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Municipal Lawyer

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

A Message from the Chair

As Chair of the Municipal Law Section of the New York State Bar Association, it is my pleasure to welcome you to the expanded and enhanced *Municipal Lawyer,* the official publication of our Section.

With much inspiration from our membership, we have decided to redevelop this publication, providing more features that will be of benefit to you. The *Municipal Lawyer* will now be published four times per year, but will contain more in-depth articles and a greater variety of materials. After you review this issue, please let us know your thoughts.

As my two year term as Chair of the Municipal Law Section comes to a close, I cannot help but reflect on how much the field of municipal law has changed, as has the role of the municipal attorney. Seventeen years ago when my practice moved into the field of municipal law, the role of the attorney was much more limited and straightforward. At the same time, the Municipal Law Section had a strong and primary focus on planning and zoning issues as being one of the major roles of the municipal attorney.

I was never more strongly reminded of how much things have changed than in the aftermath of September 11, 2001. The Municipal Law Section was forced to cancel our fall meeting because of a tragedy of proportions that none of us could have imagined a decade ago. Now, one of the major roles of municipal attorneys (particularly in larger jurisdictions) is guiding, planning (and occasionally directing) in the area of disaster preparedness. Who would have thought ten years ago that a municipal attorney would carry a briefcase of emergency planning materials in the trunk of his or her car in case a disaster occurred and his or her office was destroyed or inaccessible? While the tragedy of September 11 cannot possibly ever be viewed in a positive light, it is my opinion that it has forced municipal attorneys to focus on the many issues of disaster and emergency. Let us all hope that there is never again a September 11, but we can all have tornadoes, floods, earthquakes, train derailments or chemical explosions that will require us to use the skills we have honed in the past few years.

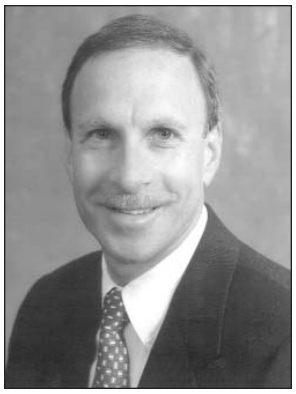
Another more recent challenge facing municipal attorneys is the ever-increasing frivolous litigation brought against municipalities. The proliferation of attorneys who advertise in a manner that begs people to sue has caused people to believe that if something bad happens to them, they must and will get paid. In a recent deposition, a claimant said to me that since he knew he had done nothing wrong, therefore, it must be the city's fault and the city must pay. The lack of personal responsibility, of understanding that accidents do just happen and that tragedies occur without always having someone to blame is a battle we must continue to face.

I have been honored to chair this Section, especially through these troubled times when we have all had to rethink what our roles are and what skills we need. I look forward to the guidance of the Section for the next two years under the able chairing of the Honorable Renee Minarik. I wish all of you the best in your roles in a challenging and often under-recognized field of law.

Linda S. Kingsley

Inside

From the Editor



In 1979, the Edwin G. Michaelian Municipal Law Resource Center of Pace University began publishing a newsletter entitled the *Municipal Lawyer* for its constituents. In January 1986, the Municipal Law Resource Center and the New York State Bar Association entered into an agreement to jointly publish the *Municipal Lawyer* in a bi-monthly four-page newsletter format. The *Municipal Lawyer* became the official publication of the Municipal Law Section.

For the past 24 years, the *Municipal Lawyer* has explored virtually every aspect of municipal practice and updated subscribers on significant new cases and legislation. Space constraints have been the only limitation on the scope and depth of coverage.

In May of 2002, Municipal Law Section Chair Linda S. Kingsley established a Subcommittee on Publications. Chaired by incoming Section Chair Hon. Renee Minarik, the subcommittee, working with Pace University and the State Bar Association staff, recommended that the *Municipal Lawyer* be published four times a year as a journal, with expanded and enhanced content and features. This Spring 2003 issue represents the debut of this new format.

In this issue, Norma Meacham and Peter Bee explore the constitutional and statutory underpinnings of privacy rights of public employees in the workplace. Part I of the article provides an overview, in the public workplace context, of what is protected freedom of speech and what is a reasonable expectation of privacy under the Constitution. Part II discusses privacy rights prior to employment in connection with inquiries by a government employer of a prospective employee. Privacy rights during employment are examined in Part III of the article. Workplace searches, monitoring of telephones and e-mail, drug testing, video camera surveillance, whistleblowing and polygraph testing are among the topics addressed. Privacy rights outside the workplace based upon off-duty associations and activities are the focus of Part IV of the article.

Against the background of the recent United States Supreme Court decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, Henry M. Hocherman, Chair of the Municipal Law Section's Land Use and Environmental Law Committee, discusses whether a moratorium on development of land is a compensable taking under the just compensation clause of the Fifth Amendment of the United States Constitution.

Edwin J. Kelley, Jr. has expertly summarized the salient principles involved with the operation of Industrial Development Agencies, local development corporations and Empire State Development, the most common forms of public benefit corporations and not-for-profit corporations utilized by municipalities to facilitate development projects and promote economic development.

I welcome your comments, suggestions and proposed articles for the new *Municipal Lawyer*.

Lester D. Steinman

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *Municipal Lawyer* Editor

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Privacy Rights of Public Employees in the Workplace

By Norma Meacham and Peter Bee[1]

I. Introduction

Like all constitutional protections, the right to privacy creates tensions in the workplace. The constitutional restrictions binding public employers provide their employees with protections from intrusions on their privacy rights. Public employers have broad powers to restrict some freedoms in order to maintain order necessary for the provision of governmental services to the public. All constitutional rights require a balancing of two competing interests—the legitimate governmental or state interest to maintain order and safety and the right of citizens to be free from governmental restraints or intrusion on free speech and to maintain privacy.

Employees' privacy rights in a public workplace derive protection from several sources. First, privacy rights are fundamental constitutional rights defined by the Supreme Court of the United States. The First Amendment protects employees' rights to certain political speech, association and their religious freedoms. The Fourth Amendment prohibition against unreasonable searches and seizures often applies to the searches of the employees and their work areas, as well as to drug and medical testing. The Fifth Amendment is most often raised as a protective shield against the employer's use of polygraph testing.

Second, privacy in the workplace is protected by certain federal and state statutes. The Federal Privacy Act of 1974, for example, prohibits employers from disclosing employees' personnel records without the employees' written consent.[2] Examples of other statutes protecting certain privacy rights in public workplaces are:

- The Fair Credit Reporting Act of 1970 (regulating employer's use of information about job applicant's and employee's credit standing);
- Title VII of the Civil Rights Act of 1964 (recent amendments prohibiting certain biased actions and expressions, such as sexual harassment);
- The Family Medical Leave Act (defining medical records as confidential and requiring separate filing, while limiting the ability to release the information);
- The Health Insurance Portability and Accountability Act of 1996 (requiring national standards for protecting confidentiality of protected health information and electronic healthcare transactions);
- The Americans with Disabilities Act (prohibiting medical examinations and certain inquiries about individuals' disabilities prior to the hiring of applicants and protecting medical records);
- The Civil Service Reform Act of 1978 (protecting federal employees from discipline and termination for disclosure of certain information about their employers);
- The Taylor Law (protecting certain speech by union representatives);
- The Wiretap Act (prohibiting interception of wire, oral and electronic communication).

Some states' constitutions and laws provide public employees with greater protections than the federal government. Furthermore, public employees whose privacy rights have allegedly been violated may also sue their employers under the common law theories of defamation and invasion of privacy.

A. Constitutional Principles

The legal right to define or to do something does not always mean that such a right should be exercised. Employees not only have their usual recourse of grievances and the right to challenge discipline, in the context of constitutional violations they also are entitled to sue under section 1983 in a federal action for monetary damages. In the private sector many other principles are protected by federal statute, albeit on a less grandiose scale.

B. Free Speech in the Workplace

The constitutional basis for free speech is the First Amendment of the Constitution. It prevents government from unreasonably interfering with freedom of expression (speech, symbolic speech, writing). Prior restraint of freedom of expression is harder to defend than action taken after later evaluation. For purposes of this article it is important to note that we are writing about a public sector issue. The constitutional right to freedom of expression does not exist in the private sector.

C. Privacy in the Workplace

The constitutional basis for privacy in the workplace is the Fourth Amendment which provides a reasonable expectation of privacy and freedom from search and seizure by government without a reasonable basis. The protection is the "right of the people to be secure in their persons, houses, papers and effects,

against unreasonable searches and seizures. . . ." Again, the limitation is on government and the protection is for people, not property *per se*. In the private sector, an employer has much greater latitude in searching property.

D. Work Rules and Reasonable Work Behavior

There are inherent management rights and rights of the sovereign (as a governmental entity) to maintain decorum and to set certain standards of behavior that conform to public policy. In school systems, there is an expectation that employees will be role models for children. There also is an expectation that academic freedom will allow for free interchange of ideas. The actual practice in the workplace will govern any analysis. There are hundreds of these unwritten rules and an overlay of written, and often in the public sector, negotiated, rules that govern workplace behavior.

Cornell University has stated its policy for electronic communications in this way:

> The University cherishes the diversity of values and perspectives endemic in an academic institution and so is respectful of freedom of expression. The University does not condone censorship, nor does it endorse the inspection of electronic files other than on an exceptional basis (i.e., if required to ensure the integrity, security, or effective operation of university systems). Nevertheless, the university reserves the right to place limited restrictions on the use of its computers and network systems in response to complaints presenting evidence of violations of university policies or codes, or state or federal laws. . . . [3]

Cornell's policy took almost four years to write and is 21 pages in length, including an index and special forms. The Cornell policy is illustrative of the legal problems and tensions in an academic community where the employer is seeking to encourage creative expression.

There is an inherent framework for tension in any constitutional issue.

A quick list of a series of issues and the constitutional or statutory rules they implicate are illustrative:

- leaflets or flyers in school mailboxes (issue of equal treatment and access and whether statutorily prohibited subjects are addressed) (a union has a right to negotiate exclusive access because it is less than a public forum; there is no basis in this case to treat as impermissible content access; rationally favors a legitimate state purpose . . . peaceful relations with the union);
- dress, including hair (mandatory subject of bargaining under the Taylor Law unless health or safety are involved);
- speech at a public board meeting (case law both ways . . . teacher in public letter critical of the school board's allocation of funds, constitutionally protected free speech (1967, 1964), but more recently, superintendent found to make speech which disrupts work rules and the community termination not unconstitutional; secretary constitutionally permitted to criticize the school board without harm);
- e-mail (private or confidential communication versus employer's property and right to control access);
- lesson plans (academic freedom versus the employer's right to prepare for absences);
- desks and briefcases (issue is whether employee has expectation of privacy based on workplace rules and whether employer has an outweighing interest);
- use of alcohol and drugs (generally unwritten rules although some negotiated, case law and statutory basis . . . issue arises as to basis for doctor's examination or drug testing);
- smoking (statutory prohibition restricts freedom);
- dating (generally no prohibitions among adults in the public sectors, but prohibitions in statute with students and employees);
- off-duty behavior that would be unacceptable on the job (depends on the relationship between the employee behavior and the central core of the job duties);
- medical records (FMLA confidentiality; also workers' compensation statutory protection);
- time and leave records (accessible by litigation, freedom of information, but may be protected if issued to determine disability . . . ADA);
- statements relating to someone's sex, race, religion, national origin . . . including sexual harassment (EEO violation restricts freedom of speech);
- off-color jokes or skits (EEO violation restricts speech);
- bulletin board notices (depends entirely on what is said and whether there are restrictions on

what other people who use the school can do . . . can you post used car notices? Bake sales for the PTA, union notices? Then, you can't restrict access without a reasonable basis);

- armbands (acceptable exercise of First Amendment rights);
- political activity (certain restrictions are acceptable, Hatch Act for federal employees (1947), misdemeanor for police to solicit political funds okay (1972));
- membership in the Communist Party (not a threat to teacher's employment (1966));
- classroom discussion led by teacher (criticizing school board is not protected (1988)) (not a public forum, school reserved as a forum for teaching; speech is sponsored by the school and thus subject to its authority and discretion).

E. What Is Protected as Freedom of Speech?

Whether there is freedom of speech or expression depends on the following analysis:

- Who is the speaker? Is it a superintendent, teacher, secretary or janitor? The higher the position the higher the standard that is acceptable;
- Who is the audience? Public forum, public newspaper, radio classroom, bulletin board, students?; the more open and public the forum, the more freedom of expression is permitted;
- What is the subject matter of the speech? Libel, bias, harassment, pornography, criticism of school or authority or pedagogical concerns, e.g., Thoreau's philosophy, Darwinism? The more directly related to academic freedom the more protection is afforded.
- Does the government interest in safety, teaching, or being a role model outweigh the individual's right to freedom of expression? "Make love not war" is not illegal or unsafe. The early cases focus on disruption. The question was how disruptive and how much more disruptive in the workplace than in society as a whole.

F. What Is a Reasonable Expectation of Privacy under the Constitution?

The U.S. Supreme Court has held that "when an expectation of privacy that society is prepared to consider reasonable is infringed," a search has occurred. *United States v. Jacobsen*[4] and *O'Connor v. Ortega*.[5] Consideration is given to the "uses to which the individual has put a location . . ." In *Ortega*, the Court stated: "Individuals do not lose Fourth Amendment rights merely because they work for the government."[6] In the same case, it stated that "constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer."

These factors are considered:

- Did the employee have reason to believe the space was private? Was the briefcase, desk or file locked? Who had access to that space? Is the workspace shared (e.g., substitute teachers)? If the employee only had personal belongings in a locked space that no one else had access to, a violation is apt to have occurred. The workplace includes all spaces related to work and in the employer's control such as cafeterias and hallways, but not personal luggage or pocketbooks.
- Did the employer have a legitimate interest in conducting the search? Was the employer looking for an important document? Was the employee in a coma?
- How intrusive was the search? Looking through a stack of files is not intrusive, taking blood samples is . . .
- Did the public interest override all the employees' interest? Was the safety of the public at issue? (Airline pilots should not be drunk; train engineers should not take illegal drugs; police who carry guns should not drink.)
- Did the employer make clearly defined rules? . . . (All employees know that lesson plans will be reviewed by the principal. The fact that a letter from a student was in the lesson book does not protect the teacher's privacy.)
- Did the employer have a reasonable basis for taking the action?

G. How Can an Employer Help to Define Reasonable Expectations?

Employers may alter an employee's expectation of privacy by defining a policy that the property of the employer is to be used only for work-related purposes. This is particularly true for computers and e-mail networks. Similarly, in networked computer environments, employees should be informed that passwords will be generally available to office support staff and managers although kept in a secure way to protect unauthorized use.

Certain statutes change these rights, including, for example:

- The Freedom of Information Act (defines when certain information must be given to the public on request and limits exclusions).
- The Family Medical Leave Act (defines medical records as confidential, requiring separate filing, and limits the ability to release information).
- The Ethics Law of 1987[7] (requires employees earning over $50,000 or policymakers to disclose certain financial information and business relationships and requires public inspection of this information.) (Earlier executive orders were found to be overbroad and were struck down).
- The whistleblower statute (protects employees from discipline or termination for disclosing information about improper governmental action which creates and presents a substantial specific danger to public health or safety).
- The recent amendments to Title VII of the Civil Rights Act of 1964 (prohibits certain actions or expression that is biased, including sexual harassment).
- The Taylor Law (protects certain speech of union representatives that would not be protected otherwise for employees, including the manner in which things are said, freedom of association; defines negotiations as necessary to effect certain changes).
- The Education Law.

II. Privacy Rights Prior to Employment

When considering an applicant for a position, employers often wish to obtain personal information about the prospective employee. Privacy issues may arise with regard to certain inquiries by a government employer prior to hiring a prospective employee.

A. Inquiries about Arrest and Conviction Records

Courts have upheld the constitutionality of inquiries about an applicant's arrest and conviction records. In *Paul v. Davis*,[8] the Supreme Court held that arrest and conviction information was not constitutionally protected because it was a matter of public record. Therefore, employers, like the general public, could obtain it freely. However, Correction Law in New York State limits the use and defines how such records can be considered in hiring. Education Law defines a procedure for background checks, pre-certification and hiring.

B. Inquiries about Medical Condition and Physical Capabilities

The Americans with Disabilities Act of 1990 (ADA) limits employers' ability to gather information about the applicant's disabilities by prohibiting employers from conducting medical examinations prior to hiring.[9] The ADA also prohibits employers from asking about the applicant's:

- physical or mental limitations;
- physical or mental injuries and illnesses;
- addictions to drugs or alcohol or treatment for such;
- history of workers' compensation claims;
- history of on-the-job injuries;
- use of prescription drugs;
- absences due to medical reasons;
- known or obvious disabilities, their origin, severity or prognoses.

These restrictions are all couched in terms of discrimination but protect privacy rights of applicants and employees.

Sample of Impermissible and Permissible Questions Prior to Hiring:	
Impermissible	**Permissible**
1. "Should I call you Miss or Mrs.?"	"Are you known under a different name?"
2. "Do you live near a ghetto?"	"What is your current address?"
3. "How did you learn to speak Italian?"	"What language skills do you have?"
4. "Are you willing to work on Hanukkah?"	"Can you work during the required hours?"
5. "How old are you?"	"Can you show proof of age after hiring (for health insurance, life insurance reasons)?"
6. "Are you single?"	"Can you provide marital status after hiring?"
7. "Do you plan on having children?"	No questions are permissible about children.
8. "Where does your sister live?"	"Could you give information about any relatives currently employed by this organization?"

C. Inquiries about Personal Lifestyle

Questions about the applicant's marital status, plans to have children or other family matters may raise constitutional protections.[10] The protections are sometimes waived when employers hire for safety-sensitive jobs. In *McKenna v. Fargo*,[11] for example, the District Court of New Jersey upheld the town's inquiries about a prospective firefighter's religious beliefs, political opinions, reading habits, sexual preferences, social beliefs, and family relationships. The court ruled that employer's interests in evaluating the applicant's ability to withstand psychological pressure inherent on the job outweighed the plaintiff's privacy rights.

D. Inquiries about Employment Eligibility

Under the Immigration Reform and Control Act, every employer must obtain an Employment Eligibility Verification Form (Form I-9) from every employee, citizen or non-citizen, hired after November 6, 1986. In addition, the employee must present appropriate documentation, including a birth certificate and a Social Security Card. According to the Immigration and Naturalization Service (INS), employers who knowingly hire and continue to employ unauthorized aliens commit a serious offense "punishable under law."[12] For purposes of this policy, knowledge may be inferred from:

(1) failing to complete or improperly completing the Form I-9;

(2) having available information indicating that the employee is an alien, not authorized to work;

(3) acting with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force.

Knowledge of an employee's unauthorized status will not be inferred from the employee's foreign appearance or accent.

Form I-9 must be completed within three business days of the hire date (or by the end of the first business day if the employment is to last less than three days). Wayne State University, for example, informs all prospective applicants that if they perform "any work beyond three (3) business days of [their] official date of hire before filing the Form I-9, [the university] cannot pay [the employee] for that work and the work . . . will have been performed as a volunteer."

III. Privacy Rights During Employment

A. Workplace Searches

Searches and seizures by government employers are subject to Fourth Amendment scrutiny. The leading case on the matter is the 1987 Supreme Court decision of *O'Connor v. Ortega*.[13] In this case, a hospital employee's office, desk, and file cabinets were searched while he was on administrative leave. Officials seized personal items from the plaintiff's office and used them in an administrative proceeding that resulted in his dismissal. The Supreme Court held that government employees had a reasonable expectation of privacy in their offices, desks, and file cabinets. These rights must be balanced against the government's need to control and operate the workplace efficiently. The balancing test should be conducted under the standard of reasonableness and a reasonable need by the employer to search the employee's office would not require a search warrant. Four Justices dissented from this opinion, stating that a search warrant and probable cause should be required to search an employee's property.

A recent case, relying on *Ortega*, upheld the searches of public employees' office computers. The Tenth Circuit held that a state university professor had no reasonable expectation of privacy in his office computer because the university warned its employees about prohibited access and storage of obscene materials and the possibility of random auditing.[14]

B. Monitoring Telephone Calls and Electronic Mail

The Omnibus Crime Control and Safe Streets Act of 1968 (the Wiretap Act) makes it a crime for employers to intentionally intercept "any wire, oral or electronic communication."[15] This law protects only those employees who have a reasonable expectation of privacy in their communication and certain exceptions to the prohibition are recognized by the courts. An employee, for example, may consent to the monitoring of his or her telephone calls. The Act also does not apply where the interception of the call was in the "ordinary course of business."[16] In *Watkins v. L.M. Berry & Co.*, the Eleventh Circuit declined to rule that monitoring of a telephone call, in which an employee was discussing new employment, was in the ordinary course of business. According to the court, the ordinary course of the company's business was not equivalent to the company's best interests.

In 1986, the Act was extended to include e-mail communication through the Electronic Communications Privacy Act of 1986 (ECPA). The ECPA's ambiguous language created a dispute among courts as to its interpretation. Specifically, federal courts disagree about the definition of the term "intercept" in the context of electronic mail. In 1994, the Fifth Circuit ruled that seizing of a computer with stored private e-mail that has not yet been delivered to its intended recipients did not constitute interception.[17] The Ninth Circuit agreed with that decision in 2002, finding that electronic communications retrieved from storage

before they reached their intended recipients were not protected under the ECPA.[18] The court held that unauthorized access to an employee's Web site that was protected by a password did not constitute an infringement on the employee's privacy rights. A recent Pennsylvania District Court decision of *Fraser v. Nationwide Mutual Insurance Co.*,[19] however, stated that the ECPA was implicated when an employer retrieved employee's e-mail before it reached its intended recipient. The District Court further held that no such implication existed where the e-mail was retrieved after being transmitted to its recipient.

In *U.S. v. Simons*,[20] the District Court of Virginia demonstrated that information obtained from a public employee's office computer is afforded little constitutional protection. Citing *Ortega*, the court stated that an employee's expectation of privacy may be reduced by office practices and procedures. It held that an electronic engineer had no reasonable expectation of privacy in his office and computer files at the Foreign Bureau of Information Services (FBIS), a component of the CIA, because the FBIS's official policy warned its employees about possible audits "within all FBIS unclassified networks."[21] Therefore, a supervisor, who had reasonable suspicion that an employee was downloading pornographic material, acted reasonably and did not violate the employee's Fourth Amendment rights by searching and copying the employee's hard drive. Furthermore, after the FBIS contacted an FBI agent to investigate certain files containing child pornography, the agent did not exceed the scope of the warrant by seizing copies of the disks instead of the disks themselves.[22]

In 1989, the Eighth Circuit held that cordless telephone communication was outside the protection of the Wiretap Act, creating no reasonable expectation of privacy.[23]

C. Opening of Employees' Mail

Under *Vernars v. Young*,[24] the employer's representative violated the employee's privacy by opening and reading the employee's personal mail. The protection is lessened when the envelopes or return addresses suggest that the mail is related to business.

D. Video Camera Surveillance

In order to determine whether the installation of video surveillance equipment violates an employee's privacy rights, courts look to whether the employee has a reasonable expectation of privacy at the workplace. In *Thornton v. University Civil Service Merit Board*,[25] the Illinois appellate court held that a state university police officer did not have a reasonable expectation of privacy. The court upheld the university's installation of a video camera to determine whether the officer engaged in gambling activities.

In *Jeffers v. City of Seattle*,[26] the Washington appellate court reversed the jury's finding that a police officer's privacy was invaded when his activities, while on a limited assignment, were videotaped. According to the court, the jury should have focused on whether the plaintiff had a reasonable expectation of privacy.

In 1991, the Eighth Circuit held that models had a reasonable expectation of privacy while changing backstage during a fashion show.[27] Therefore, the security guard's installation of a video camera in that area constituted "an invasion by strangers into a private dressing area."[28]

E. Polygraphs and Other Psychological Examinations

The Federal Employee Polygraph Protection Act of 1988 prohibits the general use of polygraph testing by employers. The Act, however, expressly exempts public employees from its scope of protection. Nevertheless, public employers' use of polygraph testing and of other psychological examinations raise privacy issues about the questions and the physical intrusion of the tests.

Courts have generally upheld the use of polygraph tests by public employers when the questions were tailored to work-related duties and performance. In *Hester v. City of Milledgeville*, the Eleventh Circuit upheld the city's questioning of a fireman about possible substance abuse.[29] Although not directly related to his duties, the court justified the questions as necessary to ensure public safety by eliminating drug problems in the fire department.[30] The court placed special emphasis on the questions' limited scope, avoiding matters related to family, marriage, and sexual relationships.

In *Thorne v. City of El Segundo*,[31] the Ninth Circuit rejected the city's argument that a polygraph examination, asking a prospective police officer about her sexual relations with a married officer on the force, was narrowly tailored to meet the employer's interests.

The case law in the area of psychological testing demonstrates that a public employer should examine the following issues before establishing a psychological testing policy:

- whether psychological testing is permitted under state law;
- whether the testing is conducted reasonably;
- whether the testing is the only reasonable method of obtaining the desired information;
- whether the public interest justifies the intrusion of employee's privacy;

- whether the overall scope of testing is work-related.

F. Free Speech at Workplace

An employee's freedom of expression is generally protected by the First Amendment. The Supreme Court, in *Pickering v. Board of Education*, stated that a public employee's speech may be restricted by the employer in order to ensure efficient performance of public services.[32] In this decision, the Court established a balancing test to determine whether the restrictions on the employee's speech are justified. For speech determined to be a matter of public concern, the courts decide whether the employee's statement:

(1) impairs discipline or harmony among co-workers;

(2) undermines close working relationships where loyalty and confidence are necessary;

(3) impedes the performance of the employee's duties;

(4) interferes with the employer's operation.

In *Babcock v. Rezak*,[33] a District Court reversed the jury's finding that a university employee's First Amendment rights were not violated when he was allegedly discharged for his speech and actions. The court held that the jury instructions were erroneous and the appropriate standard to determine whether the discharge was retaliatory was to examine whether the employee's speech was the President's "motivating factor in deciding not to reappoint [the employee]."[34]

G. Whistleblowing

The Civil Service Reform Act of 1978 protects federal employees from retaliatory action for disclosing their employer's illegal, immoral or improper conduct. Under the Act, a disclosing employee must reasonably believe that the employer engaged in "a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety . . . "[35]

Similar protections exist under individual statutes protecting employees against retaliation for filing claims of public health and safety. Civil Service Law § 75-b provides specific whistleblower protection to certain public employees.

H. Release of Employee Information

1. Statutory Restrictions

The Federal Privacy Act of 1974 limits the disclosure of a person's records that would otherwise be accessible to the public under the Freedom of Information Act (FOIA). According to the FOIA, with the exception of some protected information,[36] any person has the right to request access to federal agency records. The Federal Privacy Act applies to the federal executive branch and to regulatory agencies. Under this law, a federal employee's records cannot be released without the employee's written consent.[37] Several exemptions permit the disclosure of such records.[38] First, the records may be released, without the employee's consent, to the agency officers responsible for maintaining the records or the officers who need such records to perform their duties. Second, the disclosure is permitted if properly requested under FOIA.

In addition, some employee information can be released to the unions under the Federal Service Labor Management Relations Act (FLRA). The Act requires a federal agency to release any information requested by the employee's union if it is necessary for collective bargaining.[39] In 1994, the Supreme Court held that federal employees' home addresses are protected under the Federal Privacy Act and may not be released to their unions without consent.[40]

In New York, public employees have different but similar protections under the state's "sunshine laws."[41]

2. Medical Files

Employees' medical information is inherently private and is generally afforded greater protection. The Family Medical Leave Act (FMLA) expressly states that employees' medical records, created for purposes of the Act, are confidential.[42] The Americans with Disabilities Act (ADA) similarly requires confidentiality of medical information obtained as a result of employee's job-related medical examination or inquiry.[43]

In addition, some privacy protections of medical files have been recently enacted through the Health Insurance Portability and Accountability Act (HIPAA) of 1996. Under HIPAA, the Department of Health and Human Services (HHS) was required to adopt national standards for ensuring privacy of electronic healthcare transactions. The entities that must comply with HIPAA's provisions are individual or group health plans that provide or pay for the cost of medical care,[44] health care clearinghouses,[45] and healthcare providers.[46] The regulations require an average health plan provider to engage in the following activities:

- notify patients about their privacy rights and how information can be used;
- adopt and implement privacy procedures for its practice, hospital, or plan;
- train employees to understand the privacy procedures;

- designate an individual to be responsible for overseeing the adoption of and compliance with privacy procedures;
- secure patients' records containing individually identifiable health information.

With the exception of small health plans, the entities covered under the Act must have complied with the regulations by April 14, 2003. Small health plans have an additional year to implement the regulations.

3. Revealing Employee's HIV Status

An employee's HIV status is sensitive and private information which is often protected by the courts from disclosure. Some states enacted statutes penalizing employers and co-workers for disclosing an employee's HIV status. California's statute, for example, prohibits negligent or willful disclosure of HIV tests "to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to written authorization."[47] New York State strictly limits disclosure of confidential information about AIDS or HIV (Public Health Law art. 27-F; 10 N.Y. Comp. Codes, R. and Regs pt. 63 (N.Y.C.R.R.)). However, the state PESH Bureau has adopted OSHA standards for workers' protection from blood-borne pathogens which require the adoption of exposure plans for employees.

In addition, some courts have prohibited employers from inquiring about an employee's HIV status. In *Doe v. Kohn Nast & Graf, P.C.*, a District Court held that an employer may not make a medical inquiry or mandate an employee's medical testing in order to confirm suspicions that the individual is HIV positive.[48] In addition, testing of public employees is likely to raise suspicions of intent to discriminate against HIV-positive individuals based on their disability, prohibited under the Americans with Disabilities Act of 1990 and, in some instances, by the Federal Vocational Rehabilitation Act of 1973. The U.S. Supreme Court ruled that the ADA applies to individuals infected by HIV.[49]

In some situations employers are permitted to disclose an employee's HIV status without incurring liability. In *Doe v. Southeastern Pennsylvania Transportation Authority*,[50] an employer learned about its employee's treatment for AIDS by accessing his prescription drug information for auditing purposes. The court ruled that the employer's need to access this information for auditing justified the intrusion into employee's privacy.[51] In another case, *Plowman v. Department of the Army*,[52] the court held that a civilian army employee's privacy was not invaded when his supervisor disclosed his positive HIV results to his superiors. According to the court, the invasion of privacy did not occur because the information was not disclosed to the public at large and the disclosure was narrowly tailored to determine how to further proceed with the information.[53]

I. Drug Testing

Substantial restrictions have been imposed on drug testing by public employers. Federal and state constitutions impose limitations to protect employees' privacy rights and due process. Some federal laws restrict drug testing by protecting individuals with addiction disabilities. Finally, under the Drug-Free Workplace Act, employers receiving federal money must comply with requirements for drug testing.

In *National Treasury Employees' Union v. Von Raab*,[54] the Supreme Court ruled that a urinalysis test constituted a search and seizure, regulated by the Fourth Amendment. The Court upheld the testing program as reasonable, emphasizing the Treasury Department's compelling interest in preventing the promotion of drug users to positions involving interdiction of drugs or requiring carrying of firearms. In *Skinner v. Railway Labor Executives' Association*,[55] the Supreme Court upheld the Department of Transportation's drug testing policy. The Department had a policy of post-accident testing and testing based on reasonable suspicion.

Unlike testing based on reasonable suspicion, random and across-the-board testing requirements have been subject to greater scrutiny. In *Rushton v. Nebraska Public Power District*,[56] the Eighth Circuit upheld such a program for all employees of a nuclear power plant with access to protected areas. The court found that the government's interest in safe nuclear power outweighed the employees' privacy interests.

Similarly, the D.C. Circuit relied on *Von Raab* in approving part of the Justice Department's random drug-testing program of certain employees.[57] Although the *Von Raab* decision validated suspicion-based testing, the Circuit court relied on it to validate random testing of employees who had access to sensitive information. The Ninth Circuit also relied on *Von Raab* in validating random drug-testing policies in the interests of safety. In *International Brotherhood of Teamsters v. Department of Transportation*,[58] it upheld the Department of Transportation's random, pre-employment, post-accident, and biennial drug testing of commercial vehicle drivers.

J. Hair Testing

Hair testing is currently a good alternative for employers to blood, urine or saliva drug testing. It is less intrusive and provides a wider window of detection. In *Koch v. Harrah's Club*,[59] the court upheld a private employer's mandatory testing requirement which included hair testing. In this case, the employee was

not terminated based on hair testing alone and the employee could choose to instead submit two urine samples over a sixty-day period.

IV. Privacy Rights Outside the Workplace

A. Associations Outside the Workplace

Public employers may want to restrict the employees' personal relationships in order to maintain the organization's reputation and mission. Such rules are generally upheld by the courts if they are supported by legitimate concerns. In *Fleisher v. City of Signal Hill*,[60] for example, the Ninth Circuit upheld the police department's dismissal of an employee for conduct unbecoming an officer. According to the court, the department reasonably applied its policy to the officer for engaging in a sexual relationship with a fifteen-year-old girl.

In another case, *Shahar v. Bowers*,[61] a state law department denied employment to a female attorney when she announced plans to marry another woman. The court used the *Pickering* balancing test in evaluating whether the attorney's constitutional rights were infringed. The court concluded that the department's decision was justified by the interest of supporting the state laws against sodomy and requiring its employees to refrain from conduct inconsistent with these laws.

Similarly, in *Doe v. Gates*,[62] the D.C. Circuit dismissed the claim of a CIA undercover agent fired for disclosing his homosexual orientation. The court found no violation of the Equal Protection Clause and held that the CIA's concern about employee's trustworthiness was reasonable due to the officer's long-time concealment of his sexual orientation.

Based on the Supreme Court decision in *Bowers v. Hardwick*,[63] courts do not apply strict scrutiny to homosexuals' discrimination claims based on the Equal Protection Clause. Nevertheless, some courts have invalidated employers' discriminatory practices under the rational basis test.

B. Drug Testing Based on Reasonable Suspicion Arising from Off-Duty Activities

Following *Skinner*, courts have routinely upheld employers' drug tests based on individualized suspicion. In 1993, however, the New Jersey Supreme Court held that reasonable suspicion may arise from information obtained from off-duty activities.[64] In this case, a police department asked an officer to undergo a drug test after his arrest on suspicion of selling cocaine off-premises. After the officer refused to take the test, he was fired. The court upheld the test, finding that the officer's expectation of privacy was diminished by his safety-sensitive position. The court further ruled that the officer's arrest on drug charges created a compelling interest for his employer's drug testing.

Similarly, in *American Federation of Government Employees v. Martin*,[65] the Ninth Circuit upheld the Department of Labor's (DOL) drug testing policy. DOL required that employees in certain sensitive positions, such as safety and health inspectors, nurses and drivers, be tested based on reasonable suspicion obtained as a result of their off-duty activities.

Endnotes

1. This article was prepared with the assistance of Lucy Kats, an associate at Whiteman Osterman & Hanna LLP.
2. 5 U.S.C. § 552a(b).
3. Responsible Use of Electronic Communications at 5.
4. 466 U.S. 109, 113 (1984).
5. 480 U.S. 709, 715 (1987).
6. *Id.* at 717.
7. Education Law and General Municipal Law § 813.
8. 424 U.S. 693 (1976).
9. 42 U.S.C. § 12101.
10. *See Loving v. Virginia*, 388 U.S. 1 (1967) (decisions about marital choice are constitutionally protected); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (extending constitutional protection to procreation decisions); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (constitutional protection afforded to decision-making about raising children).
11. 451 F. Supp. 1355 (D. N.J. 1978).
12. Employer Information Bulletin 103, *available at* <http://www.usdoj.gov/ins/> (last visited Jan. 10, 2003).
13. 480 U.S. 709 (1987).
14. *See United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002).
15. 18 U.S.C. § 2510.
16. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 583-84 (11th Cir. 1983).
17. *See Steve Jackson Games v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994).
18. *See Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002).
19. 135 F. Supp.2d 623 (E.D. Pa. 2001).
20. 29 F. Supp.2d 324 (E.D. Va. 1998).
21. *Id.* at 327.
22. *Id.* at 329.
23. *See Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989).
24. 539 F.2d 966 (3d Cir. 1976).
25. 507 N.E.2d 1262 (Ill. App. Ct. 1987).
26. 597 P.2d 899 (Wash. Ct. App. 1979).
27. *See Doe By Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991).
28. *Id.* at 1427.
29. 777 F.2d 1492 (11th Cir. 1985).
30. *Id.* at 1497.
31. 726 F.2d 459 (9th Cir. 1983).
32. 391 U.S. 563 (1968).
33. 2000 WL 1335743 (W.D.N.Y. 2000).
34. 2000 WL at *1.
35. 5 U.S.C. § 2302(b)(8).

36. Among the protected exceptions to disclosure are employees' personnel and medical files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).
37. 5 U.S.C. § 552a.
38. 5 U.S.C. § 552a(b).
39. 5 U.S.C. § 7114(b)(4)(A), (B).
40. *See U.S. Department of Defense v. FLRA*, 510 U.S. 487 (1994).
41. Public Officers Law § 87, *et seq.*
42. 29 C.F.R. § 825.500(g).
43. 29 C.F.R. § 1630(c)(1).
44. These health plans include: (1) HMOs and health insurers; (2) insured and self-funded employee welfare benefit plans that have 50 or more participants or are administered by an entity other than the plan sponsor; and (3) Medicare, Medicaid, CHAMPUS. 42 C.F.R. § 164.103.
45. A healthcare clearinghouse is a public or private entity that processes or facilitates the processing of health information, received from another entity, from a nonstandard to standard format. *Id.*
46. Under the regulation, the healthcare providers of medical or healthcare services furnish the bill or get paid for health care in the normal course of business and transmit health information in electronic form. *Id.*
47. Cal. Health & Safety Code § 120980(a).
48. 866 F. Supp. 190, 197 (E.D. Pa. 1994).
49. *Bragden v. Abbott*, 524 U.S. 624 (1998).
50. 72 F.3d 1133 (3d Cir. 1995).
51. *Id.* at 1143.
52. 698 F. Supp. 627 (E.D. Va. 1988).
53. *Id.* at 635.
54. 489 U.S. 656 (1989).
55. 489 U.S. 602 (1989).
56. 844 F.2d 562 (8th Cir. 1988).
57. *See Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989).
58. 932 F.2d 1292 (9th Cir. 1991).
59. 5 Ind. Empl. Rts. Cas. (BNA) 1295 (Nev. Dist. Ct. 1990).
60. 829 F.2d 1491 (9th Cir. 1987).
61. 114 F.3d 1097 (11th Cir. 1997).
62. 981 F.2d 1316 (D.C. Cir. 1993).
63. 478 U.S. 186 (1986).
64. *See Rawlings v. Police Dep't of Jersey City*, 133 N.J. 182 (1993).
65. 969 F.2d 788 (9th Cir. 1992). *But see Am. Fed'n of Gov't Employees v. Derwinski*, 777 F. Supp. 1493 (N.D. Cal. 1991) (part of reasonable suspicion-based testing invalidated because it was based on off-duty information).

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Moratorium Te Salutamus

A Discussion of the United States Supreme Court Decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*

By Henry M. Hocherman

In April of 2002, the United States Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,*[1] which addressed (but did not entirely answer) the question of whether a moratorium on development of land (which in this case totaled 32 months) is a compensable *taking* under the just compensation clause of the Fifth Amendment to the United States Constitution.[2]

Background

Tahoe-Sierra involves two moratoria, enacted successively, which together halted development in portions of the Lake Tahoe Basin (the "Basin"), a 500-square mile area surrounding Lake Tahoe in the states of California and Nevada, for a 32-month period. Those moratoria (and the enactment and implementation, in general, of the interstate compact discussed below) gave rise to no fewer than four Federal District Court cases, one of which culminated in the Supreme Court decision under discussion here.

The Supreme Court noted that Lake Tahoe, which straddles the California-Nevada boundary, was characterized by President Clinton as "a national treasure that must be protected and preserved" and that Lake Tahoe is exceptionally clear due to the lack of nitrogen and phosphorous which nourish the growth of algae. In the 1960s, the states of California and Nevada entered into an interstate compact, the Tahoe Regional Planning Compact (the "Compact") pursuant to which an interstate agency, the Tahoe Regional Planning Agency (TRPA) was created to regulate development in the Basin.

The Compact included findings by the legislatures of California and Nevada to the effect that ". . . in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan."

Thus, during the period following the adoption of the Compact, and until the plan for the basin was adopted, the Compact itself prohibited development of new subdivisions, condominiums and apartment buildings, and also prohibited each city and county in the Basin from granting any more permits than had been granted by those entities in 1978. The Compact provided that the TRPA was required to adopt air quality, water quality, soil conservation, vegetation preservation, and noise standards by June 19, 1983.

Shortly after its formation, the TRPA realized that it would not be able to complete its studies and adopt standards by the deadline. Accordingly, on June 25, 1981, it enacted its Ordinance 81-5, imposing the first of two moratoria on development in the Basin. The first moratorium was for a period of two years ending on August 26, 1983. The second began on August 27, 1983 and ended on April 25, 1984. The moratoria effectively halted all residential development on certain designated sensitive areas of the Basin for a period of 32 months for the stated purpose of protecting the Basin until appropriate regulations could be adopted. Petitioners, who were individual property owners as well as associations of property owners, filed actions against the TRPA in federal courts in Nevada and California. Those actions were ultimately consolidated in the District of Nevada.

Petitioners sought, among other things, compensation on the grounds that their property had, in effect, been appropriated without just compensation during the aggregate period of the moratoria, in violation of the just compensation clause of the Fifth Amendment. The District Court held for petitioners, holding that the moratoria constituted "categorical takings" under the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.[3] As will be discussed more fully below, under *Lucas* a categorical taking occurs when plaintiffs are denied "all economically beneficial or productive use of land." On petitioners' appeal, the Ninth Circuit affirmed the lower court's decision and, of significance, noted that the petitioners had effectively waived arguments that would have required analysis under the *ad hoc* balancing approach established in *Penn Central Transportation Co. v. New York City*,[4] as well as any argument that the moratoria did not substantially advance a legitimate state interest as required under the rule of *Agins v. City of Tiburon*.[5]

Issue Before the Supreme Court

As a result of petitioners' litigation posture in the lower court, the question that ultimately made its way to the Supreme Court was very narrow; in essence, whether *any* moratorium on development, of any dura-

tion, constitutes a *per se* compensable administrative taking. The lower court's logic was simple but failed to account for the very fundamental (if somewhat elusive) "numerator-denominator" issue central to the evolution of takings jurisprudence. The District Court held that during the period of the moratoria the petitioners had been deprived of *all* economically beneficial or productive use of land so that there had been, *for that period*, a total taking. The Court of Appeals disagreed.

The Court of Appeals recognized that land has at least three dimensions, which it characterized as being physical, temporal, and functional. Property exists in space, in time, and has certain uses. The Ninth Circuit reasoned that if, as the Supreme Court has held, a regulation that deprives a property owner of the use of a *part* of his land for *all* time is not a categorical taking, then a regulation which deprives a property owner of the use of *all* of his land for a *part* of the time is similarly not a categorical taking since, on that analysis, it does not deprive the property owner of all economically beneficial or productive use of the land; *all* in this case being interpreted to include the spacial, temporal, and functional attributes of the property. Understanding that definition of the term "all" is the key (particularly in light of the Supreme Court's recent decision in *Palazzolo v. Rhode Island)*[6] to understanding the Supreme Court's decision in *Tahoe-Sierra*. The Supreme Court affirmed the decision of the Ninth Circuit, denying damage to petitioners.

Per Se Rule Rejected

It may be said, in analyzing the Supreme Court's reasoning in *Tahoe-Sierra*, that petitioners' argument bore the seeds of its own destruction. Petitioners, in seeking to characterize every moratorium as a categorical taking, sought to impose a strict rule which the Supreme Court ultimately rejected. The Supreme Court characterized the petitioners' argument, and set forth its answer to that argument, in the following terms:

> Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[7]
>
> * * *
>
> In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case.[8]

It appears that petitioners took the course that they did, seeking a *per se* rule, because there was a multiplicity of them, and that while it is conceivable that some could have established the right to compensation on the facts of their particular case, on the whole the group required a *per se* rule in order to succeed. Resisting, as it had in *Palazzolo,* the "temptation to adopt what amount to *per se* rules in either direction" the Supreme Court concluded that the circumstances in *Tahoe-Sierra* are best analyzed within the framework which the Court established in *Penn Central Transportation Company v. City of New York*.[9]

Penn Central involved a decision by the New York City Landmarks Preservation Commission not to approve plans for the construction of a 50-story office building over Grand Central Terminal. Grand Central had been designated a "landmark" under New York City's Landmarks Preservation Law which, in effect, prohibited the alteration of buildings and spaces designated a "landmark" or a "landmark site."

The *Penn Central* petitioners, the owner of the terminal property, brought a proceeding to enjoin the application of the Landmarks Preservation Law arguing that its application constituted a "taking" of their property (in this case the air rights over Grand Central Terminal) without just compensation and had arbitrarily deprived them of their property without due process. Trial Term granted the injunctive relief sought by petitioners; the Appellate Division reversed and the New York Court of Appeals upheld the Appellate Division. Ultimately, the United States Supreme Court upheld the Court of Appeals, holding that the property owners could not establish a taking merely by showing that they had been denied the right to exploit the "super-adjacent air space" irrespective of the potential value and uses left to the remainder of the parcel.

It should be noted that in *Penn Central* the fundamental question of whether the Landmarks Preservation Law was a proper exercise of the police power, that is, whether it furthered the health, safety and wel-

fare of the community as applied to *Penn Central*, was not in dispute. The petitioners conceded that point.

What was in dispute, and central to petitioners' argument, was their position that the air rights should be treated as a distinct property which had been rendered entirely valueless by the regulation in question. The Supreme Court noted that under the developing law of takings jurisprudence, the law does not divide a single parcel into discrete segments and then attempt to determine whether rights in a particular segment have been entirely abrogated. To the contrary, the property is looked at as a whole and the determination of whether the administrative restriction on the use of any portion of that property constitutes a compensable taking is a factual one, relating, in part, to whether the taking of that portion of the property frustrates the owner's legitimate investment-backed expectations with respect to the *entire* property.

Stating the issue in the language of the "numerator-denominator" problem, the petitioners in *Penn Central* argued that the air rights, standing alone, were the property in question (the denominator) so that the taking of the air rights (which then also became the numerator) resulted in a taking of the entire property. The Court rejected this argument, and in effect defined the denominator as the entire Grand Central Terminal property, including the air rights, so that the taking of the air rights alone created a taking of less than all of the property in question. The Court noted that the right to use the existing Grand Central Terminal had not been diminished by the decision of the Landmarks Preservation Commission; that some portion of the air rights remain usable since the Landmarks Preservation Commission had ruled only on a 50-story building but did not foreclose the possibility that something less than a 50-story building could be built; and noted specifically that under applicable law the air rights could be transferred to at least eight other nearby parcels such that the value of those rights was retained. On those facts, the Supreme Court refused to find a compensable taking in the decision of the Landmarks Preservation Commission.

Conclusion

Returning to *Tahoe-Sierra*, we now know what the case does not do: It does not establish a *per se* rule that any moratorium is a categorical taking. Similarly, it does not establish a rule that a moratorium is not a taking. What *Tahoe-Sierra* does is return to an inquiry relating to the facts of the individual case and to the separate aspects of those facts, such as: whether the moratorium is, in the context of its purported purpose, a legitimate exercise of the police power in that it furthers the health, safety and welfare of the community; whether it is reasonable in duration (directly proportional) to the public purpose sought to be accomplished; and whether the nature and degree of its effect on the property owner seeking compensation is such as to frustrate the property owner's legitimate investment-backed expectations as applied to the whole property. In terms of the "numerator-denominator" problem, it would appear that the Supreme Court has adopted the theory that the time dimension is to be included in the denominator with the spacial and functional dimension of the property. That said, it would appear that, on the basis of *Tahoe-Sierra*, a regulation which impacts only the temporal dimension of a parcel of real property can never be a *per se* taking if the spacial and functional dimensions are ultimately left intact. That analysis becomes absurd, however, as the length of the moratorium increases and the remainder becomes less and less valuable. Unfortunately, the Supreme Court declines to tell us how long is too long and *Tahoe-Sierra*, standing alone, gives little guidance to the determination of that question. For the time being, to paraphrase Art Buchwald (who, I believe, was paraphrasing Abraham Lincoln) the Supreme Court rule may be expressed as follows: You can take some of the property all of the time or all of the property some of the time, but you can't take all of the property for all time.

Endnotes

1. 535 U.S. 302 (2002).
2. The first clause of the Fifth Amendment, often referred to as the "Just Compensation Clause" provides: " . . . nor shall private property be taken for public use without just compensation." The "just compensation clause" of the Fifth Amendment is made applicable to the states and, consequently, their subdivisions, by the due process clause of the Fourteenth Amendment.
3. 505 U.S. 1003 (1992).
4. 438 U.S. 104 (1978).
5. 447 U.S. 255 (1980). Other questions decided by the lower court were appealed by petitioners. In fact, the total package of Lake Tahoe litigation included four separate District Court cases. The only issue before the Supreme Court in this case related to the moratoria, and specifically to the narrow question of whether the moratoria constituted a "categorical" taking under the rule of *Lucas*.
6. 533 U.S. 606 (2001).
7. *Armstrong v. United States,* 364 U.S. 40, 49 (1960).
8. *Tahoe-Sierra,* 535 U.S. at 320-321.
9. 438 U.S. 104 (1978).

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A Primer on Industrial Development Agencies, Local Development Corporations and Empire State Development

By Edwin J. Kelley, Jr.

I. Introduction

A variety of public benefit corporations and not-for-profit corporations may be established on behalf of municipalities to facilitate development projects and promote economic development within a municipality. Industrial Development Agencies, local development corporations and the Urban Development Corporation, better known as Empire State Development, are the most common forms of public benefit corporations and not-for-profit corporations that are utilized by municipalities to foster and encourage economic development activities.

II. Industrial Development Agencies

A. Purposes

First authorized in 1969, today there are more than 100 Industrial Development Agencies (IDAs) that have been established on behalf of counties, cities, towns and villages throughout New York State. IDAs are governed by the provisions of Title 1 of General Municipal Law article 18-A (GML).[1] The general purposes of IDAs are to prevent unemployment and economic deterioration by promoting, encouraging and developing various types of facilities including industrial, manufacturing, warehousing, commercial, recreation, research, civic and pollution control facilities. Each IDA is formed by a special act of the state legislature.

B. Types of IDA Financial Assistance

IDAs customarily provide four forms of financial assistance: issuance of tax-exempt or taxable bonds, real estate tax abatement, sales tax exemptions and an exemption from the mortgage recording tax.

1. Bonds

Section 864 of the GML authorizes IDAs to issue bonds to finance costs of eligible "projects." Interest on bonds issued by IDAs is exempt from New York State taxation and may also be excludable from gross income for federal income tax purposes. The Internal Revenue Code provides restrictions on the types of facilities for which IDAs may issue tax-exempt bonds. Tax-exempt bonds may be issued for projects on behalf of hospitals, universities and other not-for-profit corporations that qualify as section 501(c)(3) organizations under the Internal Revenue Code, and to finance certain manufacturing facilities, retirement facilities, solid waste disposal facilities and multi-family housing facilities. For hospitals and universities, IDAs may be an alternative to having the Dormitory Authority of the State of New York issue tax-exempt bonds for hospital and university projects.

2. Payment-in-Lieu of Tax Agreements

Real property owned by an IDA, or under the jurisdiction and control of the IDA, is exempt from real property taxes but is not exempt from special assessments and special district taxes.[2] Customarily, IDAs require project occupants to enter into so-called payment-in-lieu of tax agreements ("PILOT Agreements") requiring the project occupant to make certain payments in lieu of real property taxes. Importantly, IDAs may be used to obtain a real estate tax abatement which would not otherwise be available by law. For example, although a municipality or school district may have opted out of Real Property Tax Law § 485-b (initial 50% abatement phased out over 10 years), nonetheless the IDA can provide the equivalent of a section 485-b exemption for taxes that would otherwise be paid to the municipality or school district. More importantly, an IDA is authorized to implement a PILOT Agreement that provides whatever amount of tax abatement the IDA feels is appropriate or necessary to a project. Thus, for example, an IDA can exempt a project completely from paying taxes. Alternatively, PILOT payments can be based on the revenues derived from a project.

If the proposed PILOT Agreement deviates from the IDA's uniform tax exemption policy, the IDA is required to notify the affected tax jurisdictions of the deviation and it must take comments from the tax jurisdictions. The IDA is not, however, required to obtain the local tax jurisdictions' consent to the PILOT Agreement terms.

Payments in lieu of taxes qualify as "eligible real property taxes" for which a Qualified Empire Zone Enterprise may obtain up to a 100% New York State tax credit or refund. To qualify, PILOT Agreements executed or amended on or after January 1, 2001 must be approved by both the Department of Economic Development and the Office of Real Property Services.

3. Sales Taxes

One of the benefits of financing a facility through an IDA is that materials purchased by or in the name of an IDA and incorporated into real property owned by

the IDA are exempt from sales taxes. Tangible personal property purchased by a company is also exempt from sales tax as long as the property becomes property of the IDA. Purchases or rentals of materials by contractors necessary for completion of an IDA project are also exempt if the contractor has been appointed the agent of the IDA.

Example of Savings

Typically, approximately 40% of the cost of a construction contract is attributable to building materials—lumber, steel, concrete, etc. Contractors are required to pay sales tax on building materials. For a $10 million construction contract, an IDA's sales tax exemption can save approximately $280,000 in a county having a 7% sales tax rate.

4. Mortgage Recording Tax

In New York State there is a mortgage recording tax of .75-1% based on the principal debt obligation secured by a mortgage. Mortgages from IDAs are exempt from the mortgage recording tax.

C. Typical Structure for IDA Transactions

Two structures are typically used for an IDA financing. The first involves the issuance of bonds by an IDA on behalf of a company. The second involves only a transfer of title to a project by a company to the IDA and the use of conventional financing by the company.

1. IDA Bond Issue

If an IDA will issue bonds for a project, the company undertaking the IDA-sponsored project will deed or lease to the IDA the property on which the project will take place. The IDA will then sell or lease the property back to the company. The IDA lease or installment sale agreement will obligate the company to pay the debt service on the IDA's bonds.

Principal documents for a bond issue generally include a lease or installment sale agreement, a trust indenture or agency agreement, a guarantee agreement and a mortgage and security agreement. These documents are customarily prepared by the IDA's bond counsel.

The trust indenture or agency agreement is the agreement between the IDA and either the purchaser of the IDA bonds or a trustee on behalf of the holders of the IDA bonds, whereby special accounts are created to pay the cost of a company's project. Upon submission of requisitions, together with the required accompanying documentation, a company will be entitled to draw down proceeds from the sale of the IDA bonds held by the trustee or the bond purchaser to pay for costs of the project. The IDA will agree to pay interest on sums advanced and to make scheduled principal and interest payments. As part of the trust indenture or agency agreement the IDA will assign all of the lease or installment sale payments from the company directly to the trustee or bondholder to pay debt service on the IDA bonds.

Typically, an IDA will lease or sell bond-financed property to the company which, as agent of the IDA, will construct or acquire the property with the proceeds of the IDA's bonds. The lease or installment sale agreement will require the company to make payments equal to the debt service on the IDA's bonds, complete the acquisition, construction, equipping of the project and to maintain and insure the project. Title to the property will be conveyed to the company after the bonds are paid in a lease transaction and upon completion of construction in a sale transaction. The lease or installment sale agreement prohibits the IDA from transferring or encumbering the project without the company's prior written consent.

For tax purposes, a company, and not an IDA, is treated as the owner of facilities financed through an IDA. Accordingly, the company is entitled to all depreciation deductions. For IDA projects in an Empire Zone, a company may also receive all of the benefits made available to Qualified Empire Zone Enterprises.

2. Straight Lease Transaction

For projects in which an IDA does not issue tax-exempt bonds an IDA may enter into a so-called "straight lease" transaction. In a straight lease transaction, a company will transfer title to real property on which a project is to be constructed to the IDA and the IDA will then lease or sell the property back to the company.

As in a bond financing, the lease or installment sale agreement will require the company to complete the acquisition, construction and equipping of the project and to maintain and insure the project. The lease or installment sale agreement will provide that title to all the property incorporated in the project or used in connection with the operation of the project, will vest in the IDA. The company, however, will be obligated to use its funds, and not the IDA's funds, to complete the project.

Title to the property will be transferred to the company upon termination of the lease or upon completion of construction in a sale transaction for $1.00. Alternatively, the company will have the option at any time to acquire the property from the IDA for $1.00.

In a straight lease transaction, a company can use conventional bank financing to finance the costs of the project. The IDA would join in the mortgage for purposes of perfecting the mortgage and to exempt the

mortgage from the mortgage recording tax. In straight lease transactions companies may obtain a PILOT Agreement, sales tax savings and avoid the mortgage recording tax on financings obtained to complete a project.

D. Projects Eligible for IDA Participation

1. General Rule

IDAs may only provide financial assistance for facilities which qualify as "projects" under GML § 854(4). Additionally, IDAs may not provide financial assistance for any project where a project applicant has an agreement to subsequently contract with a municipality for the lease or purchase of the project.

Facilities which qualify as projects include facilities suitable for manufacturing, warehousing, research, commercial or industrial purposes, industrial pollution control facilities, recreation facilities, educational or cultural facilities, horse racing facilities, railroad facilities, continuing care retirement communities and civic facilities.

2. Civic Facilities

Civic facilities are any facilities which are to be owned or occupied by a not-for-profit corporation organized under the laws of the State of New York or authorized to conduct activities in the State of New York. Civic facilities exclude convention centers, housing facilities, dormitories for educational institutions or roads, buildings, water systems, sewer systems, or any public facility for use by any municipality in the performance of its governmental functions or medical facilities which are predominantly used for delivery of medical services, except civic facilities may include rehabilitation centers and hospices.

Notwithstanding the general restrictions on civic facilities above, civic facilities may include (a) dormitories for educational institutions; (b) hospitals and other facilities defined in article 28 of the Public Health Law (hospitals, nursing homes, etc.); and (c) housing facilities designed to be occupied by individuals 60 years of age or older, provided the cost of any such IDA civic facility project may not exceed $20 million.

3. Continuing Care Retirement Communities

IDAs may finance continuing care retirement communities (CCRC) for which a Certificate of Authority pursuant to article 46 of the Public Health Law is issued. Issuance of bonds by an IDA for a CCRC must be approved by the Continuing Care Retirement Community Counsel pursuant to Public Health Law § 4604-a, and the sponsor must be a not-for-profit corporation which qualifies as an organization described in Internal Revenue Code § 501(c)(3). A CCRC does not include any facility for which the Certificate of Authority is granted upon application of a state or local government.

4. Recreation Facilities

Recreation facilities include any facility for the use of the general public as spectators or participation in recreation activities. Examples include facilities for skiing, golf, swimming, tennis, ice skating or ice hockey.

E. Prerequisites for IDA Financial Assistance

1. Environmental Matters—SEQRA Compliance

The State Environmental Quality Review Act (SEQRA) requires an IDA to make a determination of the environmental impact of a project and if negative, the steps to be taken to reduce that impact, before taking any action towards a project. SEQRA must be considered at the time an application for financial assistance is considered by an IDA. We have case law that tells us that any proceedings taken prior to resolution of the SEQRA question are invalid, null and void. Accordingly, no resolution for IDA financial assistance should be adopted until the SEQRA process is completed.

2. The Public Hearing

Section 859-a of the GML requires that, prior to granting any financial assistance of more than $100,000 to any project, an IDA must (a) adopt a resolution describing the project and the financial assistance contemplated by the IDA with respect thereto, (b) determine if the financial assistance will be consistent with the IDA's uniform tax exemption policy, (c) hold a public hearing with respect to such project in the city, town or village where the project will be located, (d) give 30 days published notice of the public hearing, and (e) mail notice of the public hearing, at least 30 days prior to the date of such public hearing, to the chief executive officer of each municipality and school district in which a project will be located.

3. Deviations from a Uniform Tax Exemption Policy

If an IDA is proposing to deviate from its uniform tax exemption policy, the IDA must state its reasons for the deviation in writing and notify the affected taxing jurisdictions. This includes each municipality and school district in which a project will be located. Notice to the affected tax jurisdictions must be given at least 30 days prior to the meeting of the IDA at which the proposed deviation will be considered. Prior to taking final action at such meeting, the IDA must review and respond to any correspondence received from any affected tax jurisdiction, and must allow any representative of an affected tax jurisdiction present at such meeting to address the IDA regarding the proposed deviation.

F. Limitations on IDA Facilities

IDAs are prohibited from providing financial assistance for certain types of facilities.

1. Civic Facilities

The total costs of certain civic facilities undertaken by IDAs for non-profit entities may not exceed $20 million. This includes dormitories for educational institutions, nursing homes and medical facilities.

2. Continuing Care Retirement Communities

Only county IDAs may provide financial assistance for a CCRC. Specific state approvals are also required before an IDA may provide financial assistance for a CCRC.

3. Municipal Facilities

IDAs may not be used as a conduit by a municipality to avoid the requirements of the Local Finance Law. IDAs may generally not finance roads, buildings, water systems, sewer systems or any public facilities for use by a municipality in the performance of its public functions.

4. Retail Facilities

a. General Prohibition

Section 862(2)(a) of the GML provides restrictions on the financial assistance which IDAs can provide to retail facilities. Retail facilities for this purpose include facilities or property primarily used in the making of retail sales to customers who personally visit such facilities if the cost of such facilities constitutes more than one-third of the total project cost. Tourism destination projects and projects operated by not-for-profit corporations are not subject to this retail prohibition.

b. Exceptions

IDAs may provide financial assistance to retail projects where (a) the project occupant would, but for the assistance provided by the IDA, locate the related jobs outside of New York State; or (b) the predominant purpose of the project is to make available goods or services which would, but for the project, not be reasonably accessible to the residents of the city, town or village within which the project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services, or (c) the project is located in a highly distressed area.

c. Highly Distressed Area

Highly distressed areas are defined to include census tracts or block numbering areas or areas of a census tract or block numbering area contiguous thereto which, according to the most recent census data available, has (i) a poverty rate of at least 20% for the year or at least 20% of the households receive public assistance, (ii) and an unemployment rate of at least 1.25 times the statewide unemployment rate, or (iii) certain areas within New York City, or areas designated as an Empire Zone pursuant to article 18-B of the GML.

5. Anti-Piracy

IDAs may not provide financial assistance for the purpose of preventing the establishment of an industrial or manufacturing plant, nor provide any financial assistance for any project if the completion of the project would result in the removal of a facility or plant of the project occupant from one area of the state to another area of the state, or in the abandonment of one or more plants or facilities of the project occupant located within the state. This anti-piracy prohibition on providing financial assistance does not apply if a project is reasonably necessary to discourage a project occupant from removing a plant or facility to a location outside of New York State or is reasonably necessary to preserve the competitive position of the project occupant in its respective industry.

G. Public Bidding/Wicks Law/Employment Opportunities

1. Public Bidding

The public bidding provisions of the General Municipal Law, including GML § 103, do not apply to IDA projects.

2. Wicks Law/Prevailing Wage

IDA projects are not subject to the requirement of paying prevailing wages or subject to the provisions of GML § 101, which requires multiple prime contracts for construction of public works projects.

3. Employment Opportunities

Except to the extent restricted by collective bargaining agreements, companies using IDA financial assistance are required to list new employment opportunities with the New York State Department of Labor Community Services Division, and with the administrative entity of the service delivery area created by the federal Job Training Partnership Act.

H. Miscellaneous Requirements

1. Sales Tax Appointment

GML § 874(9) requires an IDA, within 30 days after an IDA designates an agent for sales tax purposes, to file a statement identifying the agent by name and providing certain other information, with the New York State Department of Taxation and Finance. Form ST-60 is used for this purpose.

2. Annual Filings

Agents of an IDA (i.e., companies benefiting from the IDA sales tax exemption) must file an annual report

with the New York State Department of Taxation and Finance detailing the value of sales tax exemptions claimed by such agents. The penalty for failure to file is possible removal of the authorization to act as an agent of the IDA. Form ST-340 is used for this purpose.

III. Local Development Corporations

A. Purposes

Local Development Corporations (LDCs) are not-for-profit corporations incorporated under Not-for-Profit Corporation Law § 1411 (NPCL). LDCs may be formed for purposes of (1) relieving and reducing unemployment; (2) promoting and providing for additional maximum employment; (3) bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for jobs; (4) carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to a community or area or by encouraging the development of, or retention of, an industry in the community or area; and (5) lessening the burdens of government and acting in the public interest. Any one or more counties, cities, towns or villages of the state of New York may cause an LDC to be incorporated for such purposes.

B. Agency Role

LDCs often act as an agent between local governments and the private sector. LDCs have been determined by at least one court to be a public agency for purposes of the New York State Freedom of Information Law (FOIL) and subject to the disclosure requirement of FOIL.[3]

C. Powers

LDCs have broad powers including the following: (1) to construct, acquire, rehabilitate and improve for use by others industrial and manufacturing plants in the territory in which their operations are principally to be conducted; (2) to assist financially in such construction, acquisition, rehabilitation and improvement; (3) to maintain such plants for others in such territories; (4) to disseminate information and furnish advice, technical assistance and liaison with federal, state and local authorities with respect thereto; (5) to acquire property by lease, purchase, gift or bequest; (6) to borrow money and issue negotiable bonds, notes and other obligations therefor; (7) to sell, lease, mortgage or otherwise dispose of or encumber any such plants or any of its real or personal property or interest therein without approval of a court; (8) to enter into loan agreements with the New York Job Development Authority; and (9) to foster and encourage the location or expansion of industrial or manufacturing plants in the territory in which the operations of the LDC are principally to be conducted.

D. Commercial Projects

LDCs may assist commercial projects and are not limited to manufacturing and industrial plants.[4]

E. Purchase or Lease of Real Property Owned By a Municipality

An LDC may acquire property from a local government by sale or lease without appraisal or public bidding. A public hearing by the local legislative body is required by statute prior to the sale or lease.[5]

F. Certificate of Incorporation

NPCL § 1411 requires that specific information be included in the Certificate of Incorporation for an LDC. Required items include statements to the effect that all income and earnings will be used exclusively for the corporate purposes of the LDC or allowed to accrue and then be paid to the New York Job Development Authority, no part of the income of the LDC may be distributed or used for the benefit of any member or private party of interest, and if the LDC will accept a loan from the New York Job Development Authority, that the LDC will be dissolved pursuant to NPCL § 1411(g).

G. Compatibility of Office

The duties and responsibilities of the officers and directors of an LDC have been found to be separate, distinct and independent from those of officials of municipalities. As a result they are not considered to be incompatible.[6]

H. Conduit for Economic Development

Municipalities are generally prohibited from establishing a revolving loan fund to foster economic development either directly or indirectly. LDCs have been established for this purpose and to directly receive federal and state grants intended for economic development purposes.

I. Issuance of Tax-Exempt Bonds

For federal tax purposes, LDCs which are organized for purposes of lessening the burdens of government may issue tax-exempt bonds. LDCs are deemed for federal tax purposes to be acting on behalf of the local governmental unit. Most recently, LDCs have been formed by counties seeking to issue so-called "tobacco bonds."

IV. Empire State Development[7]

A. UDC/JDA Consolidation

Empire State Development (ESD) is the parent organization for New York State's economic development entities—Empire State Development Corporation (formerly known as the Urban Development Corpora-

tion) and the Job Development Authority. The Urban Development Corporation (UDC) and the Job Development Authority (JDA) were consolidated in 1995 as ESD.

B. Mission

The mission of ESD is to create jobs and encourage economic prosperity in New York State. To do this, ESD can provide businesses with a wide range of assistance from financial incentives to technical expertise.

C. Financial Assistance and Other Incentives for Businesses Provided by ESD

1. Financial Incentives

ESD provides financial assistance for various purposes including acquisition of land and buildings, acquisition of machinery and equipment, renovation of buildings, construction or improvement of infrastructure required for facilities, working capital, employee training and productivity enhancement.

2. Forms of ESD Financial Assistance

ESD provides various forms of financial assistance. ESD may provide direct loans and/or grants to businesses for a portion of eligible costs. ESD may also provide interest rate subsidies in the form of a grant or a bank deposit with a lending institution to reduce the cost of the borrowing for a company's project. ESD may also provide loans and grants for working capital in specialized situations. For projects which require infrastructure improvements, ESD may provide a loan and/or grant for a portion of the cost of the needed infrastructure.

3. Type of Projects Eligible for ESD Assistance

ESD can provide assistance to manufacturers, service providers, warehouses and distributors, research and development companies, tourism/destination businesses and minority- and women-owned businesses.

4. Training Assistance

ESD offers training assistance to businesses to help companies bring its workforce up to the highest standards required to be competitive. ESD may provide up to one-half the cost of any training project that creates or retains jobs. ESD may provide employers in the manufacturing and non-retail service sectors, either directly or through industry groups or associations, alliances of employers, government agencies, not-for-profit private industry councils, or workforce investment boards.

5. ESD Productivity Enhancement

ESD may provide assistance to companies to identify, develop and implement management and production processes to enhance efficiency, expand market share and develop job growth through ESD's Manufacturing Extension Program and Industrial Effectiveness Grants. ESD may provide grants of up to $60,000 to private consultants to identify, develop and implement improved management and production processes for businesses to expand market share and promote growth or retention within New York State.

6. Minority- and Women-Owned Business Development

ESD provides assistance to minority- and women-owned businesses in various forms including help with business plans, access to capital and certification to qualified minority- and women-owned businesses for contracts set aside for minority- and women-owned businesses.

7. ESD Bond Program

ESD oversees the issuance of debt under programs of both UDC and the JDA. UDC was used traditionally to provide bond issuance for various New York State programs, including correctional and youth facilities, sports stadiums, convention centers and various educational and civic facilities. The JDA issues bonds to finance lending programs for businesses to promote job growth by providing loans to assist New York companies to build and expand facilities and acquire machinery and equipment.

Endnotes

1. GML §§ 850-888.
2. GML § 874; Real Property Tax Law § 412-a.
3. *See Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991). (The Buffalo Enterprise Development Corp. was formed for purposes of lessening the burdens of government and created by the City of Buffalo to attract investment and similar growth in the City of Buffalo.)
4. *See Tribecca Community Association, Inc. v. New York State Urban Development Corporation*, 200 A.D.2d 536, 607 N.Y.S.2d 18 (1st Dep't 1994). (LDC's participation in a commercial project for a ten-story office tower to house commodities exchanges determined to be within LDC's purposes).
5. *See* NPCL § 1411(d)(3).
6. *See* Attorney General Informal Opinion 98-23 (Position of town attorney and director of LDC found to be compatible).
7. <http://www.empire.state.ny.us>.

Mr. Kelley is a partner in the firm of Bond, Schoeneck & King, LLP, Syracuse, New York. He regularly works with municipalities, industrial development agencies and local development corporations in the development of commercial, industrial and civic projects.

For Your Information

Municipal Formbook Being Supplemented

Herbert A. Kline, past chair of the Municipal Law Section, is in the process of preparing a supplement to the *New York Municipal Formbook* published by the New York State Bar Association. This supplement will contain over 100 new forms to accompany the more than 725 forms that are in the current Second Edition, published in 2001.

Most municipal attorneys are familiar with this resource, which contains forms for such areas of practice as zoning, municipal litigation, municipal finance, labor and employment law disputes, building code, health and benefit plans, special districts, highway services and purchasing.

Herb would be delighted to receive any unique forms that you may have prepared for possible inclusion, with credit to the preparer. Here is your opportunity to save our fellow attorneys (particularly younger attorneys just starting their municipal practice) from having to "reinvent the wheel" in creating the documents needed in their practice with your own name prominently monumented on that form which you worked so hard to produce and are so proud of.

Please either e-mail (HerbKline@pearislawfirm.com), fax (607-773-0090) or mail your contributions to Herbert A. Kline, Esq., Pearis, Kline, Barber & Schaewe, LLP, P.O. Box 1864, Binghamton, New York 13902, on or before July 31, 2003.

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