Hatter & Donovan, LLP, Mineola, New York. On a related theme, the "Civil Rights of Government Employees—Free Speech and Whistle-Blower Litigation" will be presented by Paul F. Millus of Snitow, Kanfer, Holtzer, & Millus, LLP, New York City, and Frederick K. Brewington, Hempstead, New York.

Robert Freeman, Executive Director and Counsel, New York State Committee on Open Government, Department of State, Albany, New York, will review "Cutting Edge And Recurring Issues Under the Freedom of Information Law and Open Meetings Law." Mark Davies, Executive Director and Counsel of the New York City Conflicts of Interest Board, and Gerald Stern, Chair of the City of White Plains Ethics Board and former Administrator and Counsel for the New York State Commission on Judicial Conduct, will discuss "Drafting Municipal Ethics Legislation and Operating A Municipal Ethics Board."

Also, our Section's substantive committees will be convening at luncheon meetings to be held between the morning and afternoon sessions of that program. A total of six CLE credits, including two credits of ethics, can be earned by attending this full-day program.

Municipal ethics is also addressed in this issue of the *Municipal Lawyer*. Phillip Zisman, Inspector General of the City of Yonkers, discusses the origins, objectives and accomplishments of his office and provides guidance to other municipalities that are considering establishing an inspector general's office.

The extent to which the government must go to provide landowners with due process before taking any action that substantively affects their property interests is the subject of an article by Douglas S. Rohrer of Sidley Austin Brown & Wood LLP. The article reviews controlling United States Supreme Court cases as applied by New York appellate courts in determining what type of notice must be given, and the steps that must be taken to insure that the required notices are received, before government can deprive a property owner of an interest in his or her property.

Robert H. Feller of Bond, Schoeneck & King, PLLC provides a general overview of the complex federal, state and local requirements for regulating storm water, with a particular focus on municipal separate storm water systems (MS4s) in "Phase II—The Perfect Storm (Water Regulation)."

Finally, Henry M. Hocherman of Shamberg, Marwell, Hocherman, Davis & Hollis, P.C. scrutinizes two recent Court of Appeals decisions which limit the ability of developers to obtain damages from municipalities whose arbitrary and capricious actions deprive them of their property rights.

Please take advantage of the resources of our Section by attending the Annual Meeting program on January 27, 2005 in New York City and submitting an article in your area of expertise for publication in the *Municipal Lawyer*.

Lester D. Steinman

Phase II—The Perfect Storm (Water Regulation)

By Robert H. Feller

I. Introduction

Most people give little consideration to where rainwater ultimately goes. In a comprehensive survey performed in 1996, 40% of U.S. water bodies failed to meet designated water quality standards.[1] A principal cause is polluted runoff from storm water. With all the rain this summer in the Northeast, it seems an appropriate time to focus on the new storm water requirements recently imposed by state environmental authorities which attempt to remedy this situation.

Regulation of storm water is a complex overlay of federal, state and local requirements. Traditionally, storm water has been regulated at the local level, principally to ensure proper drainage. Most municipalities have site plan review requirements that address this concern. However, the traditional site plan review focuses little, if at all, on issues of water quality in receiving streams that may be impacted by storm water runoff.

Storm water discharges, particularly from urbanized areas, are of particular concern because of the high concentration of pollutants.[2] Increased development creates more impervious surfaces preventing storm water from dissipating naturally into the ground. As a result, pollutants from human activities concentrate until they are washed away in storm events into storm drains. Among the most common pollutants are pesticides, fertilizers, oils, salt, litter, debris and sediment.[3]

This article will provide a general overview of the new storm water regulatory program with particular focus on municipal separate storm water systems (MS4s).

II. Components of the Storm Water Program

The federal Clean Water Act (CWA, or the "Act") prohibits discharges of pollutants except those in compliance with the Act.[4] Typically, in order to be in compliance with the CWA, the discharge must meet certain treatment standards and be granted a permit.[5] Discharges of storm water were generally exempted from these requirements until 1994.[6]

Since that time, pursuant to a statutory mandate, the U.S. Environmental Protection Agency (EPA) has established a comprehensive regulatory framework for regulating storm water discharges.[7] The regulatory program has three components: (1) the regulation of construction activities; (2) the regulation of industrial activities; and (3) the regulation of municipal separate storm water sewer systems (MS4s).[8]

The program was implemented in two phases. Phase I established a system of permitting and regulatory controls for construction activities involving over 5 acres, 10 classes of industrial activities, and "medium" and "large" MS4s.[9] Phase II extends those controls to construction activities involving over 1 acre, to additional classes of industrial activities and to "small" MS4s.[10] With respect to the MS4 requirement, all municipalities in New York State that qualified for the Phase I program, except New York City, received waivers. Those municipalities and others are now required to implement the Phase II rules.

III. Comparison of the Storm Water Program with the Traditional CWA Program

Since the inception of the CWA, state and federal regulatory authorities have issued pollutant discharge permits.[11] The permits are generally issued on an individual basis to the entity discharging the pollutant. For example, a municipal sewage treatment plant would receive a SPDES permit for all outfalls associated with the plant. The permit would set concentration limits for specific pollutants being discharged.

These limits are set based on various technology standards that are established under the CWA. For instance, the standard for non-toxic pollutants is set as best practicable control technology and for toxics as best available technology economically achievable.[12] In addition, where the technology limit is insufficient to protect the receiving body of water, the CWA provides authority for more stringent controls, known as water-quality-based limits.

The approach in the storm water program is different in a number of respects. First, the vast majority of permits are issued on a "general" as opposed to an individual basis. This means that the regulatory authority (the New York State Department of Envi-

ronmental Conservation (DEC) in the case of New York) will issue a general permit that covers a defined, but broad, class of activities. Entities that are engaged in these activities that come within the qualifying requirements may take advantage of coverage of these general permits simply by notifying the regulatory authorities. Those who obtain coverage under these general permits do not have to undergo any individual permit review. The theory is that the entity involved in the activity is not getting a new permit but rather is just qualifying for coverage under an existing permit.

Under the general permit, as under the more traditional individual discharge permit, the discharger is required to meet technology standards set in the CWA. In the more traditional programs, the technology standards are well-defined in rules, and when they are applied in specific cases, the performance of the technology is reflected in an effluent limit in the permit. In the storm water program, the technology standards are performance-oriented, requiring the implementation of best management practices (BMPs), and there are no specific numerical effluent standards in the permits.

For example, municipal storm water dischargers are required to put in place controls that reduce the discharge of pollutants to the "maximum extent practicable" (MEP).[13] No precise definition of this standard has been promulgated and hence its application is both flexible (the good news) and vague (the bad news). The general permit requires the municipal discharger to establish goals that would meet the MEP standard and then demonstrate that it is making steady progress towards those goals.[14] Presumably, DEC will exercise oversight into whether the goals indeed satisfy the MEP standard and over whether "steady progress" is being made. Nonetheless, enforcing these permit requirements presents issues for both the regulatory agency and for the permittee that differ from the more straightforward ones associated with enforcing numerical effluent limits.

IV. The Municipal Program—MS4

A. Who Is Covered?

In order to be covered, municipalities must own or operate a "separate storm sewer system" (the S4 of MS4). The definition of what constitutes an S4 is very broad. It encompasses any conveyances or systems of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains) that are designed or used for collecting or conveying storm water.[15]

In New York, only New York City was covered by the Phase I requirements. The Phase II program is picking up all other "medium" and "large" MS4s (those that generally service populations over 100,000) as well as many "small" ones. "Small" MS4s that are covered by the Phase II program include all those that are in "urbanized areas" as defined by the Bureau of the Census and others that are designated on a case-by-case basis. Case-by-case designations might occur, for instance, where the body of water into which the storm water discharges is already polluted to the extent that it is not currently meeting water quality standards. Controlling storm water through the MS4 program would thus be another way to reduce pollution loadings. The New York municipalities that have been designated are listed in Appendix A to this article.

B. What Is Excluded?

Specifically excluded from the definition of MS4s are sanitary sewers and combined sewers (i.e., those that convey both sanitary and storm waters).[16] Several other important classes of storm water discharges are not definitionally excluded but are ineligible for coverage under the general permit. This means that such discharges would have to be permitted through an individual permitting process. The categories include storm water discharges whose unmitigated impact would jeopardize an endangered or threatened species or adversely modify its habitat, and those that adversely affect properties listed or eligible for listing on the National Register of Historic Places.[17] Discharges to bodies of water that are "impaired" (those that are on a list of impaired waters developed by the state based on an inability to meet water quality standards) are covered under the MS4 general permit but they will have to conform to the state's strategy for discharges into impaired waterways as well.[18]

C. What Geographic Areas Are Municipalities Responsible For?

Ultimately, municipalities are responsible for all discharges from their S4s into the waters of the United States.[19] This presents problems where the sources of pollution come from areas outside of their jurisdiction. Both EPA and DEC have encouraged municipalities to work on a regional basis to address storm water pollution problems for just this reason. Cooperation is more likely where the involved municipalities own covered S4s. Where this is not the case, the municipality on the receiving end may wish to petition EPA to cover the municipality where the source of the pollution is. In either event, many municipalities will find that in order to comply with their permit requirements they will need to negotiate cooper-

ative agreements. Involving DEC in these negotiations may be imperative in order to have sufficient leverage to arrive at an agreement that is equitable to all parties.

D. Substantive Responsibilities of Covered Municipalities

Municipalities that are covered must do two things—(1) get coverage under the general SPDES permit issued by DEC; and (2) develop a program that fully meets the requirements of the permit no later than January 8, 2008.[20]

Obtaining coverage is relatively straightforward. Municipalities must submit a notice of intent on a form designated by the DEC by March 10, 2003 (or 180 days after designation, whichever is later).[21] By that date, an operator must also have developed the initial storm water management plan (SWMP).[22] The initial SWMP must include a listing of initial management practices and initial measurable goals for each of the six minimum measures that must be in all SWMPs (see discussion in paragraph E. below).

Municipalities must ultimately adopt and implement a program that reduces the discharge of pollutants from MS4s to the maximum extent practicable (MEP). The standard itself is undefined. However, as stated by EPA and DEC, meeting the MEP standard will require the implementation of all applicable best management practices (BMPs) for activities in the municipality.[23] The regulatory agencies intend to adopt BMPs for various activities; which ones apply to particular municipalities will have to be determined on a case-by-case basis. The only conclusion that can be drawn definitively is that, minimally, it will have to include the six measures discussed below.

E. The Minimum Program

Minimally, the SWMP must have the following six elements:[24]

1. Public education and outreach.
2. Public involvement/participation in the planning and implementation process.
3. Illicit Discharge Detection and Elimination (e.g., sanitary wastewater, effluent from septic tanks, car wash wastewaters, improper oil disposal, radiator flushing disposal, laundry wastewaters, roadway spills, and improper disposal of auto and household toxics).
4. Construction site runoff. This will generally be implemented through regulatory controls on developers. Typically, these controls are implemented through the site plan review process.[25] Municipalities must ensure that substantively the controls required are consistent with those required by the DEC construction storm water permits.[26]
5. Post-construction runoff control. This component would be implemented through a combination of regulatory measures and good maintenance practices by the municipality of its own system.
6. Pollution prevention/good housekeeping. These measures generally would be those that relate to the municipalities' maintenance of publicly-owned facilities and projects.

V. Financing the Program

There will be considerable funds required to develop and implement the programs needed to support an adequate SWMP. EPA has estimated that MS4s might expect to spend between $3 and $60 per capita each year to implement storm water programs in their jurisdiction. These numbers run the gamut from a program that just needs to meet the minimum requirements to one that must implement a complex program with optional components. To put these numbers in perspective, a suburban town with a population of 30,000 would spend between approximately $100,000 and $2,000,000 annually.[27]

The state is providing funding through the Environmental Protection Fund to assist with the start-up costs.[28] In state fiscal year 2003 (April 1, 2003 to March 31, 2004), $3.4 million was earmarked for these purposes.[29] Obviously, these funds will not come close to covering all the costs. The state is urging regional solutions and partnering with existing institutions such as soil and water conservation districts, particularly on the outreach and public education components of the SWMP.

Some of the resources may also be generated from increased fees imposed on developers, particularly with respect to the regulatory aspects of the SWMP. According to DEC, some communities are considering storm water management authorities or districts which would charge back management costs based on the amount of impervious area on a given property.[30]

VI. Conclusion

Phase II of the MS4 program is certain to be far-reaching in its effects. Communities that focused largely on controlling the quantities of storm water draining off construction sites will now have to put programs in place that address water quality issues. Significantly, covered municipalities will have to clean up their own act in terms of the storm water

infrastructure that they themselves control and will have to establish public education and participation programs as well.

The new storm water requirements raise many challenging issues for municipalities and for their attorneys. Among the most challenging are how to conform local and state programs, how to address storm water arriving from outside their jurisdiction, and how to pay for the local program. Practitioners will have to work their way through these problems as the program continues to mature and more guidance from DEC becomes available.

Endnotes

1. Storm Water Phase II Final Rule: An Overview EPA Fact Sheet No. 1, January 2000.
2. *Id.*
3. *Id.*
4. 33 U.S.C. § 1311(a).
5. *See* requirements of 33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, and 1344.
6. 33 U.S.C. § 1342(p).
7. *Id.*
8. Municipal systems discharging sanitary wastes or combined systems discharging both sanitary wastes and storm water are handled under a separate regulatory scheme. This scheme is the more "traditional" one under the CWA that involved the setting of effluent limits in individual pollutant discharge permits.
9. Storm Water Phase II Final Rule: An Overview EPA Fact Sheet No. 1, January 2000.
10. *Id.*
11. The federal permit is known as the National Pollutant Discharge Elimination System ("NPDES") permit. In New York, the state implements these requirements and issues a State Pollutant Discharge Elimination System ("SPDES") permit.
12. *See* 33 U.S.C. § 1311(b).
13. 33 U.S.C. § 1342(p)(3)(B).
14. SPDES General Permit from Municipal Separate Storm Water Sewer Systems. Permit No. GP-02-02 at 4.B.
15. 40 C.F.R. § 122.26(b)(8).
16. *Id.*
17. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at I.C.2. and 3.
18. This is commonly referred to as the TMDL (Total Maximum Daily Load) Strategy. Conforming with the strategy will likely require implementing measures that go beyond what is necessary to meet the Maximum Extent Practical (MEP) standard.
19. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at IV.A.; Final Draft Phase II Responsiveness Summary for Proposed SPDES General Permit for Regulated MS4s, January 8, 2003, at p. 13.
20. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer Systems (MS4s), Permit No. GP-02-02 at IV.B.
21. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at II.A.
22. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at II.B.
23. *Id.*
24. SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at IV.C.
25. While persons who disturb more than one acre minimally must obtain coverage under the general storm water permit for construction activities, such coverage at the state level does not involve an approval process. In situations where the activity is occurring in an MS4 community, there is an additional requirement for the review and approval of the storm water measures as part of the municipality's own MS4 storm water permit.
26. In the past, some municipalities have prohibited the storage of storm water on site, fearing infestation of pests that cause water-borne diseases. Such prohibitions are in direct conflict with Phase II requirements that direct the use of retention basins to allow the settling of pollutants before the release and discharge of storm water to receiving waters.
27. Final Draft Phase II Responsiveness Summaries for Proposed SPDES General Permit for Regulated MS4s, at p. 6.
28. Overview of the Municipal Separate Storm Water Sewer System (MS4) Phase II Storm Water Permit Program—A Summary of MS4 Phase II Permit Requirements. DEC Publication, February 2003, Revised August 2003.
29. *Id.*
30. Final Draft Phase II Responsiveness Summaries for Proposed SPDES General Permit for Regulated MS4s, January 8, 2003, at p. 6.

Robert H. Feller is Senior Counsel with the firm of Bond, Schoeneck & King, PLLC and practices in the Albany office. His practice focuses on environmental and land use issues. Mr. Feller previously served as Assistant Commissioner for the New York State Department of Environmental Conservation.

Appendix A

New York Regulated Areas

New York State Automatically Designated Urbanized Areas

MS4s located wholly or partially within the designated Urbanized Area portion of these listed municipalities will be required to develop Phase II storm water programs. Municipalities, special districts or "other public entities" can check the interactive map on the Department's website (http://www.dec.state.ny.us/website/imsmaps/urbanmap/viewer.htm of New York State "Urbanized Areas") to help determine whether their MS4 is located within the Urbanized Area boundaries. This list below is believed to be reasonably accurate; however, consult the map to be sure.

ALBANY COUNTY

ALBANY(C)
BETHLEHEM(T)
COHOES(C)
COLONIE(V)
COLONIE(T)
GREEN ISLAND(T)(V)
GUILDERLAND(T)
MENANDS(V)
NEW SCOTLAND(T)
VOORHEESVILLE(V)
WATERVLIET(C)

BRONX COUNTY

BRONX(BORO)

BROOME COUNTY

BINGHAMTON(C)
BINGHAMTON(T)
CHENANGO(T)
CONKLIN(T)
DICKINSON(T)
ENDICOTT(V)
FENTON(T)
JOHNSON CITY(V)
KIRKWOOD(T)
MAINE(T)
PORT DICKINSON(V)
UNION(T)
VESTAL(T)
WINDSOR(T)

CHEMUNG COUNTY

ASHLAND(T)
BIG FLATS(T)
CATLIN(T)
ELMIRA(C)
ELMIRA(T)
ELMIRA HEIGHTS(V)
HORSEHEADS(V)
HORSEHEADS(T)
MILLPORT(T)
SOUTH PORT(T)
VETERAN(T)
WELLSBURG(T)

DUTCHESS COUNTY

BEACON(C)
BEEKMAN(T)
EAST FISHKILL(T)
FISHKILL(V)
FISHKILL(T)
HYDE PARK(T)
LA GRANGE(T)
PLEASANT VALLEY(T)
POUGHKEEPSIE(C)
POUGHKEEPSIE(T)
UNION VALE(T)
WAPPINGER(T)
WAPPINGERS FALLS(V)

ERIE COUNTY

ALDEN(T)
ALDEN(V)
AMHERST(T)
ANGOLA(V)
AURORA(T)
BLASDELL(V)
BOSTON(T)
BUFFALO(C)
CHEEKTOWAGA(T)
CLARENCE(T)
DEPEW(V)
EAST AURORA(V)
EDEN(T)
ELMA(T)
EVANS(T)
GRAND ISLAND(T)
HAMBURG(T)

Key:
C = City
T = Town
V = Village

HAMBURG(V)
KENMORE(V)
LACKAWANNA(C)
LANCASTER(T)
LANCASTER(V)
MARILLA(T)
NEWSTEAD(T)
ORCHARD PARK(T)
ORCHARD PARK(V)
SLOAN(V)
TONAWANDA(T)
TONAWANDA(C)
WEST SENECA(T)
WILLIAMSVILLE(V)

HERKIMER COUNTY

FRANKFORT(T)
SCHUYLER(T)

KINGS COUNTY

KINGS(BORO)

MADISON COUNTY

SULLIVAN(T)

MONROE COUNTY

BRIGHTON(T)
BROCKPORT(V)
CHILI(T)
CLARKSON(T)
E. ROCHESTER(V)
FAIRPORT(V)
GATES(T)
GREECE(T)
HENRIETTA(T)
HILTON(V)
IRONDEQUOIT(T)
MENDON(T)
OGDEN(T)
PARMA(T)
PENFIELD(T)
PERINTON(T)
PITTSFORD(T)
PITTSFORD(V)
ROCHESTER(C)
RUSH(T)
SPENCERPORT(V)
SWEDEN(T)
WEBSTER(T)
WEBSTER(V)

NASSAU COUNTY

ATLANTIC BEACH(V)
BAXTER ESTATES(V)
BAYVILLE(V)
BELLEROSE(V)
BROOKVILLE(V)
CEDARHURST(V)
CENTRE ISLAND(V)
COVE NECK(V)
EAST HILLS(V)
EAST ROCKAWAY(V)
EAST WILLISTON(V)
FARMINGDALE(V)
FLORAL PARK(V)
FLOWER HILL(V)
FREEPORT(V)
GARDEN CITY(V)
GLEN COVE(C)
GREAT NECK(V)
GREAT NECK ESTATES(V)
GREAT NECK PLAZA(V)
HEMPSTEAD(T)
HEMPSTEAD(V)
HEWLETT BAY PARK(V)
HEWLETT HARBOR(V)
HEWLETT NECK(V)
ISLAND PARK(V)
KENSINGTON(V)
KINGS POINT(V)
LAKE SUCCESS(V)
LATTINGTOWN(V)
LAUREL HOLLOW(V)
LAWRENCE(V)
LONG BEACH(C)
LYNBROOK(V)
MALVERNE(V)
MANOR HAVEN(V)
MASSAPEQUA PARK(V)
MATINECOCK(V)
MILL NECK(V)
MINEOLA(T)
MINEOLA(V)
MUNSEY PARK(V)
MUTTONTOWN(V)
N. HEMPSTEAD(T)
NEW HYDE PARK(V)
NORTH HILLS(V)
OLD BROOKVILLE(V)
OLD WESTBURY(V)
OYSTER BAY(V)(T)
OYSTER BAY COVE(V)
PLANDOME(V)
PLANDOME HGTS(V)
PLANDOME MANOR(V)
PORT WASH NO.(V)
ROCKVILLE CENTER(V)
ROSLYN(V)
ROSLYN ESTATES(V)
ROSLYN HARBOR(V)

RUSSELL GARDEN(V)
SADDLE ROCK(V)
SANDS POINT(V)
SEA CLIFF(V)
SO. FLORAL PARK(V)
STEWART MANOR(V)
THOMASTON(V)
UPPER BROOKVILLE(V)
VALLEY STREAM(V)
WESTBURY(V)
WILLISTON PARK(V)
WOODSBURGH(V)

NEW YORK

MANHATTAN(BORO)

NIAGARA COUNTY

CAMBRIA(T)
LEWISTON(T)
LEWISTON(V)
NIAGARA(T)
NIAGARA FALLS(C)
NO. TONAWANDA(C)
PENDLETON(T)
PORTER(T)
WHEATFIELD(T)
YORKVILLE(V)
YOUNGSTOWN(V)

ONONDAGA COUNTY

BALDWINSVILLE(V)
CAMILLUS(V)
CAMILLUS(T)
CICERO(T)
CLAY(T)
DEWITT(T)
E. SYRACUSE(V)
FAYETTEVILLE(V)
GEDDES(T)
LAFAYETTE(T)
LIVERPOOL(V)
LYSANDER(T)
MANLIUS(T)
MANLIUS(V)
MARCELLUS(V)
MARCELLUS(T)
MINOA(V)
N. SYRACUSE(V)
ONONDAGA(T)
POMPEY(T)
SALINA(T)
SOLVAY(V)
SYRACUSE(C)
VAN BUREN(T)

ONEIDA COUNTY

CLAYVILLE(V)
CLINTON(V)
DEERFIELD(T)
KIRKLAND(T)
MARCY(T)
NEW HARTFORD(T)
NEW HARTFORD(V)
NEW YORK MILLS(V)
ORISKANY(V)
PARIS(T)
UTICA(C)
WESTMORELAND(T)
WHITESBORO(V)
WHITESTOWN(T)

ONTARIO COUNTY

FARMINGTON(T)
VICTOR(T)
VICTOR(V)

ORANGE COUNTY

BLOOMING GROVE(T)
CHESTER(T)
CORNWALL(T)
CORNWALL-ON-HUDSON(V)
GREENWOOD LAKE(V)
HAMPTONBURGH(T)
HARRIMAN(V)
HIGHLAND FALLS(V)
HIGHLANDS T)
KIRYAS JOEL(V)
MIDDLETOWN(C)
MONROE(T)
MONROE(V)
MONTGOMERY(T)
MOUNT HOPE(T)
NEW WINDSOR(T)
NEWBURGH(T)
NEWBURGH(C)
OTISVILLE(V)
WALDEN(V)
WALLKILL(T)
WARWICK(T)
WASHINGTONVILLE(V)
WAWAYANDA(T)
WOODBURY(T)

OSWEGO COUNTY

CENTRAL SQUARE(V)
HASTINGS(T)
PHOENIX(V)
SCHROEPPEL(T)
WEST MONROE(T)

PUTNAM COUNTY

BREWSTER(V)
CARMEL(T)
KENT(T)
PATTERSON(T)
PHILIPSTOWN(T)
PUTNAM VALLEY(T)
SOUTHEAST(T)

QUEENS COUNTY

QUEENS(BORO)

RENSSELAER COUNTY

BRUNSWICK(T)
CASTLETON(V)
EAST GREENBUSH(T)
NASSAU(T)
NO. GREENBUSH(T)
POESTENKILL(T)
RENSSELAER(C)
SAND LAKE(T)
SCHAGHTICOKE(T)
SCHODACK(T)
TROY(C)

RICHMOND COUNTY

STATEN ISLAND(BORO)

ROCKLAND COUNTY

AIRMONT(V)
CHESTNUT RIDGE(V)
CLARKSTOWN(T)
GRANDVIEW-ON-HUDSON(V)
HAVERSTRAW(T)
HAVERSTRAW(V)
HILLBURN(V)
KASER(V)
MONTEBELLO(V)
NEW HEMPSTEAD(V)
NEW SQUARE(V)
NYACK(V)
ORANGETOWN(T)
PIERMONT(V)
POMONA(V)
RAMAPO(T)
SLOATSBURG(V)
SO. NYACK(V)
SPRING VALLEY(V)
STONY POINT(T)
SUFFERN(V)
UPPER NYACK(V)
WEST HAVERSTRAW(V)
WESLEY HILLS(V)

SARATOGA COUNTY

BALLSTON(T)
BALLSTON SPA(V)
CHARLTON(T)
CLIFTON PARK(T)
GREENFIELD(T)
HALFMOON(T)
MALTA(T)
MILTON(T)
MOREAU(T)
ROUND LAKE(V)
S. GLENS FALLS(V)
SARATOGA(T)
SARATOGA SPRINGS(C)
WATERFORD(T)
WATERFORD(V)
WILTON(T)

SCHENECTADY COUNTY

GLENVILLE(T)
NISKAYUNA(T)
PRINCETOWN(T)
ROTTERDAM(T)
SCHENECTADY(C)
SCOTIA(V)

SUFFOLK COUNTY

AMITYVILLE(V)
ASHAROKEN(V)
BABYLON(T)
BABYLON(V)
BELLE TERRE(V)
BELLPORT(V)
BRANCH(V)
BRIGHTWATERS(V)
BROOKHAVEN(T)
HEAD OF HARBOR(V)
HUNTINGTON(T)
HUNTINGTON BAY(V)
ISLANDIA(T)
ISLIP(T)
LAKE GROVE(V)
LINDEN HURST(V)
LLOYD HARBOR(V)
NISSEQUOGUE(V)
NORTHPORT(V)
OLD FIELD(V)
PATCHOGUE(V)
POQUOTT(V)
PORT JEFFERSON(V)
QUOGUE(V)
RIVERHEAD(T)
SHINNECOCK BAY
SHOREHAM(V)

SMITHTOWN(T)
SOUTHAMPTON(T)
SOUTHAMPTON(V)

SULLIVAN COUNTY

MAMAKATING(T)

TIOGA COUNTY

OWEGO(T)

TOMPKINS COUNTY

CAROLINE(T)
CAYUGA HEIGHTS(V)
DRYDEN(T)
ITHACA(C)
ITHACA(T)
LANSING(V)(T)
NEWFIELD(T)
UYSSES(T)

ULSTER COUNTY

ESOPUS(T)
HURLEY(T)
KINGSTON(T)
KINGSTON(C)
LLOYD(T)
MARBLETOWN(T)
MARLBOROUGH(T)
PLATTEKILL(T)
ROSENDALE(T)
SAUGERTIES(T)
SAUGERTIES(V)
SHAWANGUNK(T)
ULSTER(T)

WARREN COUNTY

GLENS FALLS(C)
QUEENSBURY(T)

WASHINGTON COUNTY

FORT EDWARD(T)
FORT EDWARD(V)
HUDSON FALLS(V)
KINGSBURY(T)

WAYNE COUNTY

MACEDON(T)
MACEDON(V)
ONTARIO(T)
WALWORTH(T)

WESTCHESTER COUNTY

ARDSLEY(V)
BEDFORD(T)
BRIARCLIFF MANOR(V)
BRONXVILLE(V)
BUCHANAN(V)
CORTLANDT(T)
CROTON-ON-HUDSON(V)
DOBBS FERRY(V)
EASTCHESTER(T)
ELMSFORD(V)
GREENBURGH(T)
HARRISON(T)(V)
HASTINGS-ON-HUDSON(V)
IRVINGTON(V)
LARCHMONT(V)
LEWISBORO(T)
MAMARONECK(V)
MAMARONECK(T)
MOUNT KISCO(V)(T)
MOUNT PLEASANT(T)
MOUNT VERNON(C)
NEW CASTLE(T)
NEW ROCHELLE(C)
NORTH CASTLE(T)
NORTH SALEM(T)
NORTH TARRYTOWN(V)
SLEEPY HOLLOW(V)
OSSINING(T)
OSSINING(V)
PEEKSKILL(C)
PELHAM(T)
PELHAM MANOR(V)
PLEASANTVILLE(V)
PORT CHESTER(V)
POUND RIDGE(T)
RYE(T)
RYE BROOK(V)
SCARSDALE(V)(T)
SOMERS(T)
TARRYTOWN(V)
TUCKAHOE(V)
WHITE PLAINS(C)
YONKERS(C)
YORKTOWN(T)

NEW YORK STATE ADDITIONALLY DESIGNATED AREAS (AS OF JANUARY 2003)

Criterion 1—Entire NYC Watershed East of Hudson

(any portion(s) of these municipalities that lie within the NYC Watershed)

PUTNAM COUNTY

Brewster (V)

Carmel(T)
Kent(T)
Patterson(T)
Putnam Valley(T)
Southeast(T)

DUTCHESS COUNTY

Beekman(T)
East Fishkill(T)
Pawling(V)
Pawling(T)

WESTCHESTER COUNTY

Bedford(T)
Cortlandt(T)
Lewisboro(T)
New Castle(T)
North Salem(T)
Pound Ridge(T)
Somers(T)
Yorktown(T)

Criterion 2—Eastern Long Island and Eastern Westchester County
(coverage extended to town lines)

LONG ISLAND

Brookhaven(T)
Quogue (V)
Riverhead(T)
Sag Harbor(V)
Southhampton(T)
Westhampton Beach (V)

WESTCHESTER COUNTY

Lewisboro(T)
Pound Ridge(T)
North Castle(T)

Through The Looking Glass: *Bower Associates v. Town of Pleasant Valley* and *Home Depot U.S.A., Inc. v. Dunn*

By Henry M. Hocherman

> 'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'[1]

On May 13, 2004 the Court of Appeals, in a combined opinion, decided the cases of *Bower Associates v. Town of Pleasant Valley* ("*Bower Associates*")[2] and *Home Depot U.S.A., Inc. v. Dunn* ("*Home Depot*"),[3] and with a stroke of its judicial pen defined and significantly narrowed the constitutional protections afforded those who would develop property in New York. In so doing the Court enlarged New York's legal lexicon by bifurcating the meaning of the term "arbitrary" and endowing it with two legally cognizable levels, or degrees of severity; the first (arbitrariness in the second degree, if you will) being arbitrariness sufficient to justify reversal and nullification of a municipal action in an Article 78 or similar proceeding but insufficient to support the imposition of money damages, and the second (arbitrariness in the first degree, or "unconstitutional arbitrariness") being arbitrariness of a severity sufficient to constitute a redressable deprivation of due process under 42 U.S.C. § 1983.[4] Further, and perhaps more far-reaching in its consequences, in setting the threshold for a legally cognizable violation of due process in the land use context, the Court of Appeals appears to have enlarged the meaning of the term "discretion," at least insofar as that term informs the powers and obligations of municipal bodies charged with the authority to grant or withhold land development permits.

While it may be said that in deciding *Bower Associates* and *Home Depot* as it did the Court was merely adopting the "strict entitlement" test already articulated by the federal courts,[5] an argument can be made that in choosing these cases (in which, as will be discussed later in this article, final judicial determinations that the municipal actions complained of had no valid legal basis had already been made) and in referencing the extraordinary facts of its prior decision in *Town of Orangetown v. Magee* [6] the Court of Appeals created a rule for New York which is harsher than the federal one, and tilts to an even greater degree the jurisprudential playing field in the land-use world; a playing field that long ago ceased to be an entirely level one.

Both *Bower Associates* and *Home Depot* involved attempts by municipalities to exercise (by withholding approval) their approval powers over an aspect of a proposed land use plan to block the implementation of that plan in a bordering municipality.

In *Bower Associates,* the Appellant owned, and sought to develop, a 91-acre parcel of land, 88 acres of which were located in the Town of Poughkeepsie, and three acres of which were located in the Town of Pleasant Valley. Access to the development was proposed through two access roads, one entirely in Poughkeepsie and the other through the three-acre Pleasant Valley portion of Appellant's property. In granting final approval for Appellant's project (134 single-family homes and 54 townhouse units) Poughkeepsie conditioned its approval on approval by Pleasant Valley of the access roads which would run through that town, thus empowering the tail to wag the dog. Pleasant Valley had already expressed its antipathy to the development, having brought its own Article 78 proceeding to nullify Poughkeepsie's approval of the subdivision.[7]

Bower applied to the Pleasant Valley Planning Board for approval to subdivide the three acres in Pleasant Valley into three residential lots, and to create the access road upon which Poughkeepsie's approval was conditioned. In January 2000, the Pleasant Valley Planning Board unpleasantly denied Bower's application, citing environmental concerns.

Bower challenged the Planning Board's denial in an Article 78 proceeding. The Supreme Court determined that the Pleasant Valley Planning Board's denial of Bower's subdivision application was arbitrary and capricious, was not supported by any evidence in the record, and was made without foundation in fact. On appeal, the Second Department affirmed, expressly affirming Supreme Court's decision directing the Planning Board to approve the petitioner's subdivision application rather than remitting the matter for further consideration by that Board. The Appellate Division observed: "The record discloses that the only reason for the Board's denial of the subdivision application was generalized com-

munity opposition. The record also revealed that the petitioner met all the conditions needed for approval of its subdivision application."[8]

Having won the Article 78 proceeding, Bower brought an action against the Town of Pleasant Valley and its Planning Board alleging a violation of 42 U.S.C. § 1983 and seeking money damages on account of that violation. Supreme Court denied the Town's CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, noting the Appellate Division's decision in the prior Article 78 proceeding that Bower had met all the conditions needed for approval of its subdivision application and that the only reason for denying the application was generalized community opposition.

The Appellate Division reversed the lower court, relying, in part, on the broad statement that in New York "granting subdivision approval is discretionary," and citing two of its own prior decisions which, strictly speaking, do not establish that proposition, but rather found such discretion "as long as the Board's determination has a rational basis supported by substantial evidence."[9]

In *Home Depot*, the Petitioner, a home improvement retailer, obtained site plan approval from the Village of Port Chester to develop an approximately eight-acre site for an approximately 101,000 square foot retail store. The entire facility lies within the Village of Port Chester, but is located at the border between Port Chester and the City of Rye. In the course of the approval process in Port Chester, the City of Rye, as an Interested Agency under SEQRA, demanded that four traffic mitigation measures be imposed by the Lead Agency, among them a measure that required the widening of a public road in the City of Rye. Although it declined to require three of Rye's proposed mitigation measures, the Village of Port Chester did impose the fourth mitigation measure, the widening of Midland Avenue in Rye, as a condition of site plan approval, thus empowering (as had the Planning Board in *Bower*) the neighboring municipality to block the project. Because Midland Avenue is a county road within the City of Rye, the widening of Midland Avenue required county approval, which in turn required Rye's consent. Rye wryly withheld that consent.

In April 1997, Home Depot commenced an Article 78 proceeding to compel Rye to sign (and Westchester County to issue) the required permits for widening Midland Avenue and simultaneously brought an action pursuant to 42 U.S.C. § 1983 against the Mayor and the City Council of the City of Rye seeking substantial money damages on account of Rye's action is blocking the road widening permit. Home Depot had received a letter from the County Department of Public Works which stated, in pertinent part, as follows: "The Department of Public Works has reviewed those plans, has no issue with regard to the plans and is prepared to issue a County Road Permit for work along C.R. 72, City of Rye, providing Petitioner complies with all permit requirements and conditions." Thus, it would appear that the technical requirements for the road widening permit had been met. The reasons for Rye's refusal to approve the road widening permit were set forth in a letter from the Mayor of the City of Rye to the Petitioner, the text of which is included in the lower court decision.[10] The Mayor's letter cited no deficiencies in the proposed road widening plans, but imposed additional conditions (the mitigation measures which Port Chester had declined to impose) which were, manifestly, beyond Rye's power to impose.

The lower court held that Rye's refusal to approve the widening of Midland Avenue was "arbitrary and capricious" and went on to hold that "Refusing to approve the widening of Midland Avenue without any reason other than the municipality would like petitioner to pay for other improvements within the City's borders is arbitrary and without a rational basis." The court annulled Rye's denial of Home Depot's road widening application.[11]

During the pendency of the *Home Depot* proceeding, Home Depot's site plan approval from Port Chester expired. Port Chester then issued a new site plan approval which did not require the widening of Midland Avenue, thus effectively declawing Rye and rendering the Article 78 proceeding moot. Ultimately, Supreme Court granted Home Depot's motion for summary judgment (and denied Rye's cross motion for summary judgment dismissing the complaint) with respect to its substantive due process claim, holding that Home Depot had a clear entitlement to the underlying permit, and that insofar as Rye's refusal to consent to that permit lacked a rational basis, its conduct was "a gross abuse of governmental authority."[12]

The Second Department reversed, holding that defendants, the Mayor and the City Council, had established their entitlement to summary judgment dismissing the complaint. The Appellate Division found that "complainant fails to raise a triable issue of fact that it had *a clearly established right* to approval of the county permit which it claims was wrongfully denied."[13] This appeal ensued.

As will be seen from the discussion that follows, the issue of what is, and when one has established, *a clearly established right* to a permit or approval, is at the heart of the Court of Appeals decision in these cases. The resolution of that issue turns upon the nature and the limits of "discretion," insofar as dis-

cretion resides in a municipal body (in these cases, a planning board and a mayor/city council) to approve or deny a land use application.

Substantive Due Process

Enacted shortly after the Civil War to redress rampant civil rights abuses in the reconstructed South, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In the land use context, 42 U.S.C. § 1983 protects a landowner's right (i) to equal protection of the law as guaranteed by the Fourth Amendment, (ii) to just compensation for the taking of property as guaranteed by the Fifth Amendment, and (iii) to due process of law as guaranteed by both the Fifth and the Fourteenth Amendments.[14] Both Bower and Home Depot alleged a violation of the third of these protections, a deprivation of property without due process of law.[15]

Relying heavily on its decision in *Town of Orangetown v. Magee*,[16] which, the Court of Appeals noted, was the first and only time it had been called upon to address the substantive due process issue in a land use context, the Court enunciated the two-part test which a plaintiff must meet in order to prevail on its due process claim. First, the plaintiff must establish a "cognizable property interest" of which it was deprived under color of law. Second, the plaintiff must show that the municipality's actions were "without legal justification."

The difficulty arises from the Court's definition of a "cognizable property interest" when that interest involves a land use permit or approval which the municipality has the *ability* (the Court used the word "opportunity"),[17] but not necessarily the *right*, to deny. Thus, relying upon federal Second Circuit cases that have addressed the issue, the question of whether there existed a "cognizable property interest" in the first instance is answered by the Court of Appeals with reference to the degree of "discretion" in the municipal body to deny the sought-for permit or approval. The Second Circuit has held that in order to prevail a plaintiff must have "a legitimate claim of entitlement" to have its application granted,[18] and that a "legitimate claim of entitlement" can only exist where, under applicable state law, and but for the alleged denial of due process, "there is either a certainty or a very strong likelihood that the application would have been granted."[19] In essence, the issue devolves upon the distinction (drilled into our heads in elementary school) between the terms *can* and *may*. In *Bower/Home Depot*, the Court of Appeals seems to say that a permit is *discretionary*, to a degree sufficient to defeat a due process claim under 42 U.S.C. § 1983, if the approving agency *can* (meaning it *de facto* has the ability to) deny a permit even though it *may* not (on the record before it) do so without acting arbitrarily and in violation of state law, since, in that circumstance, the requisite degree of certainty can never be attained. Read most starkly, the Court of Appeals' decision seems to hold that the existence of any degree of discretion in a municipal body shields the abuse of that discretion from an action for damages under 42 U.S.C. § 1983.

A brief description of the facts in *Magee* is necessary to an understanding of the ultimate outcome of *Bower/Home Depot*. In *Magee*, a developer had obtained approval, including a permit from the building inspector, to construct a 184,000-square-foot commercial building on its 34-acre parcel in the Town of Orangetown. The developer began clearing and site development, and spent (as Supreme Court found) more than $4 million in land and building improvements.[20] As the project was progressing, substantial community and political opposition emerged in the Town. Ultimately, the town supervisor directed the building inspector to revoke the permit. The Town subsequently amended its zoning code to preclude construction of commercial buildings on the developer's property. The action which ultimately brought *Magee* to the Court of Appeals was brought by the Town to compel the developer to remove a temporary building that it had erected on the property for use during the preliminary stages of construction, hence Magee is the defendant. Supreme Court dismissed the Town's complaint and entered judgment in favor of the developer on counterclaims (brought under 42 U.S.C. § 1983) for damages totaling in excess of $5 million.

In holding in favor of the property owner, the Court of Appeals held that the property owner was required to demonstrate a "legitimate claim of entitlement" to continue construction, and that it had done so "in this case by establishing that the rights to develop their land had become vested under State law" and that "the Town had 'engendered a clear expectation of continued enjoyment' of the permit sufficient to constitute a protectable property inter-

est."[21] On that basis, the Court held that the property owner had acquired a cognizable property interest, and was therefore assured of "the right to be free from arbitrary or irrational municipal actions destructive of this interest." The Court of Appeals noted that "The evidence in the record supports the trial court's conclusion that the Building Inspector's revocation of the defendants' permit was arbitrary and capricious in this case because it was without legal justification and motivated entirely by political concerns."[22]

Thus, the facts in *Magee* were at one extreme end of the entitlement spectrum; that is, the permit had already been issued and had been improperly revoked after site preparation had commenced, solely in response to public outcry, and without any legal justification. The facts in *Magee* were the strongest facts (but not the only facts) tending to establish a legally protected property right. *Magee* was an easy case.

If the fact pattern in *Magee* (an issued permit, work begun) marks one end of the property rights spectrum, then a purely discretionary action (as, for example, a response to a petition for a purely legislative act) marks the other end. In between, however, there is a vast universe of municipal actions which are "discretionary" in the sense that they require the applied judgment of a municipal board, but are limited by a set of standards, either defined in an ordinance or judicially established. In those cases, a property owner has a legitimate expectation that if the legal criteria are met, the permit will be issued, or at least that a denial will be based upon the proper exercise of a board's judgment, based on a record which reasonably supports that judgment. The *Bower/Home Depot* Court throttles that expectation, at least insofar as money damages are concerned, in that it appears to require a degree of established entitlement equal to the facts in *Magee* before a "cognizable property interest" is found to exist. The Court put it this way:

> Even if "objective observers would estimate that the probability of [obtaining the relief sought] was extremely high, the *opportunity* of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest". Beyond a vested property right arising from substantial expenditures pursuant to a lawful permit (as in *Magee*), a legitimate claim of entitlement to a permit can exist only where there is either a "certainty or a very strong likelihood" that an application for approval would have been granted [Citing cases]. Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion "is so narrowly circumscribed that approval of a proper application is virtually assured" [Citing cases]. [23]

Harlen Associates v. Incorporated Village of Mineola,[24] the most recent in a line of Second Circuit cases that speaks to this issue, applied the "strict entitlement" test which has now become the law in New York under *Bower/Home Depot.* In *Harlen*, Plaintiff had sought a special use permit under the Village of Mineola's Zoning Ordinance in order to build a convenience store on its property at Jericho Turnpike, a major thoroughfare. The Second Circuit noted that Harlen presented evidence in support of its application, including expert testimony, which evidence was not rebutted on the record. The Zoning Board of Appeals, apparently acting solely upon the members' personal knowledge and public comment, unanimously denied the application noting, among other things, that the proposed location was in close proximity to three schools and alongside "one of the most dangerous crosswalks in the Village of Mineola." Harlen did not bring an Article 78 proceeding, but went directly to the Eastern District, which granted summary judgment in favor of the municipality. Harlen appealed.

The Second Circuit, in applying the "strict entitlement" test, noted that the Mineola Zoning Ordinance provided that the Zoning Board of Appeals "after notice and public hearing, *may* issue special use permits . . . after considering numerous general standards as applied to a specific application."[25] The fact that there was apparently a well-articulated set of special permit standards in the Mineola ordinance was trumped by the appearance of the word "may" rather than "shall," describing the powers and obligations of the Zoning Board of Appeals. The Second Circuit noted, however, that

> Under New York law, the Board has the power to grant and deny special use permits within its "untrammeled, but of course not capricious discretion . . . with which courts may interfere only when it is clear that the Board has acted solely upon grounds which as a matter of law may not control."[26]

There is a significant difference between *Harlen*, and the underlying cases on which it relies, and the circumstances in *Bower/Home Depot*. In *Bower* and *Home Depot* an independent court had already determined that the denial of the application in question was in

fact, *based solely upon grounds which as a matter of law may not control*. Those determinations had been upheld on appeal. The Court was not being asked (as was the Court in *Harlen*) to review a board decision. That had already been done.

The second prong of the test enunciated by the Court of Appeals is, upon the facts of the present cases, similarly problematic. It is in this context that the Court of Appeals has, while on the face of it merely interpreting federal decisional law, bifurcated the meaning of the term "arbitrary" in New York.

Having first stated that the second element of the two-part test requires a showing that the governmental action complained of was "wholly without legal justification,"[27] the Court went on to quote *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*,[28] in holding that "only the most egregious official conduct can be said to arbitrary in the constitutional sense." In *City of Cuyahoga Falls,* the City Engineer refused to issue building permits, notwithstanding that the applicant had obtained site plan approval, during the pendency of a referendum to repeal the ordinance pursuant to which site plan approval was granted. The referendum was the product of a public petition drive challenging the ordinance; a petition drive which was authorized by, and wholly consistent with, Cuyahoga Falls' City Charter. The City Charter gave the voters the power to approve or reject by referendum any ordinance or resolution passed by the City Council within thirty days of the ordinance's passage,[29] and went on to provide that an ordinance challenged by a petition would not go into effect until approved by a majority of those voting in the referendum.

In that context, the United States Supreme Court refused to find the City Engineer's actions constitutionally arbitrary notwithstanding the fact that the public's motivation in petitioning for the referendum (the ordinance provided for affordable low income housing) had itself been arbitrary or improperly motivated.[30]

The Court of Appeals then goes on to quote language from *Harlen* holding that a board action based on community opposition is not unconstitutionally arbitrary "if the opposition is based on legitimate state interests."[31] The Court spends little time on the second prong of the test, but the thrust of the decision is that the municipality must be found to have acted "in an outrageously arbitrary manner"[32] in order for arbitrariness to rise to an unconstitutional level.

Having enunciated that test, however, the underlying facts in *Bower* and *Home Depot* give little guidance as to when municipal behavior is sufficiently outrageous to be actionable. In each case, the Supreme Court had held (and the Appellate Division had affirmed) that there was absolutely no legal basis for the actions of the municipal body. Still, the Court found an insufficient degree of arbitrariness to constitute a violation of the applicant's due process.

It is clear from the Court of Appeals' decision that the Court was concerned not to establish a *per se* rule that success in an Article 78 proceeding must necessarily result in success in a subsequent action for money damages under 42 U.S.C. § 1983. It may be argued, however, that in seeking to protect municipalities under those circumstances, and in using these cases as its vehicle, the Court established a standard which few plaintiffs will ever be able to meet. By equating the "opportunity" to deny an application with the discretion to do so, the Court has narrowed the application of 42 U.S.C. § 1983 in the land use context to those permits which are ministerial in the purest sense. One is hard-pressed to imagine, given the overlay of SEQRA in all its labyrinthian imprecision, that any board approval or permit is subject to sufficiently rigid standards to pass the strict entitlement test, and that any board action short of rescinding a ministerial permit will be found sufficiently outrageously arbitrary to pass the second prong of the due-process standard.

While the Court of Appeals was clearly correct in seeking to protect the public purse in a manner that prevents every successful Article 78 petitioner from collecting money damages as well, the delicate balance between protecting the environment and stated municipal values on the one hand, and protecting property rights on the other, is not served when the only redress that remains to an applicant whose land-use permit has been improperly denied is an Article 78 proceeding; an expensive and time-consuming process from which, at the very best, the petitioner emerges at the place he should have been had the improper municipal action not taken place, and the improper actor suffers not at all. 42 U.S.C. § 1983 (as much in the specter of its imposition as in its imposition itself) offered a measure of protection which, in New York at least, may no longer exist.

Endnotes

1. Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass.
2. 2 N.Y.3d 617, 781 N.Y.S.2d 240 (2004).
3. *Id.*
4. 42 U.S.C. § 1983, provides, in pertinent part, as follows:

   > Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress.

5. *See, e.g., Harlen Assoc. v. Incorporated. Vill. of Mineola*, 273 F.3d 494 (2d Cir. 2001).
6. 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).
7. *Town of Pleasant Valley v. Town of Poughkeepsie Planning Bd.*, 289 A.D.2d 583, 736 N.Y.S.2d 70 (2d Dep't 2001).
8. *Bower Associates v. Planning Board of the Town of Pleasant Valley*, 289 A.D.2d 575, 735 N.Y.S.2d 806 (2d Dep't 2001).
9. *Bower Associates v. Town of Pleasant Valley*, 304 A.D.2d 259, 263, 761 N.Y.S.2d 64, 68 (2d Dep't 2003), citing *Terra Homes v. Smallwood*, 247 A.D.2d 394, 667 N.Y.S.2d 920 (2d Dep't 1998), and *Fawn Bldrs. v. Planning Bd. of Lewisboro*, 223 A.D.2d 996, 636 N.Y.S.2d 873 (2d Dep't 1996).
10. *Home Depot U.S.A., Inc. v. City of Rye*, Sup. Ct. Westchester Co., Feb 2, 1998, Cowhey, J. Index No. 3486/97.
11. *Id.*
12. *Home Depot U.S.A., Inc. v. Dunn*, Sup. Ct. Westchester Co., Feb 17, 1998, Cowhey, J. Index No. 05316/97.
13. *Home Depot U.S.A., Inc. v. Dunn*, 305 A.D.2d 459, 460, 759 N.Y.S.2d 335, 336 (2d Dep't 2003) (emphasis added).
14. *See Bower Associates v. Town of Pleasant Valley*, 304 A.D.2d 259, 761 N.Y.S.2d 64 (2d Dep't 2003).
15. Home Depot's appeal to the Court of Appeals also included an equal protection claim which the Court of Appeals dismissed on a finding that there was no proof that entities similarly situated to Home Depot, in terms of obtaining Rye's signature on a permit, had been treated differently.
16. 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).
17. *Bower Associates v. Town of Pleasant Valley and Home Depot U.S.A., Inc. v. Dunn*, 2 N.Y.3d at 628, 781 N.Y.S.2d at 246 (2004).
18. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989).
19. *Waltz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1998).
20. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).
21. *Id*. at 53, 643 N.Y.S.2d at 28.
22. *Id.*
23. *Bower Associates v. Town of Pleasant Valley,* 2 N.Y.3d 628, 781 N.Y.S.2d at 246 (2004).
24. 273 F.3d 494, 498 (2d Cir. 2001).
25. *Id.* at 504 (emphasis in original).
26. *Id.*
27. *Bower Associates v. Town of Pleasant Valley and Home Depot U.S.A., Inc. v. Dunn supra,* 2 N.Y.3d at 627, 781 N.Y.S.2d at 245 (2004).
28. 538 U.S. 188, 198 (2003).
29. *Id*. at 192.
30. *Id*. at 198.
31. *Harlen Associates v. Incorporated Village of Mineola, supra,* 273 F.3d at 501 (2d Cir. 2001).
32. *Id*. at 505.

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Inspectors General in Mid-Sized Cities—The Yonkers, New York, Experience

By Phillip Zisman

In the wake of embarrassing financial and ethics scandals that have rocked municipal governments, many elected officials are seeking ways to restore the public trust. One idea that is increasingly being considered is the creation of inspectors general offices. According to the Association of Inspectors General,[1] interest in the IG concept is on the rise, as local officials try to ensure greater accountability and integrity within their governments.

In the United States, the IG concept can be traced back to George Washington and the Continental Congress.[2] It was not until 1978, however, when Congress passed the Inspector General Act[3] that the modern concept of the IG began to take hold. In an effort to fight corruption and improve accountability, the IG Act created independent offices of inspectors general in twelve federal agencies. The major innovations of the IG Act included joining together in a single office investigative and audit functions, and authorizing the IG to monitor and review virtually every aspect of his or her agency's operations.

Deemed a successful and necessary reform, the IG concept spread throughout the federal government, to state and large municipal governments, and to public authorities around the country. Now, mid-size municipalities are beginning to consider adopting an IG function.[4] In light of this increasing interest, this article provides an overview of the development of the Yonkers, New York, Inspector General's Office, which was one of the first mid-size cities to appoint an IG.

The origins of the Yonkers Inspector General can be traced back to a long and bitter dispute that took place during the mid-1990s between the city council and the mayor over the separation of powers. As part of its ongoing efforts to exert control over the mayor, the council passed legislation creating a council-appointed, city auditor position with broad investigative powers. The mayor vetoed the legislation and the council overrode his veto. The mayor then sued to stop the legislation as an unlawful curtailment of his executive powers.[5] In the interim, the mayor appointed his own auditor, who became something of a grand inquisitor, boasting that he was working with state and federal officials on major investigations involving widespread corruption throughout the government. (The auditor was ultimately discredited and his claims were never substantiated.)

The feud between the council and mayor and the controversy over the city auditor was not resolved until the following mayoral election, when the city council president defeated his political rival, the incumbent mayor. The new mayor proposed creating an inspector general's office out of the city-auditor position. With unanimous support of the city council, legislation creating the Department of Inspector General was adopted and was included in a comprehensive Charter reform that was approved by the voters in 1995.[6] Funding for the office was first provided in 1998.

Based on the federal model, the newly created Yonkers Inspector General was granted broad powers to conduct investigations and audits into all aspects of municipal government, with a traditional focus on promoting economy, efficiency and effectiveness in government while detecting and preventing fraud, waste and abuse.[7]

As the city's first Inspector General,[8] my immediate task was to create a vision for the office and establish achievable goals and objectives. From the outset, I wanted to gain acceptance for the office and integrate the IG function into overall government operations. This was particularly important because some city officials and employees initially viewed the IG with skepticism. They believed that the discredited former city auditor had done serious damage to the government and their own reputations by making specious allegations of widespread city corruption. They were concerned that an overzealous IG might further undermine their credibility and overshadow their accomplishments.

One of my first chances to publicly address these concerns was during my confirmation hearing before the city council. I agreed that the former city auditor had been a destructive force within government, and made clear that the focus of my office would be on the audit and review process, and not on criminal investigations. In my view, based on my previous

experience as the city's corporation counsel, Yonkers was not in pressing need of yet another level of law enforcement with jurisdiction to conduct public corruption investigations.[9] However, the city's need for an internal audit function was dramatic. In many instances, departmental procedures were antiquated and inefficient, and operations had never been subject to an external review or evaluation. Thus, there was little objective information on how effective the city government was in delivering municipal services.

If the Inspector General were to be successful, I believed that the office should not be seen as an arm of law enforcement bent on developing criminal prosecutions. Criminal matters could be referred to an appropriate law enforcement agency.[10] Instead, I wanted to build an office that was dedicated to assisting operating personnel to do a better job, and that provided guidance to city officials and employees to ensure that the decisions they made were lawful, ethical and furthered the public interest. To demonstrate these objectives, in our earliest projects, such as a review of departmental cash controls, we concentrated on assisting administrators in developing policies and procedures with the necessary internal controls to minimize opportunities for fraud and mismanagement in the handling of cash receipts.

In keeping with our focus on auditing municipal operations, the daily work of our office[11] now evolves around two core audit functions: 1) conducting performance reviews of governmental operations, and 2) monitoring the procurement process and auditing municipal contracts.

Over the past six years, we have conducted audit and review work in almost every governmental department. In some instances we have conducted performance reviews of entire city departments, including the building department, the assessment department, the clerk's offices, and the parking violations bureau. In the larger departments such as police, fire and public works, we have monitored specific aspects of their operations, including payroll, procurement, and overtime. We have also completed a number of comprehensive reviews of administrative functions of the Yonkers Public Schools,[12] including a review of the food services program, the fixed asset inventory system, and the teacher/administrator hiring process. During our reviews we work closely with commissioners and agency heads, as our mission is to help them improve the administration of their offices.

With respect to municipal contracts, our objective is to ensure the integrity of the city's contracting process, and to see that city administrators appropriately supervise their contracts. We conduct background checks on all competitively bid contracts that exceed $100,000. Utilizing vendor background questionnaires of low bidders, we focus on integrity, safety history, financial stability and quality of performance. We also conduct investigations into alleged violations of state and local bidding laws.

In our contract audits, which cover all facets of municipal contracting, we seek to determine whether the city's payments to vendors are consistent with the contract terms, and whether the vendor has appropriately performed under the contract. In one such review we discovered an extensive fraud perpetrated by an employee of the city's workers' compensation third-party administrator. Our contract reviews have lead to significant reforms in the manner in which the city and board of education administer their contracts and oversee their vendors.

Although the office's focus and our general area of expertise is on auditing, when required we also conduct traditional IG investigations into such matters as employee misconduct and conflicts of interest. Despite our attempt to provide comprehensive IG services, nonetheless, some have criticized us for not doing enough, or being little more than a management consultant, and not the strong public watchdog who ferrets out mismanagement and abusive practices. Indeed, recently the local newspaper criticized our office for alleged nonfeasance in addressing a failure of some public officials to file personal financial disclosure forms.[13]

Although I believe the newspaper's criticism to be unjustified, it underlies perhaps the most difficult challenge facing an IG in a mid-size city where it is generally possible to have a professional relationship with every city administrator. By focusing on performance auditing, we have, by design, committed the office to working closely with the city administration. This relationship, however, raises the question of how we balance working within the government to promote economy and efficiency, and yet at the same time maintain independence so that we can also hold the government accountable for its shortcomings?

For the course that I have charted for the Yonkers IG, there is no easy answer to that question. Taking too strident a stance on exposing alleged government abuse, no matter how insignificant, would invariably lead to the office's ostracism within the city's administration, which would in turn limit our access and effectiveness. However, taking too passive an approach to disclosing mismanagement in the administration would have the same negative effect, because the office would lose its credibility and be subject to the claim that we have ignored public corruption.

Ultimately, I believe that the effectiveness of our office—and whether we have struck the appropriate balance between our watchdog and consultant roles—can only be measured by an evaluation of the work that we have performed, and the impact it has had on improving the government's administration.

My experience in Yonkers has led me to believe that there is no generic inspector general's office that will work for every municipality. As other mid-size cities officials consider IG offices of their own, they should give careful thought to the structure and function of those offices, and establish goals and objectives that are carefully tailored to meet the specific needs of their communities. In Yonkers, the auditing function has given our office an important structure that also provides the city with a long-neglected but important element of government oversight and administration.

Endnotes

1. The Association of Inspectors General is an umbrella organization of IGs that was created in 1995. The Association has developed standards for inspectors general, model legislation for establishing an IG office, and also conducts intensive training and certification of inspectors general and their staff. For more information see *http://www.inspectorsgeneral.org*.
2. *See* Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (The Brookings Institute 1993).
3. The Inspector General Act of 1978, as amended, 5 U.S.C. App. (1982).
4. For example, Albuquerque, New Mexico is currently considering the creation of an IG office.
5. *See* Municipal Home Rule Law § 23(2)(f) (A local law must be subject to mandatory referendum if it abolishes, transfers or curtails any power of an elective officer.).
6. *See* Yonkers City Charter §§ C7-1-3.
7. *Id.*
8. The Yonkers IG is appointed by the mayor subject to the advice and consent of the city council. The IG serves a five-year term and can only be dismissed upon the consent of the mayor and a supermajority of the Council. The IG conducts reviews and investigations as requested by the mayor, city council and as determined by the IG. *Id.* § C7-2.
9. Although historically Yonkers has had its share of municipal scandals, there are numerous law enforcement agencies, including the District Attorney, U.S. Attorney, FBI, state Attorney General and the state Organized Crime Task Force, with overlapping jurisdiction to conduct public corruption investigations.
10. Over the years we have referred matters to both the Yonkers Police Department and the Westchester County DA regarding employee theft and contractor fraud.
11. In addition to myself, the Office's staff members include two accountants with auditing experience and an administrative assistant.
12. In 2000, the Yonkers Board of Education designated the city's inspector general as the inspector general for the Yonkers Public Schools.
13. *See* The Journal News, August 16, 2004, editorial.

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Fulfilling the Due Process Obligation to Landowners Prior to Government Action Affecting Their Interest

By Douglas S. Rohrer

The Court of Appeals, most recently in *Zaccaro v. Cahill*,[1] affirmed and further clarified to what extent a government actor must go to satisfy the obligation of affording landowners due process prior to taking any action that substantially affects their property interest. This article traces this particular obligation from its U.S. Supreme Court origin through the New York appellate court decisions which have further defined the various factors that courts weigh when a due process challenge is brought.

Due process is central to the jurisprudence controlling matters of notice to landowners prior to the government taking certain actions affecting real property interests. The overarching requirement, as proscribed by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*,[2] obligates the government to give notice prior to taking action affecting life, liberty or property that is, ". . . reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[3] With respect to actions substantially affecting real property interests, the Supreme Court subsequently held in *Mennonite Bd. of Missions v. Adams*[4] that notice by publication alone was insufficient to protect the due process rights of an owner and that where the owner was "reasonably identifiable," actual notice by mail at the last known address is required.[5]

These Supreme Court decisions guide New York's appellate courts' inquiry into state and local government obligations of due process with respect to acts affecting real property. In *McCann v. Scaduto*[6] the Court of Appeals adopted the due process burden proscribed in *Mennonite Bd. of Missions* holding that mere publication prior to a tax lien sale was insufficient and specifically stated that, "where the interest of a property owner will be substantially affected . . . and where the owner's name and address are known, due process requires that actual notice be given."[7] Thus, *Scaduto* establishes that tax lien sales fall within the realm of government acts substantially affecting property interests and that publication is insufficient to satisfy due process rights—actual notice to the property owner must be given.

Echoing the result in *Scaduto* are two other cases involving the tax lien sale of property belonging to incompetent owners. In *Goldmyrtle v. Woellner*[8] the court held that even the statutory notice, as required under Real Property Tax Law §§ 1124 and 1125, which includes posting notice, publication of notice and mailing notice to the owner of record, failed to afford the incompetent owner the required due process prior to forfeiting their property by tax sale.[9] *Lounsberry v. Treasurer of Yates County*[10] affirmed *Goldmyrtle*, holding that New York courts may require more than mere compliance with statutory notice, even when such statutory notice demands affecting actual notice on the property owner prior to the taking of real property from an incompetent. The *Scaduto* and the *Goldmyrtle* line of cases instruct that statutory compliance with notice requirements affords the government no assurance of "safe harbor" when taking action that may affect a property owner's interests. Particular circumstances may require greater diligence in affecting notification by the government.

Following *Scaduto*, in *ISCA Enterprises v. City of New York*,[11] property owners who had not received actual notice by mail because their addresses were not up-to-date on the annual record of assessed valuation, claimed a breach of due process. The Court of Appeals held that the efforts undertaken by the City, including (i) publication, (ii) mail notification to those filing registration cards used to generate tax bills, and (iii) mail notification to those listed on the last annual record of assessed valuations, satisfied the minimum requirements of due process.[12] The Court, in determining whether the City's efforts were *reasonably calculated* to put interested parties on notice, balanced the burden on the government of providing notice with the rights owed property owners. Requiring the City to research individual tax records to validate addresses would have imposed too great a burden on the government and proved fruitless because the property owners had themselves failed to maintain current records with the City. The three methods by which the City endeavored to place property owners on notice were held reasonable under all the circumstances and satisfied

the government's due process obligation. The *ISCA Enterprises* case introduces the following two important considerations in making the determination of whether government efforts were reasonable: (i) balancing the needs of or burden imposed on the government versus the rights of the owners, and (ii) the actions or inaction of the property owners—essentially, the "clean-hands doctrine."

At issue in *Garden Homes Woodlands Co. v. Town of Dover*[13] was the method of notifying landowners of a meeting concerning the levying of a special assessment for a joint improvement district. The Town of Dover published notice in a local paper but did not serve actual notice on the landowners by mail. A special assessment of $44,800 was subsequently levied on plaintiff's property. The Court held that publishing notice was deficient, as the landowners' names and addresses were known to the municipality and a mailing could have easily been effected. Even though Dover complied with Town Law § 239 by publishing and posting notice, *Garden Homes*, applying the *Scaduto* requirement of serving actual notice on property owners, has now effectively recognized some special assessments as an act substantially affecting property interests. The de facto effect of *Garden Homes* is to require towns to provide actual notice to property owners in advance of a proposed special tax assessment, or gamble that the balancing factors established under *ISCA Enterprises* are of the character and degree that might ultimately prove, through litigation, to relieve the town of this heightened due process burden. (Even in the presence of such factors which might relieve the town of its actual notice obligation, towns are nevertheless advised to undertake a "best efforts" approach to effecting notice on property owners as a safeguard against a court retroactively nullifying a special assessment based on its determination that actual notice, in light of the circumstances, was a reasonable burden borne by the town.)

The Court of Appeals, in *Kennedy v. Mossafa*,[14] recently revisited the second of the two factors discussed above in *ISCA Enterprises* for determining the reasonableness of the government's notice efforts. Here, the town sent tax bills to an address in its tax roll which went unpaid and the property was eventually sold in a delinquency proceeding. The owner claimed that she had notified the town of her new address after moving but the town failed to update its records accordingly. The Court held that the reasonableness of the town's notice efforts must be considered in conjunction with the property owner's actions. The town had sent other tax bills to the plaintiff's allegedly wrong address which were returned with payment and these same tax bills also included the delinquent taxes ultimately satisfied through the tax sale. Thus, while actual notice by mail may have failed due to incorrect tax roll information, the owner's actions support the finding of constructive notice and the town's efforts were viewed as reasonable under all the circumstances affording the owner sufficient due process.

The issue presented in *Zaccaro* concerned whether the method or process by which the Department of Environmental Conservation ("DEC") identified landowners whose property was to be included in a wetlands determination satisfied the DEC's due process obligation. In *Zaccaro*, the DEC—as entitled by statute—was found to have reasonably relied on tax maps, though faulty, to determine the landowners who should be notified of the proceeding. The plaintiff's property was incorrectly excluded from the tax map that would have identified the plaintiff as among those landowners to be notified. The DEC published notice in two local papers and mailed notice to the landowners as identified in the tax maps. The Court, in reaching its decision for the DEC, weighed the rights of the individual, nature of injury, and needs/burden of the government in determining whether the due process rights of the landowner had been violated. The efforts of the DEC met the *Mullane* and *Scaduto* requirement of being reasonably calculated to afford notice although notice ultimately failed for reasons beyond the DEC's control.

As in *ISCA Enterprises*, the *Zaccaro* Court considered the burden on the DEC of investigating or essentially auditing the tax maps prior to relying on them to identify owners for mail notification. The Court reasoned that were it to hold that the DEC could not reasonably have relied on the tax maps as provided for by statute and, as such, was deficient for not undertaking an independent examination of the tax maps, too substantial a burden would be imposed on the government when weighed against the potential injury to property owners. Property owners, subsequent to being included in a wetlands area, can appeal for a waiver from the wetlands restrictions and therefore are provided a secondary means of recourse.

In sum, the *Zaccaro* Court rejected raising the *Mullane* due process requirement for New York's purposes from "*reasonably calculated*" to something approaching "*exhaustive measures absolutely calculated.*" Instead, the Court held that while actual notice by mail is required prior to a wetlands determination, the government's efforts, even though failing their essential purpose, were, on balance and considering the totality of the circumstances, reasonably calculated to afford the required due process.

A contrary decision could be reached in *Zaccaro* if the facts were altered such that the landowner had no secondary means of recourse and the DEC through its ministerial acts, and not the information contained in the tax maps, was at fault in failing to correctly identify those who should receive notice by mail. Consider a further variation of the *Zaccaro* facts: had the tax maps and DEC correctly identified the plaintiff as owning two adjacent parcels of land each slated to be included as wetlands and yet the owner received actual notice for only one parcel and had no secondary means of recourse after the determination, the outcome would then be open to speculation. The addition of constructive notice, coupled with the landowner's failure to undertake due diligence regarding the similarly situated adjacent parcel at issue and for which he had not received actual notice, may mitigate the DEC's negligence and absence of a secondary means of recourse for the landowner.

This second variation illustrates the nuances in the current jurisprudence with respect to due process afforded property owners. The New York courts, in making such a determination, will weigh: (i) the efforts of and burden on the government in providing notice, (ii) degree of effect on the rights of the property owner, (iii) opportunity for recourse should prior notice fail, and (iv) the action or inaction of the property owner supporting constructive notice or their complicity in failing to have received the government's notice.

Are there other statutes that require "publish and post" notice prior to the government taking some action that could affect individuals' property interests which might fall short of the due process standard imposed by *Garden Homes* and *ISCA Enterprises*? There are a variety of statutes and situations requiring "publish and post" notice, and compliance with this obligation would, except in those cases where the government *substantially* affects individuals' property interests, be sufficient to afford the required level of due process. There is clear precedent with respect to tax lien sales demanding actual notice. The government's due process obligation in connection with levying a special assessment is less certain. If the special assessment is a nominal amount, then such government action may fall short of the *substantial affect* requiring the serving of actual notice. In all other instances of government acts affecting individual's property interests, compliance with "publish and post" statutes does not provide a foolproof "safe harbor" for the government actor, as shown in the *Scaduto* and *Goldmyrtle* cases, although, a plaintiff mounting a due process challenge to reverse this government action would have to first establish that such action substantially affected their property interest and that the other three factors summarized above do not, in the court's view, negate what would otherwise have been grounds for requiring actual notice.

Endnotes

1. *Zaccaro v. Cahill*, 100 N.Y.2d 884, 768 N.Y.S.2d 730 (2003).
2. *Mullane v. Central Hanover Bank & Trust Co*, 339 U.S. 306 (1950).
3. *Id.* at 314.
4. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).
5. *Id.* at 798.
6. *McCann v. Scaduto*, 71 N.Y.2d 164, 524 N.Y.S.2d 398 (1987).
7. *Id.* at 175; 524 N.Y.S.2d at 403.
8. *Goldmyrtle Realty Corp. v. Woellner*, 36 A.D.2d 968, 321 N.Y.S.2d 654 (2d Dep't 1971).
9. *Id.* at 969, 321 N.Y.S.2d at 655; *see also Covey v. Town of Somers* 351 U.S. 141, 146 (1956).
10. *Lounsberry v. Treasurer of Yates County*, 144 Misc. 2d 707, 545 N.Y.S.2d 255, (Sup. Ct., Yates Co. 1989).
11. *ISCA Enterprises v. City of New York*, 77 N.Y.2d 688, 569 N.Y.S.2d 927 (1991).
12. *Id.*
13. *Garden Homes Woodlands Co. v. Town of Dover*, 95 N.Y.2d 516, 720 N.Y.S.2d 79 (2000).
14. *Kennedy v. Mossafa*, 100 N.Y.2d 1, 759 N.Y.S.2d 429 (2003).

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