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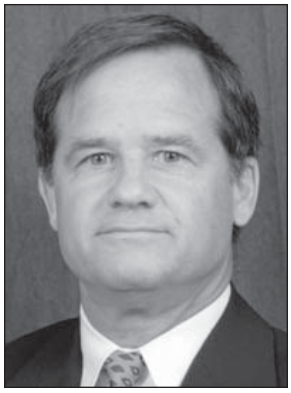
A Message from the Chair



Robert B. Koegel

This is my last message from the chair. Allow me to indulge in some observations about our Section over the last two years.

In the face of stiff competition from lower cost Bar Associations and private purveyors of CLE credits, as well as tough economic times, our Section membership continues to grow. While the growth is moderate, it is steady, and I'm confident, in light of the factors described below, it will continue. I'm not enamored with benchmarking membership growth for the sake of growth alone, even if such competition appears to be in the chair's inherent job responsibility. But to the extent growing membership reflects attorney interest in, respect for, and commitment to our Bar Association, then I'm all in. We are growing, we can do better, and we will.

Our Bar Association statistics indicate that our Section member practitioners are generally older, white, and male. We don't know whether this demographic profile is accurate for all attorneys practicing municipal law who are not members of our State Bar Association and this Section, and I suspect the cohort of non-NYSBA municipal law attorneys is more diverse.

It's worth noting that our Section's Executive Committee, which plans and carries out the business of the Section, is more diverse than our Section membership in terms of age and gender, if not race. But there is a general sense that we need to recruit more Section leaders, especially but not exclusively leaders with more diverse backgrounds, to reflect the perspectives and promote the interests of a more diverse membership. To this end, as reported in my last message from the chair, we have amended our Section bylaws to increase the number of Executive Committee members. We are actively interviewing candidates interested in being members of our Executive Committee and chairs of our committees, and we have accepted several. If you are interested in getting the most out of your membership, I invite you to contact me or any other Section officer listed on the back page of this publication. The Section programs you attend, the Section articles you read, the Section people you meet and get to know, all reflect work done by Section leaders. We thank all of those members who have given of their time to be leaders for the benefit of all, and we look forward to new leaders joining with the old.

Bar activities provide many direct and incidental public benefits, but for me, the primary purpose of a bar association is to learn from other lawyers and

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get to know them. In this regard, there is nothing like attending bar programs and volunteering for bar committee work to enjoy this salutary benefit. Still, with well over 1,000 members in our Section, it's impossible to meet, let alone converse, with all of them. Enter the Internet. As I have said over and over, our Section's list-serve is working great. Almost every day, Section members are posting interesting legal questions and getting thoughtful legal answers from their colleagues. This development shows no signs of waning, and I can only extol all who are using this Section resource and urge others to get started. At the risk of doing anything to quell this robust and responsible use of the Internet, I would like to see if we could get the same kind of Internet response from Section members for Section business matters, such as topics, speakers, and locations for Section presentations. I tried this once, and it fell flat. I'm sure there's a better way to do this, and I'm sure we'll get there with it.

Our annual Fall and January Section meeting presentations continue to be informative and thought-provoking. They will stay that way so long as there are volunteers, new and old, willing to dedicate the time to select the topics, find the speakers, and oversee the presentation of their outlines.

Our Section publication, the *Municipal Lawyer*, continues to publish excellent articles on various and sundry topics of interest to our Section members. We are always interested in new writers with new material.

For several reasons, our Section's participation in statewide, traveling CLE programs has atrophied over the last few years. With some structural changes and organizational changes, we may be able and willing to renew that interest.

Like other Sections of our State Bar Association, our Section comments on proposed state legislation and participates in task forces which write reports encouraging legislative responses to social issues. Where we have felt that certain proposed state legislation will affect municipal law constituencies in concrete ways, we have endeavored to make our objections or support known. We can do more here. Our Section's participation in task force reports has been particularly laudable. For example, the chair and one-quarter of the entire state bar task force on the Supreme Court's seminal eminent domain case, *Kelo v. City of New London*, were our Section's members. I'm sure we will continue to excel in this area.

Section committees provide an opportunity for attorneys with a specific area of practice concentration or interest to get together with attorneys of similar background or interest, to write for our publication, to propose topics or participate as speakers for our seminars, and to become acquainted with Executive Committee business. Our committee chairs have done an excellent job in these respects. However, we have been thin in our committee ranks. Again, we are setting in place procedures for growing our committee membership and increasing their activities. If you are not involved with the Section other than being a member and attending its programs, this is a great place to start. Check out the committees near the last page of this publication, or contact me or any other Section officer about committee participation.

In June 2009, Patricia Salkin, Associate Dean and Director of the Governmental Law Center of Albany Law School, took over for me as Chair of our Section. For those of you who know her, you know what a great job she will do. For those of you who don't, she's who they had in mind for the expression: If you want to get something done, ask the busiest person to do it. Our Section couldn't be in better hands.

Although this may not be the best forum for this remark, I will take this opportunity to thank one special person of the State Bar Association staff. That person is, of course, Linda Castilla. Whatever I'm responsible for, Linda makes sure it is done. Linda anticipates the task at hand, does what she can for it, makes sure I do what I can for it without antagonizing me, and stays through the job until it is done. Linda has incredible institutional memory and even more importantly, excellent judgment about people and circumstances. She is always cheerful and never gets flustered. I will miss her.

See you all at our joint Fall meeting with the Environmental Law Section on the October 23rd weekend in Canandaigua, New York.

Robert Koegel

From the Editor

The Municipal Briefs column of the Summer 2008 issue of the *Municipal Lawyer* discussed an Appellate Division ruling that held that (a) alienation of surplus municipal property used for approximately fifty (50) years as a public parking lot was not constrained by the public trust doctrine; and (b) the financing of the sale or lease of such property for private commercial use by taking back a purchase money mortgage violated the State Constitution's Gift or Loan clause.[1] The Court of Appeals however, has now reversed the second part of the Appellate Division's ruling and validated the use of the purchase money mortgage to consummate the transaction.[2]

Here, the Village of Valley Stream sold municipal property to a private entity for $275,000.00. Under the terms of the purchase agreement, no money was paid at closing, the purchase was to be paid over fifteen (15) years at a five percent (5%) interest rate and the deferred payments were secured by a mortgage taken by the Village on the property.

A civic association and several residents commenced a lawsuit to block the sale of the property arguing, among other things, that the transaction violated Article VIII, Section 1 on the New York State Constitution, which provides that no municipality "shall give or loan any money or property to or in aid of any individual, or private organization or association or private undertaking. . . ." The Appellate Division, Second Department, agreed that the transaction was a "'loan' to a private entity barred by the state constitution."[3]

Reversing the Appellate Division, the Court of Appeals cited its prior ruling in *Mandolino v. Fribourg*,[4] made in the context of the usury laws, that a purchase money mortgage is not a loan. Finding the rationale underlying its decision in *Mandolino* equally applicable in this case, the Court opined:

> "A contract which provides for [payment of interest] . . . upon a deferred payment . . . constitutes the consideration for the sale . . ." (id. at 151) and such a transaction is not the type contemplated by the Gift or Loan clause (*see Sun Print and Publ Assn v. Mayor of the City of New York*, 152 N.Y. 257, 268-269 [1897]).[5]

Given that the Village did not loan its money or property to the purchaser, the deferred payment plan it agreed to, and the mortgage taken back by the Village as security for the deferred payments, did not constitute an unconstitutional loan.

The Gift or Loan Clause is also the focus of an article by Jessie Beller, Assistant Counsel with the New York City Conflicts of Interest Board. Mr. Beller examines the "public purpose" requirement for municipal expenditures and how the use of municipal resources for private purposes violates the Gift or Loan Clause.

Constitutional issues are also at the heart of two other articles in this issue of the *Municipal Lawyer*. Richard Briffault, Joseph P. Chamberlain Professor of Legislation at Columbia Law School, analyzes the constitutional and doctrinal framework supporting municipal home rule in New York. John Cappello of Jacobowitz and Gubits, LLP discusses a recent appellate decision striking down, as unconstitutional exclusionary zoning, a town's comprehensive plan and implementing zoning laws removing all multi-family housing from the municipality.

In their quarterly review of significant land use and environmental law cases, Henry Hocherman and Noelle Crisalli of Hocherman Tortorella and Wekstein, LLP address, among other issues, the statutory obligation to adopt a negative declaration prior to holding a public hearing on a preliminary subdivision application, whether terrorism is an environmental impact that must be assessed under SEQRA, and the reasonableness of amortization periods for nonconforming uses.

Finally, in his last message as Chair of the Municipal Law Section, Bob Koegel highlights the Section's pursuit of greater diversity and the benefits available to members who participate in the Section's committees, programs and listserve. It has been my pleasure to work with Bob during his tenure as Chair and to witness the significant contributions he has made to our Section.

Lester D. Steinman

Endnotes

1. *In re 10 East Realty LLC v. Incorporated Village of Valley Stream*, 49 A.D.3d 764, 854 N.Y.S.2d 461 (2d Dep't 2008).
2. *In re 10 East Realty LLC v. Incorporated Village of Valley Stream*, 12 N.Y.3d 212 (2009).
3. *In re 10 East Realty LLC*, 49 A.D. 3d at 768, 852 N.Y.S.2d at 465.
4. *Mandolino v. Fribourg*, 23 N.Y.2d 145 (1968).
5. *In re 10 East Realty*, 12 N.Y.3d 212 (2009).

Home Rule in New York—Implied Preemption and Matters of State Concern[1]

By Richard Briffault

The Two Faces of Home Rule

Home rule has two dimensions. First, home rule enables local governments to undertake actions over a range of important issues without having to run to the state for specific authorization. Sometimes known as home rule *initiative*—or home rule as a "sword"—this aspect of home rule undoes Dillon's Rule and gives local governments power to engage in policy-making concerning local matters. Second, home rule also seeks to protect local government decisions concerning local actions from displacement by state law. Sometimes known as home rule *immunity*—or home rule as a "shield"—this component of home rule seeks to limit state power to interfere with local decision-making concerning local matters.

Although New York is often known as a weak home rule state, that assumption blurs the two facets of home rule. In fact, the state constitution gives local governments relatively broad initiative powers. Indeed, there are very few disputes and very few litigated cases concerning the scope of home rule initiative. Home rule immunity is something else again. Local protection from state displacement is limited and uncertain, and the subject of considerable litigation. The Court of Appeals has decided at least a half-dozen cases just in the current decade that deal with conflicts between state statutes and local measures, and the lower courts have addressed dozens of similar cases during the same period. The issues at stake include land use planning, consumer protection, taxation, government procurement and public employee relations. Interestingly, these cases often involve turf disputes *within* particular local governments, especially New York City, as well as conflicts between a city, town or county and the state.

Local governments enjoy relatively little protection from state interference, although they do occasionally prevail. The real issue in most cases of state-local conflict is whether there actually is a conflict. The main form of judicial protection for localities comes when the courts find that state and local laws are not actually in conflict. As a result, the judicial approach for determining whether a state and local law are in conflict is usually more important than the standard for determining who wins in case of conflict, as the winner is usually the state. Unfortunately, the Court of Appeals has failed to develop a consistent or predictable approach to this preemption question.

Home Rule as Initiative: The Constitutional Framework

The constitutional framework for these state-local disputes is provided by Article IX, as most recently and comprehensively amended in 1963. Article IX, Section 2 provides local governments—defined to include counties, cities, towns, and villages, but not school districts or other special districts (Art. IX, § 3(d)(2))—with the "power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs, or government" (Art. IX, § 2(c)(i)).

Local governments can also adopt and amend local laws "not inconsistent with the provisions of the constitution or any general law" with respect to 10 enumerated subject matter areas, whether or not they relate to local property, affairs or government; however, the Legislature has the power to restrict local adoption of laws not relating to local property, affairs or government (Art. IX, § 2(c)(ii)).

These subjects for local action include such matters as the powers, duties, qualifications, number, terms of office, compensation, hours of work, and welfare etc., of local officers and employees; the membership and composition of the local legislative body (in one of the very few instances in which the constitution distinguishes among local governments, this power is given to cities, towns, and villages, but not counties); the transaction of the local government's business; the management and use of the locality's highways, roads, streets, avenues and property; the wages, hours of work, and welfare of employees of local government contractors; and, in a catch-all provision that effectively conveys to local governments the police power: "the government, protection, order, conduct, safety, health, and well-being of persons or property therein" (Art. IX, § 2(c)(ii)(10)). Article IX further provides that "the rights, powers, privileges and immunities granted to local governments" "shall be liberally construed" (Art. IX, § 3).

Beyond the powers granted by the constitution itself Article IX, Section 2 provides that the Legislature "shall enact" a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration. A power granted in the statute of local governments can be repealed or reduced only by a law passed and approved by the Governor in each of two successive calendar years. (Art. IX, § 2(b)(1)). The Legislature may also confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article" and it may withdraw or restrict such additional powers. (Art. IX, § 2(b)(3)).

Home rule initiative is, thus, quite broad. To be sure, there are limits. Article IX, Section 3 specifically commits the maintenance, support, and administration of the public school system, the courts, and "matters other than the property, affairs or government of a local government" to the state. Other state constitutional provisions reserve control over taxation to the state and limit local borrowing and taxing. Still, within broad areas, home rule is virtually coextensive with the police power, subject to a handful of important limits.

Home Rule Immunity and Preemption

But in practice, local autonomy is often constrained because of the lack of any real home rule immunity. All of the constitutional grants of power to local government are subject to the condition that local action not be "*inconsistent* with the provisions of this constitution *or any general law" (*emphasis added). In other words, any local law that is inconsistent with a general state law—including local actions in the core area of local "property, affairs or government"—can be displaced—technically "preempted"—by a conflicting state law. The state constitution does not provide any substantive or subject matter protections for local measures. Home rule initiatives can, potentially, be entirely preempted by state laws.

In practice, whether a state law preempts local law turns on two constitutional terms: (i) whether the arguably preemptive state law is a "general law" or a "special law," and (ii) whether the state law is actually "inconsistent" with the local law or whether, instead, the two laws can operate without conflict.

General Laws and Special Laws

Decades before granting local governments home rule initiative power, the state constitution sought to provide local governments with a measure of immunity by limiting the ability of the Legislature to adopt laws targeted on one or a handful of local governments. The 1894 constitution divided cities into three classes based on population, provided that a special law is one that relates to less than all cities in a class, and then required that a special law relating to the property, affairs and government of a city had to be submitted to the city's mayor, who had 15 days to determine whether or not the city accepted it. If the city accepted the bill, it would be submitted to the Governor; if not, the Legislature would have to re-pass the bill before it could be submitted to the Governor. The mayor, in effect, had a "suspensory veto." The charter of the greater City of New York was passed over such a mayoral suspensory veto in 1897.

Over time the state constitution's protection against special laws was revised and strengthened. As most recently amended in 1963, a special law—now defined as one which "in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages" (Art. IX, § 3(d)(4))—relating to local property, affairs or government may be passed by the Legislature only (i) at the request of the local government (this is the so-called "home rule message") or (ii) for local governments other than New York City, on a message of necessity from the Governor and with the approval of two-thirds of each house of the Legislature (Art. IX, § 2(b)(2)).

The prohibition on the enactment of special state laws affecting local governments without a home rule message was most recently successfully invoked in 1996, when a unanimous Court of Appeals concluded that chapter 13 of the Laws of 1996, which eliminated New York City's exemption from the state's PERB procedure for the resolution of impasses in public employee collective bargaining negotiations, was a special law.[2] Chapter 13 applied only to New York City and not to the other local governments which had been similarly exempted from the state's PERB process and allowed to use their own local mini-PERBs. As the Court noted, under the new law "only New York City, among all units of local government throughout the State, is prohibited from providing for a local public employment relations board with jurisdiction over binding arbitration procedures when an impasse is reached in negotiations with its police force."[3] The collective bargaining process for the city and its police clearly related to the "property, affairs or government" of New York City. "Thus, there is little question but that chapter 13 . . . is a special law relating to New York City triggering the home rule procedural requirements of the Constitution."[4]

The Doctrine of "State Concern"

However, even the limited protection afforded by the constitutional prohibition on special laws without a home rule message (or, for localities other than New York City, a message of necessity and legislative supermajorities) has long been eroded by the state courts. Dating back to the 1920s, the Court of Appeals has held that a home rule message is not required for a special law affecting local property, affairs or government if the matter in question is also one of "state concern." As then-Chief Judge Benjamin Cardozo put it in the leading case of *Adler v. Deegan*,[5] a state may legislate by special law "if the subject be in a substantial degree a matter of State concern . . . though intermingled with it are concerns of the locality." In *Adler*, the Court upheld the state's adoption of a multiple dwelling code for New York City. Later cases have found that housing, local taxation, municipal sewers, planning and zoning, the protection of the Adirondack Park, aid to the Museum of Modern Art, and prohibitions on local residency requirements for municipal public employees are all of sufficiently substantial state concern to sustain the state's power to legislate concerning these matters by special law without either a home rule request or a legislative supermajority.

In the *PBA* case, the Court considered but rejected the argument that the law was supported by a substantial state concern. Although the PBA contended that the law could be supported by a state concern for local public safety, the Court found that neither the text of the statute nor the legislative history indicated a public safety purpose for the law. Instead, the legislative history focused on the goal of creating statewide uniformity with respect to impasse procedures for the police. But the statute bore "no reasonable relationship" to that goal since it continued to let other localities, including those in the New York metropolitan area, use their own mini-PERBs. As a result, chapter 13 of the Laws of 1996 became the rare special law not saved by the state concern doctrine.

The state, however, learned its lesson when it enacted chapter 641 of the Laws of 1998, which allowed the police and fire unions in any municipality with a local impasse resolution system to take their collective bargaining disputes to PERB. In *Patrolmen's Benevolent Ass'n v. City of New York* ("*PBA II*"),[6] the Court found that the law was still a special law even though it nominally applied statewide since only four localities (Nassau, Suffolk and Westchester counties in addition to New York City) had opted out of PERB coverage so "the actual effect . . . is a restriction targeted at these four localities."[7] But this time, the Legislature, in section 1 of the statute declared its interest in fostering "orderly resolution of collective bargaining disputes . . . to enhance public safety and prevent the loss or interruption of vital public services."[8] The Court agreed this is a substantial state concern which was "rationally served" by a uniform state impasse resolution procedure.

The state concern doctrine also played a pivotal role when the Court of Appeals in 2000 upheld the Legislature's abolition of the state law authorizing the application of the New York City income tax to nonresidents of New York City who were also state residents. When the state initially enacted this commuter income tax in 1966, it acted in response to a New York City home rule message. Similar home rule messages had been required by the Legislature in subsequent years whenever it voted to extend the tax. The 1999 amendment—which repealed the tax for New York State commuters and left it intact only for commuters from out of state—was adopted without a home rule message. The Court of Appeals agreed that the 1999 amendment was a special law,[9] because it related to the property, affairs or government of a single locality, but the Court concluded that it did not require a home rule message: "[I]t addresses a subject of substantial State concern and it bears a reasonable relationship to that concern."[10] The taxation of state residents is a matter of state concern. And the law "accomplishes the clearly expressed legislative objective of easing the burden on those State residents working in New York City but living outside the City limits. . . . We cannot think of a more direct way to ease the burden of a tax than to repeal it."[11]

Inconsistency and Preemption

With the constitution providing local governments absolutely no protection against inconsistent general laws, and the limited constitutional protection against special state laws undermined by the state concern doctrine, the only real home rule "immunity" local governments enjoy is the interstitial one that grows out the judicial interpretation of when a state law is "inconsistent" with a local one.

Some cases of inconsistency are relatively easy. State and local laws are inconsistent when they give conflicting commands such that both laws cannot be obeyed. This would occur if the state required motorists to drive on the right, while a city required driving on the left. A second, related easy case would be when a local law purports to legalize something that the state prohibits. The local law would be inconsistent with state law and preempted. A third case would arise if the state prohibited any local legislation with respect to a particular subject and a local government passes a law on that subject. Such a local law would be preempted by the state's "occupation of the field" which is the subject of that law.

Most preemption cases, however, are much less straightforward. The most difficult problems arise when the state regulates an area without explicitly barring additional local regulation and a local government enacts further regulation of the same activity or behavior. The state and local laws are not literally inconsistent if a regulated firm or individual can comply with both state and local laws simultaneously and the state has not expressly occupied the field. Nevertheless, the additional local regulation burdens activity permitted by the state. It can be argued—and the argument is frequently raised—that the additional local regulation is "inconsistent" with the asserted state policy of allowing activity that meets the state's requirements to go forward.

In the early case of *Wholesale Laundry Board of Trade, Inc. v. City of New York*,[12] the Court of Appeals held that New York City's local law setting a minimum wage of $1.25 per hour was in conflict with the state's $1.00 minimum wage. As the appellate division, in an opinion subsequently adopted by the Court of Appeals, put it, "[g]enerally speaking, local laws which do not prohibit what the State law permits nor allow what the State law forbids are not inconsistent. . . . However, where the extension of the principle of the State law by means of the local law results in a situation where what would be permissible under State law becomes a violation of the local law, the latter law is unauthorized."[13]

The effect of a *Wholesale Laundry* approach to the determination of whether state and local laws are in conflict is to narrow local law-making autonomy significantly. If any limited state prohibition is held to constitute an affirmative authorization of all conduct not prohibited, then, once the state has passed a law on a subject all local action that goes beyond mere duplication of the state would be preempted. Limited state regulation would be inconsistent with further local action. Given the widespread scope of state regulation this approach to conflicts would nullify home rule.

In subsequent decades, the Court of Appeals appeared to recognize the devastating effect of such an approach for home rule and has tended to reject a finding of outright conflict merely because a locality adopted a more extensive regulation than the state. Thus, in 1987, the Court of Appeals upheld New York City's ban on discrimination in certain private clubs even though such discrimination had been exempted from the anti-discrimination requirements of the state's human rights law.[14] Similarly, in *Council for Owner Occupied Housing, Inc v. Koch*,[15] New York City's requirements that the sponsor of a cooperative conversion establish a reserve fund for capital repairs and post notice of the building's housing code violations were sustained notwithstanding the argument that the state's law governing cooperative conversion did not include these rules and that since the city law would prohibit conversions that the state law would allow the city's law was "inconsistent" with the state's." The court found that the state Legislature's "silence on this issue should not be interpreted as an expression of intent by the legislature. To interpret a statute in that manner would vitiate the concept of home rule."[16]

Although a concern for home rule appears to be leading the courts to avoid the finding that more restrictive local laws automatically conflict with state regulation, the doctrine in this area is far from settled. Indeed, in its most recent cases, the Court of Appeals has sent somewhat inconsistent signals. In *DJL Restaurant Corp. v. City of New York*,[17] the Court concluded that the state's Alcoholic Beverage Control ("ABC") Law, which extensively regulates the sale of alcoholic beverages, did not preempt the application of New York City's Adult Zoning Resolution—which requires that so-called "adult" establishments be confined to the city's manufacturing and high density commercial districts—to businesses licensed under the ABC Law to dispense alcoholic beverages. Although the local law would have the effect of barring a state-licensed firm from doing business it also advanced the local interest in land use regulation. The impact on the state's interest in alcoholic beverage regulation was only "tangential." "Local laws of general application—which are aimed at legitimate concerns of a local government—will not be preempted if their enforcement only incidentally infringes on a preempted field."[18]

Similarly, in *Mayor of the City of New York v. Council of the City of New York*,[19] the Court found that a city law giving fire alarm dispatchers and emergency medical technicians the status of uniformed fire service members for collective bargaining purposes was consistent with the provision of the Taylor Law permitting local governments to supersede certain of its provisions so long as the measures are "substantially equivalent" to the laws they supersede. Although the mayor argued that the council's action was "inconsistent" with the Taylor Law's requirement that the local executive agree with unions on terms and conditions of employment, the Court concluded that all the city law did was prescribe the procedure for reaching agreement on certain issues and did "not dictate the substantive terms of an agreement."[20] The local law was, thus, not inconsistent with the Taylor Law.

On the other hand, in another internal New York City fight, the Court concluded that a local law prohibiting the city from entering into certain contracts with any firm that fails to provide its employees with domestic partner employment benefits equal to those provided to employee spouses was preempted by the state's lowest responsible bidder requirement for the

award of public contracts.[21] The Court assumed that the council was correct in contending that the city's Equal Benefits Law would have a *de minimis* effect on the cost of city contracts. And presumably the city would award contracts to the lowest responsible bidder that complied with the Equal Benefits requirement. Nonetheless, because the city law might result in the denial of an award to a bidder who qualified under the state law, the city measure was found to be inconsistent with state law and preempted.[22]

Occupation of the Field

In "occupation of the field" cases, local laws are preempted not because they are inconsistent with the substance of state policy but because the state has determined that policy-making in the area is the exclusive preserve of the state. However, the courts have not limited occupation of the field to settings in which the state has explicitly banned local law-making. Preemption, the Court of Appeals said in *Consolidated Edison v. Town of Red Hook*,[23] "need not be express. It is enough that the Legislature has impliedly evinced its desire to do so." Instead of looking only to the text of the statute, occupation of the field is treated as a question of legislative intent. To divine that intent, the courts have looked to statements of legislative policy, the scope of the state's regulatory scheme, and the nature of the subject matter, "including the need for State-wide uniformity in a given area."[24]

When the Legislature has "enacted a comprehensive and detailed regulatory scheme," occupation of the field is likely to be found. Thus, in *Albany Area Builders Ass'n,* the Court of Appeals found that the provisions of the Town Law and Highway Law that establish an elaborate budget system for town financing of highway improvements and repairs, with limits on the level of town taxation for highway purposes and regulation of the manner in which highway funds are spent, "evidenced a purpose and design to preempt the subject of roadway funding,"[25] thereby precluding a town's transportation impact fee law, which would have required a new development to pay an impact fee to finance highway improvements. Similarly, in a more recent lower court case, the court found that the Banking Law's extensive regulation of the residential mortgage lending process "evidence[d] the State's intent to occupy the field," thereby preempting a local law prohibiting the city from doing business with financial institutions that engage in predatory lending.[26]

On the other hand, not all state extensive regulatory schemes have been found to occupy the field. Thus, in *Vatore v. Commissioner of Consumer Affairs*,[27] the Court determined that a statute intended to reduce adolescent cigarette smoking by limiting the location of cigarette vending machines did not occupy the field to the exclusion of an even more restrictive local law. The state's statutory scheme was not "so broad and detailed in scope as to require a determination that it has precluded all local regulation in the area."[28] The area was not one in which statewide uniformity was considered necessary and the court found that the local law would advance the state's policy interests. Similarly, in *Jancyn Mfg. Corp. v. County of Suffolk*,[29] the Court found that state regulation of cesspool additives did not occupy the field so as to preempt additional local regulation because the state law was "not so broad in scope or so detailed."[30] More recently, a state supreme court found that state laws regulating the landlord-tenant relationship, including the rent stabilization law for apartment residents and laws dealing with the relationship between the owners and operators of mobile home parks and mobile home residents, did not so occupy the field as to preclude a county law regulating the relationship between a planned retirement community and its residents.[31]

In determining whether the state has occupied the field, the need for uniformity is clearly an important factor, which turns a lot on judicial judgment, including judicial toleration of (or support for) interlocal variation. The *Wood Village* court celebrated the values of local innovation and experimentation,[32] and the *Vatore* and *Jancyn* courts were willing to tolerate interlocal variation in cigarette and cesspool additive regulation, respectively. On the other hand, in a wide range of areas—including highway funding,[33] the location of power plants[34] and the standard for the review of variances from zoning requirements,[35]—the Court of Appeals has emphasized the value of statewide uniformity. Such ad hoc judicial decision-making produces considerable uncertainty as to when state legislation will be treated as occupying the field.

Another recurring question in occupation of the field cases is determining the contours of the field the state has occupied. In *DJL Restaurant*, the state had clearly occupied the field of alcoholic beverage regulation. But that did not mean that the state also had taken for itself exclusive control of where "adult establishments" that sell alcohol can be located. The Adult Zoning Resolution fell more within the local field of land use regulation. So, too, the state's occupation of the field of competitive bidding for municipal procurement contracts was held not to extend to contracts requiring specialized services, so that the state competitive bidding law did not preempt a county's law creating a local preference for such specialized service contracts.[36] On the other hand, the predatory lending law case suggests that a field can sometimes be broadly defined to go beyond the regulation of private activity and to pick up a city's relations with regulated entities.

Supersession

One interesting twist on preemption is "supersession," which is a form of "reverse preemption." The state legislature can provide general rules that bind local governments but can also authorize localities to adopt alternative rules in lieu of the state's. The Taylor Law case previously discussed is an example of this. The Municipal Home Rule Law allows towns and villages to supersede various general provisions of the Town Law and Village Law when dealing with local property, affairs or government. Thus, in *Kamhi v. Town of Yorktown*,[37] the Court of Appeals found that a local law conditioning site plan approval for a multifamily residential development on the provision of parkland or its money equivalent could be valid, notwithstanding its inconsistency with a provision of the Town Law, because it fell within the supersession authority of the Municipal Home Rule Law, Mun. H.R.L. § 10(1)(ii)(d)(3), permitting a town to adopt a law relating to its local property, affairs or government, notwithstanding inconsistency with a general state law, unless the state has expressly prohibited the local law. The Court found that the local law fell within "the intended purpose of the supersession authority . . . to permit localities to fashion delegated powers to suit local needs."[38] The specific local law at issue, however, was held invalid because of its failure to comply with the formal requisites of the Municipal Home Rule Law.

Even the supersession authority, however, can be subject to judicial limitation via the preemption doctrine. In *Cohen v. Board of Appeals of the Village of Saddle Rock*,[39] the Court of Appeals invalidated a village's effort to change the standard to be applied by the local zoning board of appeals for granting a variance. Saddle Rock's ordinance was inconsistent with a provision of the Village Law but apparently authorized by the supersession provision of the Municipal Home Rule Law. But, lifting its analysis from the "occupation of the field" cases, the Court of Appeals concluded that the village measure was still precluded by state law. Although the Municipal Home Rule Law provides that the supersession authority can be displaced only when "the legislature expressly shall have prohibited the adoption of such a law," the Court of Appeals found that such an "express" prohibition could also be "*implied* from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area."[40] The Court found that the legislative history of the state statute adopting a standard of review indicated that the Legislature intended the standard to be applied statewide. Moreover, the court found that statewide uniformity would have "clear advantages" as "[p]roperty owners and zoning practitioners around the state will benefit from a better understanding of the standards for a variance."[41]

* * *

Much like the back-and-forth of the two New York City *PBA* cases, *Kamhi* and *Cohen* underscore the indeterminacy of preemption and the limited and uncertain scope of home rule immunity. Home rule-as-local-initiative may be strong in New York, but the constitution provides little in the way of home rule immunity. The state concern, inconsistency and occupation of the field doctrines have operated to narrow the scope of home rule immunity considerably, if inconsistently. In theory, the constitution gives local governments broad powers to act and limits the state's power to act on local matters to general laws. But under the doctrine of state concern, the legislature can adopt special laws with respect to many matters, including local property, affairs or government. Such laws can preempt inconsistent local laws either through a finding of outright conflict or a determination that the state has occupied the field. This possibility of preemption casts a shadow over local autonomy.

Through these doctrines the courts have taken for themselves a major role in sorting out state and local powers in the many areas where state and local governments exercise overlapping authority. Moreover, as the many mayor-versus-council captions indicate, these cases often have a significant local separation-of-powers component, so that the courts are resolving executive-legislative as well as state-local conflicts. Unfortunately, even after decades of home rule disputes, the Court of Appeals's case law in this area remains highly unpredictable. That may be an inevitable consequence of the difficulty of the specific questions raised in preemption cases, and of the general problem of allocating power between the state and local governments. Or it may be a result of the Court's apparent determination to avoid a general resolution and to balance the conflicting values of statewide uniformity and local variation in light of differing local needs, preferences, and circumstances on a case-by-case basis, with uncertainty and unpredictability the inevitable result.

Endnotes

1. Presented to the Municipal Law Section at the 2009 Annual Meeting of the New York State Bar Association.
2. *City of New York v. Patrolmen's Benevolent Ass'n*, 89 N.Y.2d 380 (1996).
3. *Id*. at 389.
4. *Id*. *Accord*, *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 824 N.Y.S.2d 366 (2d Dep't 2006) (finding that town law changing the procedure for disciplining police officers was not preempted by the state's Westchester County Police Act, which was a "special law" because limited solely to Westchester County), *lv. for appeal denied*, 8 N.Y.3d 806 (2007).
5. 251 N.Y. 467 (1929).
6. 97 N.Y.2d 378 (2001).
7. *Id*. at 387.
8. *Id*. at 388.
9. *City of New York v. State*, 94 N.Y.2d 577, 590 (2000).

10. *Id*. at 591-92.
11. *Id*. at 592.
12. 12 N.Y.2d 998 (1963).
13. 17 A.D.2d 327, 329-30, 234 N.Y.S.2d 862, 864-65 (3d Dep't 1962), *aff'd*, 12 N.Y.2d 998 (1963).
14. *New York State Clubs Ass'n v. City of New York*, 69 N.Y.2d 211 (1987).
15. 61 N.Y.2d 942 (1983).
16. 119 Misc. 2d 241, 462 N.Y.S.2d 762 (Sup. Ct., N.Y. Co. 1983) (Wolin, J.), *aff'g opinion below*, 61 N.Y.2d 942 (1983).
17. 96 N.Y.2d 91 (2001).
18. *Id*. at 97.
19. 9 N.Y.3d 23 (2007).
20. *Id*. at 31.
21. *Council of the City of New York v. Bloomberg*, 6 N.Y.2d 380 (2006).
22. *Id.*
23. 60 N.Y.2d 99 (1983).
24. *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).
25. *Id.* at 379.
26. *Mayor of City of New York v. Council of City of New York*, 4 Misc. 3d 151, 780 N.Y.S.2d 266, 274 (Sup. Ct., N.Y. Co. 2004).
27. 83 N.Y.2d 645 (1994).
28. *Id.* at 650.
29. 71 N.Y.2d 91 (1987).
30. *Id*. at 99.
31. *Wood Village NY LLC v. County of Suffolk*, 852 Misc. 2d 599 (Sup. Co., Nassau Co. 2007).
32. S*ee id*. at 608.
33. *Albany Area Builders Ass'n.*, 74 N.Y. 2d 372.
34. *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99 (1983).
35. *Matter of Cohen v. Bd. of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395 (2003).
36. *Quest Diagnostics Inc. v. County of Suffolk*, 21 Misc. 3d 944, 865 N.Y.S.2d 504 (Sup. Ct., Suffolk Co. 2008).
37. 74 N.Y.2d 423 (1989).
38. *Id.* at 433.
39. 100 N.Y.2d 395 (2003).
40. *Id*. at 400 (emphasis added).
41. *Id*. at 402.

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Court Strikes Blow for Affordable Housing

By John Cappello

Over the course of the last several years, many governments have bowed to the pressure of local, vocal minorities seeking to limit density and restrict housing opportunities to only those people able to afford what are commonly referred to as "McMansions." Recently, the New York State Appellate Division, Second Department, sounded a wakeup call to those municipalities and struck a blow in support of providing housing opportunities for all New York State citizens. In *Landmaster I, LLC v. Town of Montgomery*, the Appellate Court upheld, in its entirety, a determination of Orange County Supreme Court Justice Joseph Owen, declaring the comprehensive plan adopted by the Town of Montgomery, and two zoning laws implementing the plan, void as unconstitutional, exclusionary zoning.[1] This comprehensive plan and its implementing zoning removed all multi-family zoning from the entire Town. In addition, the Court held that the Town failed to take the requisite hard look at the anticipated environmental impacts of their actions, thus violating the New York State Environmental Quality Review Act (SEQRA).

The *Landmaster* case represents a very clear signal that the standards and principles set forth by the New York State Courts in *Berenson v. Town of New Castle*[2] and its progeny, requiring that municipalities provide an array of housing opportunities to serve the needs of its own community *and* the region, still remain in full force and effect, to be ignored only at the peril of the municipality and its taxpayers (Judge Owen awarded attorney fees to the plaintiffs in excess of $463,000).

The *Landmaster* case was initiated by parties who own or control properties in the Scott's Corners area of the Town of Montgomery, Orange County. Scott's Corners is an area located at the intersection of two state highways (NYS Route 208 and 17K), adjacent to the campus of the local middle and high schools, within approximately a mile-and-a-half of the interchange for Interstate 84, and nestled between two of the three villages (Walden and Montgomery) within the Town. The Orange County county-wide comprehensive plan adopted by the Orange County Legislature in 2003 designated the Scott's Corners area as a "priority growth" area.

Plaintiffs, Landmaster Montg I, LLC and Landmaster Montg II, LLC (collectively referred to hereinafter as "Landmaster") were contract vendees for properties located on the north and south sides of NYS Route 17K near its intersection with Bailey Road. Landmaster planned to develop the properties for a mixed use development consisting of approximately 265 single-family attached and small to medium density single family detached units (15,000–25,000-square-foot lots), to be known as Crossroad Farms, with a portion of the property along NYS Route 17K proposed for commercial development.

Plaintiffs, Rosswind Farm Corp., North 208 Properties, Inc., and MGU Realty Corp. (hereinafter collectively referred to as "Rosswind") owned several properties located on the west side of NYS Route 208 and the north side of NYS Route 17K. Rosswind proposed to develop the property, which included an existing golf course, for a mix of condominium/apartment units and single-family detached housing (approximately 350 units) along an enhanced and redesigned golf course, in addition to some commercial use proposed along NYS Route 208 (known as the Walden Golf Course proposal).

Plaintiffs Russell and Carol Ortiz were a working couple seeking affordable housing in the area. The underlying fee owners/contract vendors of the Crossroads Farms parcels were also named Plaintiffs.

The Town of Montgomery's original comprehensive plan adopted in the 1960s designated a significant area in and surrounding Scott's Corners as the area to accommodate more dense residential development within the Town. As such, much of the area around Scott's Corners included RM-1, multi-family zoning, as well as zoning districts (RA-2 and RA-3) that permitted approximately two to three single-family units per acre if central water and sewer services were provided.

Over the course of time between the late 1960s and 2000, the Town adopted several zoning amendments and two substantial revisions to their comprehensive plan (1974 and 1988), each time reducing the areas available for multi-family zoning, increasing the minimum lot sizes for single-family dwellings and reducing the density within the remaining multi-family zones from approximately fourteen (14) units per acre to seven (7) units per acre. The result was that as of the year 2000, only approximately sixty-nine (69) acres within the 25,000± acre Town were zoned for multi-family development.

In 2001, the Walden Golf Course proposal was submitted to the Town of Montgomery Planning Board followed by the Crossroads Farms application in 2002.

These two mixed-use development proposals located within the Scott's Corners area included the entire 69 acres of land zoned multi-family, additional lands zoned RA-2 and RA-3, and a portion of commercially zoned land along the state highway. Approximately thirty (30) days after submission of the Crossroads Farms application, the Town adopted a moratorium suspending approvals of any residential development and prohibiting the review of any residential application affecting more than two lots.

The moratorium lasted over two years. During that time, the applicants submitted voluminous materials to the Town's Comprehensive Planning Committee, Planning Board and Town Board demonstrating the appropriateness of the multi-family zoning for the specific properties, the lack of diverse housing opportunities within the Town, the need for affordable housing within the Town and the fact that there was very little additional land within any of the three villages within the Town that was suitable, and zoned, for new multi-family housing. At the public hearing the evening the Town Board adopted the comprehensive plan, board members were provided with evidence that there was not one home available for sale within the Town that could be considered affordable to a family earning the median family income for Orange County.

The Town Board was also provided with a General Municipal Law § 239-m report on its comprehensive plan from the Orange County Department of Planning. The Planning Department's report expressed concern regarding the decline of affordable housing, advising that the zoning revisions necessary to effectuate the comprehensive plan would "further exacerbate the inadequate supply of affordable housing in the Town."[3]

Nevertheless, in July 2004, the Town Board adopted its comprehensive plan. Almost immediately thereafter, the Town introduced two zoning laws to effectuate the comprehensive plan (Local Law 4 of 2004 and Local Law 5 of 2004). Local Law 4 proposed to remove all multi-family zoning from the Town and to remove all density bonuses for projects with central water and sewer. Under Local Law 4, any residential development within the vast majority of the Town would have to provide a minimum lot area of two (2) net acres, subtracting areas of wetlands and steep slopes. A small area of the Town would require a minimum net lot area of one (1) acre.[4] Local Law 5 proposed to prohibit central water and/or sewer systems from serving more than one parcel and subjecting approval of such a facility to the Town Board's sole discretion.[5]

In its section 239-m review, the Orange County Planning Department expressly disapproved of the local laws, stating in part that:

> These amendments that consolidate the RA-1 (Residential/Agricultural), RM-1 Residential/Multi-Family), and RA-3 Districts into either the RA-.5 and RA-2 Districts would effectively eliminate the possibility of multi-family homes in the Town, including that land in the Scott's Corners area that is identified in the Orange County Comprehensive Plan as part of a Priority Growth Area. Eliminating multi-family housing will significantly impact the Town's ability to address affordable housing needs, particularly in an area with close proximity to schools, workplaces and public transit.[6]

The Town Board voted unanimously to override the disapproval from the County Planning Department and adopted the two laws, stating that multi-family housing does not, in and of itself, guarantee affordability.

After adopting the comprehensive plan and Local Law 4, and two weeks before adopting Local Law 5, the Town established an Affordable Housing Committee to consider the need for affordable units within the Town. Several months later, the committee issued a report finding an affordability shortfall within the Town and indicating a need for between 688 and 1,010 owner/occupied units.

In declaring the Town of Montgomery comprehensive plan and implementing zoning laws unconstitutional and exclusionary, Orange County Supreme Court Justice Joseph G. Owen, relied chiefly on three leading New York State cases: *Berenson; Kurzius v. Village of Upper Brookville*,[7] and *Continental Building Company, Inc. v. Town of North Salem.*[8] *Berenson* remains the leading New York State case on the issue of exclusionary zoning. In *Berenson*, the Court of Appeals declared unconstitutional a Town of New Castle Zoning Ordinance that failed to permit multi-family housing in any of its twelve (12) zoning districts. In so holding, the Court established a test for the validity of a zoning ordinance:

> The first branch of the test, then, is simply whether the board has provided a properly balanced and well ordered plan for the community. Of course, what may be appropriate for one community may differ substantially from what is appropriate for another. Thus, in this case, the court must ascertain what types of housing presently exist in New Castle, their quantity and quality, and *whether this array adequately meets the present needs of the town*. Also, it must be determined whether new construction is necessary to fulfill the future needs of New Castle residents, and if so, what forms the new development ought to take.

> Secondly, in enacting a zoning ordinance, consideration must be given to regional needs and requirements. It may be true, for example, that New Castle already has a sufficient number of multiple-dwelling units to satisfy both its present and future populations. However, residents of Westchester County, as well as the larger New York City metropolitan region, may be searching for multiple-family housing in the area to be near their employment or for a variety of other social and economic reasons. There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met. Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality.[9]

The Court of Appeals restated and amplified the *Berenson* test in *Kurzius v. Village of Upper Brookville*. In *Kurzius*, the Court reviewed a village zoning ordinance, which created "in certain areas of the village" minimum lot requirements of five acres.

The Court in *Kurzius* held that:

> Generally then, a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant.[10]

The *Kurzius* Court held that the petitioner/plaintiff had not demonstrated evidence that the enactment of the village ordinance was motivated by improper purpose, nor had it demonstrated that any pressing regional needs were ignored in formulating the ordinance. "There was no proof that persons of low or moderate incomes were foreclosed from housing in the general region because of an unavailability of properly zoned land."[11]

The Court included a cautionary note stating: "Although regional needs may presently be met this does not foreclose a zoning ordinance from all future inquiry. As population patterns shift and the demand for housing in a given region necessarily increases, a re-examination of an existing zoning scheme may be warranted."[12]

In *Continental*, the Appellate Division, Third Department, specifically addressed the relationship between multi-family housing and affordability. The Court examined the Town of North Salem's zoning code amendments reducing the number of lots available for multi-family dwelling units permitted within the Town as of right from 379 to 129 and limiting such as of right multi-family development to only 43 of the Town's 14,000+ acres.

The *Continental* Court denied the Defendant Town's argument that *Berenson* did not include any requirements of affordability, stating:

> Finally, defendants' contention that *Berenson* and its progeny eschew any requirement of affordability is simply wrong. The Court of Appeals held that exclusionary zoning "is a form of racial or socioeconomic discrimination which we have repeatedly condemned." Furthermore, exclusionary zoning has been defined as "land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality." Thus, the general rule that a municipality may not, by its zoning ordinance, create obstacles to the production of a full array of housing includes housing such as low and moderate income housing or, in other words, affordable housing.[13]

In *Landmaster*, Judge Owen analyzed the actions of the Town, the evidence submitted by the litigants, and applying the principles set forth in *Berenson* and *Kurzius*, determined that "petitioners have made a prima facie showing that the challenged laws were enacted without giving proper regard to local and regional housing needs and that they have an exclusionary effect."[14] Judge Owen acknowledged the data and reports submitted to the Town Board documenting the fact that "given the Town's median household income of $49,422, a median income family could afford a residence valued at $145,000. According to petitioners, none of the 43 houses then listed for sale were at or below this price, showing a need for the development of affordable housing."[15] The Court also made note of the fact that "[T]he Town's own Affordable Hous-

ing Committee has found the existence of an 'affordability shortfall' within the Town, indicating a need for between 688 and 1,010 owner-occupied affordable units."[16]

Judge Owen also cited the comment letter and report from the Orange County Department of Planning on the comprehensive plan and its disapproval letter on the proposed zoning amendments, both concluding that the comprehensive plan and implementing zoning coupled to discourage the Town's ability to address affordable housing needs in an area with close proximity to schools, workplaces, and public transit.[17]

Accordingly, the Court held:

> Given these housing needs, the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing. The Court believes that the existing zoning structure fails this test.
>
> * * *
>
> . . . the Town eliminated any specifically dedicated multi-family zoning districts. For this reason the Orange County Planning Department, with its more global view of regional needs, expressed serious concerns about the Comprehensive Plan and expressly disapproved of Local Law No. 4. On its face, this zoning scheme is exclusionary.[18]

Judge Owen then applied the principles set forth in *Continental* and rejected the Town's arguments that its zoning structure allowed for affordable housing opportunities, including lot clustering, incentive zoning measures, inter-municipal agreement programs, and multiple housing opportunities, such as motor home courts and planned adult communities. Citing *Continental*, Judge Owen concluded that "these alternatives either commit multi-family and affordable housing to the total discretion of town officials or affect very limited segments of the total population."[19] Further,

> [t]he current zoning scheme, effectively, creates the illusion of affordable housing availability while limiting its reality to a few chosen sectors and vesting almost total control in the Town. "[T]hese factors are intrinsically narrow in scope and do very little to genuinely address the established need for multi-family housing."[20]

Judge Owen rejected the Town's argument that multi-family housing does not necessarily equal affordable housing. "While this may be true . . . multi-family housing, given the nature of its construction and function as a whole is one of the most affordable types of housing."[21]

The Court also rejected the Town's reliance on traffic problems as a reason to prohibit multi-family and moderate density development, stating:

> The Court does not question that traffic control constitutes a legitimate public purpose. However, nowhere on the record do respondents establish a reasonable relationship between that purpose and the total elimination of dedicated multi-family housing districts. Aside from a cursory reference to limited State DOT funding, respondents proffer no evidence of prohibitive costs, inherent geographical limitations or other factors making it unreasonable to consider alternative traffic control methods.[22]

Finally, in a footnote, Judge Owen admonished the Town for attempting to argue that it studied and considered affordable housing needs by the after-the-fact formation of the Affordable Housing Committee:

> In an exercise of true lawyer-like logic, the Town argues that while it should be commended for establishing the Affordable Housing Committee to actually consider its findings would be to engage in revisionist history. . . . The Town's self-created inability to consider the AHC's finding was due to the fact that the Committee was not established until on or about November 3, 2004, several months after adoption of the Comprehensive Plan and Local Law No. 4. Certainly, this report is probative of the actual affordable housing needs within the Town and the present exclusionary effects of the current laws.[23]

The Court concluded that:

> [I]n this particular matter respondents have not adequately done their share to accommodate the affordable housing needs of the community either within their own boundaries or the region. In short, petitioners have "demonstrated the exclusionary effect, coupled with the failure to balance local desires with

> housing needs, while [respondents] have clearly failed to demonstrate that the zoning ordinance provides a sufficient array of multi-family housing opportunities to pass scrutiny in this case."[24]

Judge Owen also went on to determine that the Town of Montgomery had not sufficiently complied with SEQRA in its review of the comprehensive plan and implementing zoning laws. The Court acknowledged that "the adoption of the Comprehensive Plan and related zoning laws constituted Type I actions under SEQRA, mandating a hard look at environmental concerns and the preparation of an EIS when a proposed [action] may include the potential for at least one significant environmental effect."[25] While Judge Owen recognized the extensiveness of the record, he correctly held that an extensive record in and of itself does not satisfy the requirements of SEQRA.[26]

Judge Owen focused on the inconsistency of the analysis between a study included in the Town's comprehensive plan prepared by its long-time planner, acknowledging that the changes being considered would have significant impacts on the number of units permitted under the existing zoning, and the EAF and Negative Declaration adopted by the Town stating that the impacts of the comprehensive plan and changes would reduce potential development by only 67 dwelling units.[27] The Court also focused on the Town's conclusions that the affordability of units was solely a market-controlled issue and out of control of the Town, holding:

> [T]his analysis is simply inadequate. The Town Board is not being asked to "guarantee" affordable housing. It is being asked to do what the law requires, i.e., to provide a balanced and well-ordered plan for the community which adequately considers regional needs and requirements, and which does not "by its zoning ordinance, create obstacles to a production of full array of housing [including] . . . affordable housing." This is not accomplished by abrogating control to others and limiting opportunities of right simply to residents of adult communities and mobile home parks. Although the Town Board may have held extensive hearings, . . . it did not take a "hard look" at the involved affordable housing concerns and certainly did not make a "reasoned elaboration" of its determination to eliminate the only multifamily zoning district within Town borders.[28]

The Town's appeal of Judge Owen's decision was unsuccessful. The Appellate Division, Second Department, upheld in its entirety Judge Owen's determination. In so ruling, the Appellate Court opined:

> The petitioners/plaintiffs established their entitlement to judgment as a matter of law as to their causes of action seeking a declaration that the Comprehensive Plan for the Town of Montgomery adopted July 29, 2004 . . . and Local Law Nos. 4 and 5 (2004) of the Town of Montgomery are unconstitutional by submitting evidence demonstrating that the new zoning restrictions, enacted pursuant to the Comprehensive Plan and the Local Laws, which eliminated the multi-family(RM-1) zoning district, constituted exclusionary zoning.[29]

By so holding, the Court recognized that the respondent/defendants failed to raise a triable issue of fact to dispute that the challenged zoning was enacted without giving proper regard to local and regional housing needs and that the actions had an exclusionary effect.

Additionally and finally, the Appellate Court upheld Judge Owen's determination that the Town of Montgomery failed to comply with SEQRA in its adoption of the comprehensive plan and related zoning laws. The Town Board's adoption of a negative declaration resulted from a failure to take the requisite hard look at the anticipated environmental impacts, and thus was arbitrary, capricious, and affected by an error of law.[30]

Conclusion

In deciding *Berenson*, the Court of Appeals stated:

> Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.[31]

Despite the fact that *Berenson* was decided in 1975, the New York State government has not taken any legislative action (unlike several states including New Jersey, Massachusetts and California) to require provisions for an array of housing opportunities in New York. Thus, it is left to individual municipalities to interpret New York State case law and determine issues, such as what constitutes "the region" and how to effectively balance the needs of the community. It is

clear, however, that a municipality must consider and make an attempt to provide an appropriate array of housing opportunities within its boundaries. Certainly, any zoning code that does not include at least some zoning districts where multi-family housing units are permitted puts a municipality at risk for an exclusionary zoning claim.

In the Mid-Hudson Valley, there are some collaborative, regional steps being taken to assist municipalities in addressing these issues. A Tri-County Housing Needs Study is being undertaken cooperatively between the Orange, Ulster, and Dutchess County Planning Departments to determine the level of need of affordable housing units in the region and to specifically assign numbers to individual municipalities to help the region provide affordable housing opportunities. This study can give a municipality a reasonable goal to shoot for in its zoning law and provide support for the validity of zoning which achieves the goals of the study.

It is important, however, that municipalities implement smart growth patterns, which include a long-term plan to improve and enhance infrastructure, provide areas for central water and sewer services, and a plan for traffic and road improvements to accommodate reasonable growth in areas that can support local businesses, be in close proximity to school services, etc. This is becoming increasingly important, not only from the standpoint of providing affordable housing opportunities, but also as a means to help communities plan for transportation-oriented development and reduce emissions and over-dependence on automobiles.

Lastly, many municipalities have been considering inclusionary rather than exclusionary zoning code provisions that provide for either voluntary or mandatory set-asides of a percentage of homes to be affordable units. These inclusionary zoning provisions often provide a system of preferences for volunteer emergency service providers, police, school teachers, municipal workers, etc. and can be used to enhance the diversity of a municipality.

It is important that municipalities, when considering inclusionary zoning programs, make sure that their underlying zoning provides appropriate densities to facilitate smart growth provisions and diverse housing opportunities. Merely adopting a zoning law that requires a set-aside of affordable units, while the underlying zoning is restrictive large-lot zoning, will not in and of itself absolve a municipality from compliance with the mandates of *Berenson* and its progeny. However, when combined with a reasoned and well-thought-out comprehensive plan, inclusionary zoning can be a very successful tool for a community to implement to ensure housing for its young families, senior citizens and workforce.

Endnotes

1. *Landmaster Montg I, LLC v. Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (N.Y. Sup. Ct. 2006), *aff'd*, N.Y.S.2d 692, 54 A.D.3d 408 (2d Dep't 2008), *appeal dismissed*, 11 N.Y.3d 864 (2008).
2. *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).
3. *Landmaster*, 821 N.Y.S.2d at 437.
4. Montgomery, New York, Local Law 4 of 2004 (2004).
5. Montgomery, New York, Local Law 4 of 2004 (2004).
6. *Landmaster*, 831 N.Y.S. 2d at 437.
7. *Kurzius v. Village of Upper Brookville*, 51 N.Y.2d 338 (1980), *cert. denied*, 450 U.S. 1042 (1981).
8. *Continental Building Co., Inc. v. Town of North Salem*, 211 A.D.2d 88, 625 N.Y.S.2d 700 (3d Dep't 1995), *appeal dismissed, denying leave for appeal*, 86 N.Y.2d 818 (1995).
9. *Berenson*, 38 N.Y.2d at 110 (citing *Udell v. Haas*, 21 N.Y.2d 463 (1968)) (emphasis added).
10. *Kurzius*, 51 N.Y.2d at 345 (internal citation omitted).
11. *Id*. at 346.
12. *Id*. at n.1.
13. *Continental*, 211 A.D.2d at 94–5 (citing *Asian-Americans for Equality v. Koch*, 72 N.Y.2d 121, 133 (1988); 1 Anderson, New York Zoning Law and Practice § 8:02, at 360 (3d ed.)).
14. *Landmaster*, 821 N.Y.S.2d at 438–39.
15. *Id*. at 436. None of the 43 houses then listed for sale were at or below this price as of the public hearing on the Comprehensive Plan.
16. *Id*. at 439.
17. *Id*. at 436.
18. *Id*. at 439.
19. *Id*. at 440.
20. *Id*. at 440 (citing *Continental*, 211 A.D.2d at 94).
21. *Id*. at 439 (citing *Continental*, 211 A.D.2d at 93).
22. *Id*. at 440 (internal citations omitted). It must be noted that the Town's comprehensive plan made no changes to the zoning for the many types of commercial and industrial developments contributing traffic to the Scott's Corners area.
23. *Id*. at 439, n. 4.
24. *Id*. at 440 (citing *Continental*, 211 A.D.2d at 94).
25. *Id*. at 441 (internal citations omitted).
26. *Id*. at 441-42.
27. *Id*. at 442.
28. *Id*. (citing *Continental* 211 A.D.2d at 95).
29. *Landmaster*, 54 A.D.3d at 410.
30. *Id*. at 411.
31. *Berenson*, 38 N.Y.2d at 111.

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Use of Municipal Resources for Personal Purposes

By Jessie Beller

Introduction

Use of municipal resources in New York State is governed by the New York State Constitution, which contains a provision specifically regulating gifts or loans of public monies to private entities. Specifically, the law states, in part, that "[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking. . . ."[1] This provision, prohibiting use of municipal resources for non-governmental purposes, limits a municipality's expenditures to ensure that the focus of municipal spending is the public good and that municipal resources are used only for government purposes. Therefore Article VIII, Section 1 of the State Constitution, the so-called "Gift and Loan Clause," serves as a way to control the use of municipal monies and resources. It aims to ensure that private citizens do not use municipal resources for their own benefit and thereby helps to preserve government resources for the public.

History of the Gift and Loan Clause

"[I]ntended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit,"[2] the Gift and Loan Clause was enacted in 1874 as a result of the widespread diversion of municipal funds to certain private entities that occurred in New York during the height of railroad building. Its purpose was to prevent the possibility of municipalities enriching private entities, as had repeatedly occurred during that era with sales of town bonds for the benefit of private railway companies in return for railway stock that often proved worthless.[3] Note, however, that even though the Gift and Loan Clause is, by its language, a broad prohibition, it is not designed to regulate the price or adequacy of consideration in sales of public property made in good faith and on fair terms.[4] Instead, the Gift and Loan Clause is intended to ensure that municipal resources are used only for public purposes. Anything else would be an impermissible gift from the municipality to the private beneficiary. The applicability of the Gift and Loan Clause in a particular case therefore rests on a determination of public purpose.

What Is a Public Purpose?

The Gift and Loan Clause's prohibition on gifting requires that municipalities use their funds and their resources to perform their designated governmental functions, that is, to serve the public. A public purpose is defined as "something 'necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens [and] public in character.'"[5] If municipal resources are used to provide a purely private benefit, they are not being used for a governmental purpose.[6] The result would be an unconstitutional gift from a municipality to a private entity, the very outcome this law was intended to prevent. The Gift and Loan Clause prevents such gifts by prohibiting a municipality from spending money to benefit a private individual except where the expenditure is in furtherance of a public purpose and the municipality is contractually or statutorily required to do so.[7]

> *"No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking. . . ."*
>
> —N.Y.S. Const., Art. VIII, § 1

While the presence of a private benefit does not automatically render the action invalid, the primary beneficiary of the municipal spending or use of municipal resource must be the public.[8] For example, a municipality may not use public funds to improve and maintain a private road.[9] In that case, the primary purpose is private benefit, so the municipality would be providing an unconstitutional gift. However, an incidental private benefit resulting from a municipal action does not violate the Gift and Loan Clause, so long as the primary purpose is for the public good.[10]

The question of whether a particular use or expenditure is for a public purpose is the key determination of whether an action is permissible or prohibited by the Gift and Loan Clause. Various court opinions, informal Attorney General's Opinions, and informal Comptroller's Opinions provide guidance and suggest that defining public purpose relies on the touchstone of whether the primary beneficiary is the public or a private entity. There are some bright-line prohibitions, where municipal resources are being used for obvious

non-governmental purposes. Other violations of the Gift and Loan Clause are less obvious, if not counterintuitive. For example, a school district may not expend municipal resources to exhort the public to vote in favor of the proposed school budget.[11] Thus, as the decisions and opinions suggest, each case is evaluated on its own merits based on whether the use of the municipal funding or resource furthers a municipal obligation; and the outcome in the particular case will depend on how the court or opining agency answers that question. If the answer is that the intended use of municipal resources is seen to conflict with or otherwise inhibit the performance of governmental obligations, then there is no public purpose, and the action violates the Gift and Loan Clause.

What Is Prohibited?

As noted, guidance as to what constitutes prohibited use of municipal resources may be found in examples and situations determined by case law and informal opinions not to further a municipal obligation but rather to benefit private entities at the expense of the public. These cases and opinions have focused on two categories of prohibited use: actions taken by the municipality itself and actions taken by a municipal employee using municipal resources.

When a municipality spends public funds or expends municipal resources, it must do so in furtherance of a public purpose. Thus, municipalities cannot pay vendors or contractors a bonus or any form of additional compensation in excess of the fixed contract amount, even to reward outstanding performance,[12] because the payment of supplementary compensation is considered beyond the contractual duty of the municipality, so the municipality would be voluntarily providing the additional funding. In other words, the municipality would be gifting the supplementary payment to the private vendor. Such an action, which is beyond the municipality's obligation, has been deemed not for a public purpose and therefore prohibited by the Gift and Loan Clause. The public resource, municipal funding, is being spent to enrich a private entity. Thus, as the Court of Appeals has held, "a governmental entity may not compensate a person who performs an act which the government had no duty to undertake."[13] Additionally, a municipality cannot accept payment of less than adequate consideration in a transaction with a private citizen.[14] Just as providing overpayment is a gift to a private citizen, permitting underpayment is also considered a gift to a private citizen. When a municipality sells a municipal asset to a private entity for less than its value, the municipality is giving the private entity the benefit of a lower price, at a cost to the public, which receives less than what it is owed for the sale.[15] Informal opinions have found in such cases that there is no government purpose where the primary beneficiary is a private citizen, so there is no public purpose to such a transaction.

Further, a municipality cannot use its resources to maintain private property. As noted above, the Attorney General has determined, in several informal opinions, that a municipality cannot use public resources to maintain a private street. The reasoning remains the same in each issued opinion: the provision of these services would afford a private entity an unconstitutional gift of public funds, in violation of the Gift and Loan Clause. Although a municipality may establish standards for the maintenance of private roads, unless the road is itself public, a municipality has no authority over such a road, and therefore no responsibility to maintain it. Therefore, without the legal obligation to maintain, there is no governmental purpose and no permissible use of public funding and resources in maintaining the private road. The intended beneficiary in that case would be private property.[16]

Where public servants themselves use municipal resources, the same rules apply. Municipal resources and funding cannot be used for non-governmental purposes, meaning that public servants are not permitted to use public resources for private benefit. For example, while town equipment and town personnel could be used to perform work on private property if the primary purpose of such work furthers a "proper town purpose," the Comptroller has opined that municipal equipment is acquired for municipal purposes only.[17] Therefore, if a public servant uses a municipal resource, such as the town snow plow, for his own personal use, including running his own snow-clearing business, such use would be inconsistent with the pronouncement from the Comptroller limiting use of municipal equipment for a public purpose. Further, a municipal employee may not use the services of the county attorney for personal legal representation, as this would be considered a prohibited use of public resources in violation of the Gift and Loan Clause.[18] These examples all present the same issue, that of a municipal employee co-opting municipal resources for private use, thereby receiving a personal benefit from public resources in violation of the Gift and Loan Clause. Court decisions and informal opinions have consistently found that use of municipal funding or resources to benefit a private citizen or entity is a prohibited unconstitutional gift. Since the primary purpose in each circumstance was to provide a private benefit, there was no governmental purpose to permit use of the municipal resource. The actions of these municipal employees did not further the function of the municipality, but instead furthered the personal interest of the employee himself or herself.

An examination of cases and opinions on impermissible uses of municipal resources reveals a common thread: the presence or absence of a governmental

purpose. Though a municipality's role may be broad, and in some cases include actions which provide an incidental private benefit, the limitation imposed by the Gift and Loan Clause provides a check on the ability of a municipality and its officers and employees to use municipal resources for private purposes. Such a restriction preserves municipal resources for the benefit of the public rather than allowing these resources to be used for the advantage of a select few.

What Is Permitted?

As discussed above, the Gift and Loan Clause is designed to prevent the use of municipal resources for private purposes. What is permissible is use of municipal resources for municipal purposes. So, for example, a municipality properly uses its municipal resources to repair public roads and properly uses municipal funds to buy property from a private citizen to construct a town hall (provided the consideration for the purchase is not excessive).

While courts have determined that municipal payment of compensation beyond what is fixed by law or contract is prohibited by the Gift and Loan Clause,[19] compensation consistent with the terms and conditions of employment is not considered conferring a gift on a public employee.[20] Specifically, compensation has been defined to include an employee's base pay, earned sick leave benefits, accrued vacation time, and fringe benefits,[21] as well as health and life insurance benefits, military leave, and pensions.[22] Whether payment is held to be proper compensation or unjust advantage depends upon the terms and conditions of employment. If the payments are outside of the compensation package, then they are a prohibited gift; if they are not outside of the package, then they are not a gift and are permitted under the Gift and Loan Clause. Once again, the key question is whether the municipality is using public funds to meet an agreed-upon obligation or to bestow a gift. If the municipality goes beyond the boundaries of its obligation, or acts in situations where it has no obligation, it is performing an act it had no duty to undertake. This, by definition, is not a governmental obligation. The same is true when a municipal employee acts purely in his or her own interest or entirely in the interest of a private entity. The beneficiary receives a gift from the municipality, which is precisely the evil the Gift and Loan Clause was intended to prevent. But when a municipality, or a municipal employee acting on behalf of the municipality, uses municipal resources to provide a public service or for a governmental purpose, the use is permissible, as the beneficiary is the public and the municipality is properly using its own resources to further its own obligations to serve the public. Therefore, a finding of a municipal obligation appears to be the determining factor in such cases.

Remedy

When a taxpayer believes that a municipality or a municipal official has wrongfully used or spent, or is about to wrongfully use or spend, municipal property in violation of the Gift and Loan Clause, the taxpayer may challenge that improper action through a suit brought pursuant to Section 51 of the General Municipal Law. To maintain a Section 51 action, the proponent must: 1) establish his or her status as a taxpayer, and 2) "allege an official act which causes waste or injury, imperils the public interest or is calculated to work public injury or to produce some public mischief."[23] A contract or a transaction that violates the Gift and Loan Clause may form the basis of a Section 51 action.[24] Section 51, therefore, offers a legal remedy to enforce the prohibitions of the Gift and Loan Clause and may be used to void a particular transaction or action as wasteful and illegal.[25] Taxpayers can also sue under Section 51 to prevent official acts that are either fraudulent or a waste of public property, in violation of the Gift and Loan Clause.[26] Likewise, a Section 51 action may be brought to recover municipal funds unlawfully expended in violation of the Gift and Loan Clause.[27] However, to maintain a Section 51 action, the taxpayer must demonstrate that the protested action is more than just illegal; it must also be injurious to municipal and public interests and "if permitted to continue it will in some manner result in increased burdens upon and dangers and disadvantages to the municipality and to the interests represented by it and so to those who are taxpayers."[28] This standard is thus higher than the standard set forth in the Gift and Loan Clause itself.

Accordingly, while both the Gift and Loan Clause and Section 51 are intended to provide checks on the exercise of municipal power and have been enacted to ensure that municipalities remain within the bounds of their governmental duties, Section 51 may be seen as a sharper tool than the Gift and Loan Clause and therefore requires a more strenuous inquiry. Section 51 enables taxpayers to prevent an illegal official act, effectively nullifying a municipal action or otherwise restraining the ability of the municipality to act. Such power of restraint, in the form of injunctive relief, serves as a reminder that taxpayers have the authority, where they meet the requirements of Section 51, to directly regulate the actions of their municipality.

Conclusion

The Gift and Loan Clause constitutes an important limitation on municipal power because it regulates use of municipal resources, prohibiting uses that are not for the public good. By helping to ensure that municipalities use their resources for public purposes, the Gift and Loan Clause prevents depletion of government

property and funds by private entities and preserves municipal resources for the functions of government. The Gift and Loan Clause also serves as a reminder to private citizens that they are not permitted to use governmental resources for their own benefit or enrich themselves at municipal expense. The touchstone of the Gift and Loan Clause is public purpose, so any application of this constitutional provision must focus on the intended use of the municipal resource. While an incidental private benefit is permissible, the primary beneficiary must be the public at large. A municipality therefore makes an unconstitutional gift when an action is not based on a governmental obligation or when an action is intended to enrich a private interest. The same is true for the actions of municipal employees using municipal resources, who cannot waste public property by using it to benefit private interests. Informal opinions and case law provide guidelines on permissible and prohibited uses of municipal resources, and these examples are instructive for their explication of what a municipality can and cannot do and how municipal employees should and should not act.

Ultimately, the limitations imposed by the Gift and Loan Clause provide a reminder of the role of municipal government: to serve the public rather than special interests. Courts and agencies such as the Comptroller's Office and the Attorney General's Office help clarify the role of municipal government through fact-specific interpretations of the Gift and Loan Clause, defining public purpose and determining the extent to which a municipality may, and may not, expend its resources. Taxpayers, through the declaratory, injunctive, and restorative relief offered by Section 51 of the General Municipal Law, can take action to prevent misuse of municipal resources and serve as a further check on misuse of municipal power, acting as well to define the role of municipalities and the meaning of public purpose.

Further, an analysis of the Gift and Loan Clause permits an examination of the role of government. As the touchstone of this constitutional provision is public purpose, interpretation of the Gift and Loan Clause necessarily involves an investigation into and definition of governmental purpose to establish whether a particular use of municipal resources is permissible or prohibited. Therefore, the Gift and Loan Clause is a lens through which we can view the function of a municipality, using the examples provided by case law and interpretive opinions as a way to understand (and define) the responsibility of government. More than just a limitation on municipal power, the Gift and Loan Clause is itself a way to define municipal function.

Endnotes

1. N.Y. Const. Art. VIII, § 1. N.Y. Const. Art.VII, § 8(1) similarly prohibits use of State funds for private purposes. Cases decided under one of these provisions inform interpretation of the other. *See, e.g., Union Free School Dist. No. 3 of Town of Rye v. Town of Rye*, 280 N.Y. 469 (1939) ("section 1 of article VIII was formulated for the protection of the finance of local units, and similar provision made in article VII to protect the finances of the State"); *Markovics v. Eckert*, 166 Misc. 2d 989, 638 N.Y.S.2d 278 (Sup. Ct. Monroe County 1996) (applying Article VII case (*Schulz v. State of New York*, 86 N.Y.2d 225, 630 N.Y.S.2d 978 (1995)) to interpret Article VIII); *Schulz v. State of New York*, 198 A.D.2d 554, 603 N.Y.S.2d 207 (3d Dep't 1993) (applying Article VIII cases to interpret Article VII); *In re United Nations Development Dist.*, 72 Misc. 2d 535, 339 N.Y.S.2d 292 (Sup. Ct., N.Y. County 1972) (same).
2. *New Windsor Volunteer Ambulance Corps., Inc. v. Myers*, 442 F.3d 101, 112 (2d Cir. 2006) (citation omitted).
3. *Sun Printing & Pub. Ass'n v. Mayor of City of New York*, 152 N.Y. 257 (1897).
4. *Landmark West! v. City of New York*, 9 Misc. 3d 563, 571, 802 N.Y.S.2d 340, 348 (Sup. Ct., N.Y. County 2005).
5. *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d 118, 122, 581 N.Y.S.2d 885, 887 (3d Dep't 1992), quoting *Sun Printing*, 152 N.Y. at 265.
6. *See, e.g., Town of Rye*, 280 N.Y. at 474, holding that "[p]ublic moneys should be used for public purposes; therefore, gifts or loans of public money or property may not be made to an individual or *private* corporation or association or private undertaking"(emphasis in original). Note, however, that "there is no prohibition against gifts of moneys to a *public* corporation for a public purpose, at least where the local unit does not borrow the money so given or loaned." *Id.* (emphasis original). By contrast, Article VIII § 1 does prohibit a municipality from using its *credit* to aid even a public corporation or association. *Id*.
7. *Landmark West!*, 9 Misc. 3d at 568-69, citing, *inter alia*, *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d 118, 121-22, 581 N.Y.S. 2d 885, 887 (3d Dep't 1992).
8. *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d at 122.
9. Op. Att'y. Gen. (Inf.) No. 92-30.
10. *Landmark West!*, 9 Misc. 3d at 569.
11. *See Phillips v. Maurer*, 67 N.Y.2d 672, 499 N.Y.S.2d 675 (1986) (so holding under N.Y. Educ. Law §§ 1709(33) and 1716); *Schulz v. State of New York*, 86 N.Y.2d at 235 (holding that the guidelines set forth in *Phillips* "express the constitutional line of demarcation under article VII, § 8(1)").
12. *Cf*. Op. State Compt. (Inf.) 80-752 (concluding that payments of salaries to village employees in excess of amount set in collective bargaining agreement would violate the Gift and Loan Clause); *Lecci v. Nickerson*, 63 Misc. 2d 756, 313 N.Y.S.2d 474 (Sup. Ct., Nassau County 1970) (concluding that the "termination pay" provided for in a collective bargaining agreement is a form of earned compensation, not a reward or gratuity granted at retirement, and therefore not a violation of the Gift and Loan Clause).
13. *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 353, 422 N.Y.S.2d 932, 935 (1979) (citation omitted). The Court in *Corning* held that, in the absence of authorizing legislation, a municipality could not reimburse municipal officers for legal expenses incurred in the successful defense of a civil rights action brought against them for acts performed in their official capacity, as such reimbursement "would constitute a gift of

public funds for a purely private purpose, a matter expressly forbidden by our Constitution." 48 N.Y.2d at 350 (citation omitted). *See also* Op. Att'y Gen. (Inf.). No. 2002-4, where the Attorney General similarly determined that without "express or implied authority" to commence a lawsuit, a municipality may not reimburse an individual member of a legislative body for litigation expenses incurred in bringing an unsuccessful legal action.

14. *See* Op. State Compt. (Inf.) 81-228.
15. The New York State Comptroller has held that a transfer of property is a gift if it is given "without or for only nominal consideration." *Id.*
16. *See* Op. Atty. Gen. (Inf.) 87-2, 92-30, 99-17.
17. Op. State Compt. (Inf.) 92-42 ("[I]t is a general rule that, because town equipment is acquired for town purposes, and town personnel is hired to perform services for the town, a town may not perform work on private property in furtherance of purely private purposes even if fair and adequate consideration is paid to the town under a contract. It is not an improper use of town equipment and personnel, however, to perform work on private property if the work primarily furthers a proper town purpose and is undertaken pursuant to a statutory or contractual obligation, although the work may also provide an incidental private benefit." (citations omitted)).
18. *See* Op. Att'y Gen. (Inf.) 97-20.
19. *See*, *e.g.*, *Corning*, 48 N.Y.2d at 354.
20. *Id.* ("This is not to question the power of the municipality to enact an ordinance empowering it to defend its officials who in the future may be charged with violating the law in the performance of their duties. Such a considered policy decision would raise no constitutional objections, for the cost of the defense would simply be considered additional remuneration." (citations omitted)); *Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt*, 68 Misc. 2d 645, 649, 327 N.Y.S.2d 143, 149 (Sup. Ct., Westchester County 1971) (holding that an agreement to pay health and life insurance benefits constitutes compensation as one of the terms and conditions of employment, permissible under the Gift and Loan Clause).
21. *See Taylor v. McGuire*, 100 Misc. 2d 834, 837, 420 N.Y.S.2d 248, 251 (Sup. Ct., N.Y. County 1979).
22. *Local 456*, at 649–650.
23. *Schulz v. Warren Cty.*, 179 A.D.2d at 121 n.2, citing, *inter alia*, *Korn v. Gulotta*, 72 N.Y.2d 363, 534 N.Y.S.2d 108 (1988).
24. *See Schulz v. Warren Cty.*, 179 A.D.2d 118.
25. *See*, *e.g.*, *id*. *See generally Korn*, 72 N.Y.2d 363 (non-Gift and Loan Clause Section 51 declaratory judgment action).
26. *Landmark West!*, 9 Misc. 3d 563. *See generally Gerzof v. Sweeney*, 16 N.Y.2d 206, 264 N.Y.S.2d 376 (1965) (non-Gift and Loan Clause Section 51 action seeking injunction restraining village trustees from performing a contract).
27. *Miller v. Town of Gorham*, 163 Misc. 2d 250, 254, 620 N.Y.S.2d 735 (Sup. Ct., Ontario County 1994) (Section 51 "also provides for other kinds of relief [in addition to restitution], such as a declaratory judgment or injunction"). *See generally Stetler v. McFarlane*, 230 N.Y. 400 (1921) (Cardozo, J.) (non-Gift and Loan Clause Section 51 action for restitution).
28. *Western New York Water Co. v. City of Buffalo*, 242 N.Y. 202, 207 (1926).

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Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

This quarter's cases bring little in the way of blockbuster rulings, but they do address a number of timely and interesting issues. Continuing its recent line of land use and SEQRA cases, the Third Department, correctly reading and applying the literal language of Town Law § 276(5), held that a planning board which adopts a SEQRA negative declaration may not hold a public hearing on the underlying application until such negative declaration has been adopted; a rule which is rarely, if ever, observed in practice. If nothing else, this case is a call to the Legislature to consider reviewing and rationalizing the way SEQRA interacts with municipal zoning law.

In the other cases discussed in this Update we learn that a project's potential to incite terrorists' wrath is not, as a matter of law, a potential environmental impact to be assessed under SEQRA, and we are treated to a succinct review of the law pertaining to SEQRA standing as applied to a number of petitioners/plaintiffs bearing different relationships to a single project. All in all, an interesting, if not an earth-shattering, quarter in the annals of land use law.

1. Subdivision Review Process

In *Kittredge v. Planning Board of the Town of Liberty*,[1] the Third Department held, among other things, that when a planning board acts as lead agency under the State Environmental Quality Review Act ("SEQRA")[2] in the review of an application for subdivision approval and adopts a negative declaration under SEQRA in connection with that application, it must adopt that determination before it holds a public hearing on the preliminary plat.

In *Kittredge*, respondent CR Menderis, LLC ("Menderis") owned a 143.2-arce parcel of property in the Town of Liberty, Sullivan County, which it wanted to subdivide into 27 single-family residential lots. In furtherance of that plan, it made an application for subdivision approval to the Planning Board of the Town of Liberty (the "Planning Board"). The Planning Board and its consultants provided Menderis with comments on the proposed subdivision and Menderis revised the subdivision plat in accordance with those comments. After the revisions were complete, Menderis submitted

the amended preliminary plat, along with a long Environmental Assessment Form and supporting documentation to the Planning Board.[3]

In August and September of 2006, before issuing a determination of significance under SEQRA for the application, the Planning Board held a public hearing on the preliminary plat. During the hearing, several members of the community voiced their concerns regarding, among other things, the environmental impacts of the proposed subdivision and the Planning Board required Menderis to further study the potential impacts raised during the public hearing. Although the public hearing on Menderis's application was closed in September of 2006, the Board continued its review of Menderis's application, reviewing studies prepared in response to the comments raised during the public hearing. In February of 2007 the Planning Board issued a negative declaration and in March 2007, apparently without holding another public hearing, it granted Menderis preliminary plat approval.[4]

Petitioners, opponents of the subdivision, brought an Article 78 proceeding seeking a determination that the Planning Board, as lead agency, did not take a hard look at the relevant areas of environmental concern during the SEQRA review of the application. Specifically, petitioners argued that the Planning Board did not take the requisite hard look at the subdivision's potential to impact wildlife, wetlands and stormwater pollution. The petitioners further argued that the Planning Board's procedure in approving the preliminary plat was flawed because even though it held a public hearing on Menderis's application, the public hearing was improperly held before the Planning Board issued a negative declaration under SEQRA.[5]

The Third Department held that the Planning Board met its obligations under SEQRA to take a hard look at the project's potential to impact wetlands and stormwater pollution, but did not meet its obligations with regard to wildlife.[6] Specifically, the Court held that the Planning Board's reliance on two letters from the New York State Department of Environmental Conservation which advised the applicant that the Department did not have any records regarding wildlife on the property, but then cautioned the applicant not to

rely on those letters as conclusive evidence of the existence (or non-existence) of protected wildlife and a report describing that the property was formerly agricultural land in the process of reverting back to woodland without an explanation as to why that was relevant in the context of wildlife, was not sufficient to satisfy the hard look standard. Accordingly, the Court vacated the Board's SEQRA determination based on its failure to take a hard look at the project's impact on wildlife.[7]

Additionally (although arguably in *dictum*), the Court agreed with petitioners' claims that the procedure before the Planning Board was flawed because the Planning Board held a public hearing on Menderis's preliminary plat before it issued a negative declaration under SEQRA, and thus failed to hold the public hearing at the time required by Town Law § 276(5)(d)(i)(1)[8] and Liberty Town Code § 130-13(D)(3)(a)(1), which require the Planning Board to hold a public hearing on a preliminary plat after it issues a negative declaration[9] or files a notice of completion[10] under SEQRA.[11]

The Court relied on the language of Town Law § 276(5)(d)(i) and the corresponding provision of the Liberty Town Code, along with Town Law § 276(5)(c),[12] to support its holding that a public hearing on a preliminary plat must be held within 62 days *after* the clerk of the Planning Board receives a complete preliminary plat and that a preliminary plat is not complete until either a negative declaration or a notice of completion under SEQRA is filed.[13] The Court, in further support of its holding, cites the fact that the SEQRA statutes and regulations do not require a public hearing at the determination of significance phase of SEQRA review.[14]

This case shows once again that in the realm of land use law, strict adherence to statutorily prescribed procedure is absolutely necessary. Thus, in the wake of this decision, municipal boards and applicants must think carefully about scheduling a public hearing on an application. A municipal board, acting as an approving board and lead agency under SEQRA, will have to acknowledge, as the Third Department did, that SEQRA does not include a public comment component at the determination of significance phase of review and wait to open a public hearing on a subdivision application until after it makes a determination of significance. Alternatively, if the board wishes (as has essentially become the practice) to include the public in the determination of significance phase of SEQRA, it will have to either hold two public hearings—one predetermination of significance and one post-determination of significance—or open a public hearing with multiple sessions, making a determination of significance at one session and then considering and deciding upon the substantive application at a separate, subsequent session. As odd as this result appears, there is little question that this is the correct result, given the plain, clear and unambiguous language of Town Law § 276(5)(d)(i)(1).

2. Constitutionality of Zoning Provisions

a. Zoning District Regulations

In *BLF Associates, LLC v. Town of Hempstead*,[15] the Second Department invalidated as *ultra vires* a zoning ordinance adopted by the Town of Hempstead which specifically dictated the type of development that must occur on a property. This case presents an egregious example of a town attempting to "acquire" by use of its zoning ordinance that which it could not afford (or chose not) to purchase.

In *BLF Associates, LLC*, the property that was the subject of the litigation was a 17-acre parcel of property in the Town of Hempstead, Nassau County, which had been owned and used by the U.S. Army as an Army Reserve facility. In 1996 the Army closed the facility and, pursuant to the federal Base Closure and Realignment Act of 1990, sought to convey the property.[16] Pursuant to the Base Closure and Realignment Act, the Town had preference in acquiring the property and established a committee to determine how it might use the property. The committee adopted a Reuse Plan and Technical Report (the "Reuse Plan") which contemplated "a specific mixed-use development limited to 34 single-family homes with a price cap, 40 senior dwellings and a community recreational facility," which the Town intended to be a deed restriction in the sale of the property.[17]

Ultimately, the Town decided not to purchase the Property and plaintiff—BLF Associates, LLC ("BLF")—was the successful bidder for the property, taking title in November of 2005 without any contractual or deed restriction related to the Reuse Plan.[18] However, prior to BLF's purchase in November, in April of 2005 the Town adopted Article XXXVIII of the Town's Building Zone Ordinance which created a zoning district applicable only to the property, which essentially implemented the Reuse Plan and dictated the number and type (form of ownership) of dwelling units that could be developed on the property and, *inter alia*, required BLF to construct the specific community recreation facilities contemplated in the Reuse Plan on the property.[19]

After closing on the property, BLF commenced this action seeking a declaratory judgment that Article XXXVIII is *ultra vires*, void and unconstitutional, and seeking to enjoin the enforcement of that ordinance against it and for damages.[20]

The Town argued that BLF could not complain about the constitutionality of Article XXXVIII since it purchased the property after the legislation was enacted. The Court rejected this argument, finding that the purchase of property with knowledge of a zoning restriction applicable to the property does not bar the purchaser from challenging the constitutional validity of the regulation.[21]

The Supreme Court, Nassau County, recognizing that towns have no inherent authority to adopt and enforce zoning regulations and are confined to the authority granted to them in the zoning enabling legislation of the Town Law, invalidated Article XXXVIII as *ultra vires*; the Second Department affirmed.[22] In its opinion, the Second Department stated that

> The statement of legislative purpose in Article XXXVIII acknowledges that it was enacted in order to implement the Reuse Plan for the property. The re-zoning of property for implementation of a specific project which the Town had intended to construct if it acquired the property is not a consideration or purpose embodied in the enabling act. . . . Furthermore, while Town Law §§ 261 and 262 empower the Town to regulate and restrict lot sizes and permitted uses, there is nothing in these sections which empowers the Town to create a zoning ordinance that specifies the exact number and type of dwelling allowed.
>
> Nor do the applicable enabling statutes purport to allow the enactment of a zoning ordinance that requires construction of a 9,000-square foot community recreational facility, with specified amenities, on no fewer than 1.25 acres of land. Zoning ordinances may go no further than determining what may or may not be built, and that Article XXXVIII is unnecessarily and excessively restrictive leads us to conclude that it was not enacted for legitimate zoning purposes. . . . Moreover, and contrary to the Town's contention, the provisions of Article XXXVIII that require the recreational facility to be owned by a homeowners' association and that the senior citizen dwellings be cooperative units are clearly ultra vires and void. It is a "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it." . . .[23]

This decision is an important reminder that although the zoning enabling legislation provides broad powers to municipal governments to control the use of land, that power is not unlimited and actions that go beyond the scope of that power will be annulled by the New York courts, specifically in cases where a zoning ordinance tries to mandate rather than regulate certain development and where it attempts to regulate form of ownership rather than use.

b. Non-Conforming Use Amortization

In *Suffolk Asphalt Supply, Inc. v. Board of Trustees of the Village of Westhampton Beach*,[24] the Second Department succinctly sets forth the standard applicable when determining the constitutionality of a non-conforming use amortization provision in a zoning ordinance.

In *Suffolk Asphalt Supply, Inc.*, the plaintiff was the owner of an asphalt plant in the Village of Westhampton Beach. The asphalt plant was constructed in 1945, at which time it was apparently a permitted use of the property. In 1985, the Village enacted legislation which made the use of the property as an asphalt plant a non-conforming use.[25] Plaintiff purchased the asphalt plant in 1994 and has operated it as such since that time. In 2000, the Village Board of Trustees adopted legislation which required non-conforming asphalt plants in the Village to either close within one year or obtain an a extension, the maximum duration of which was five years, from the Village's Zoning Board of Appeals. The plaintiff applied immediately to the Zoning Board of Appeals and received the five-year extension and brought this action challenging the legislation on the grounds that the law imposing the asphalt plant amortization schedule was unconstitutional because, among other things, the amortization period included in that legislation was too short.[26] After commencing the action, the plaintiff moved for summary judgment on this issue.

In analyzing the plaintiff's claim that the amortization period in the challenged legislation was impermissibly short, the Second Department set forth the law as follows:

> The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that an amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power . . . .

> Whether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case. . . . Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested increases or if the amortization applies to a structure rather than a use. . . . Factors to be considered in determining reasonableness include "the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner.". . .
>
> Typically, the period of time allowed has been measured for reasonableness by considering whether the owners had adequate time to recoup their investment in the use . . . . While an owner need not be given that period of time necessary to permit him to recoup his investment entirely, the amortization period should not be so short as to result in a substantial loss of his investment. . . .[27]

In light of this legal framework, the Second Department affirmed the Supreme Court, Suffolk County's denial of summary judgment on the grounds that the plaintiff failed to submit any information in its motion papers as to the investment it had in the business and thus there remained a question of fact as to whether the amortization period was reasonable.[28]

3. *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*

In *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*,[29] the First Department dismissed the petitioners' challenge to the adequacy of the SEQRA review of Forest City Ratner Companies' ("FCRC") Atlantic Yards project in downtown Brooklyn. Further, the Court upheld the findings of the New York State Urban Development Corporation, doing business as the Empire State Development Corporation ("ESDC"), that an area outside of the initially designated urban renewal area for the project was blighted and thus constituted a "land use improvement project"[30] and a "civic project"[31] under the Urban Development Corporation Act ("UDCA").

By way of background, the Court describes the Atlantic Yards project as a "purportedly transformational mixed-use development on a 22-acre swath of real estate in Brooklyn,"[32] which includes, among other things, 16 high-rise structures, an 18,000-seat arena which is intended to become the new home of the Nets NBA team, thousands of units of housing, hundreds of thousands of square feet of commercial space, and eight acres of open space.[33]

The project is generally located in two areas. The first is an eight-block area of land occupied by subgrade rail yards which was designated as an urban renewal area (called the Atlantic Terminal Urban Renewal Area, or ATURA) since 1968.[34] Another section of the project area spans two to three blocks outside of and adjacent to the ATURA. Although these blocks were not originally slated for redevelopment, they are included in the Atlantic Yards project area and were determined to be blighted by the ESDC and thus the proper area for a "land use improvement project" under the UDCA.[35] Throughout the project's history there has been no dispute that the ATURA area was blighted. In a separate litigation captioned *Goldstein v. Pataki*,[36] the U.S. Court of Appeals for the Second Circuit upheld the blight finding of the non-ATURA project area and any associated condemnations. The First Department's opinion indicates that the ESDC has been a proponent of the project and served as the lead agency for the SEQRA review of the project.[37]

The petitioners challenged the substantive sufficiency of the SEQRA review of the Atlantic Yards project, the propriety of the ESDC's determination that the non-ATURA project area was blighted and thus qualifies as a "land use improvement project" under the UDCA, and the classification of the proposed sports arena as a "civic facility" under the UDCA.[38]

a. Petitioners' SEQRA Claims

With regard to SEQRA, the petitioners argued, among other things, that ESDC's environmental review of the Atlantic Yards project was deficient because (1) the ESDC failed to take a hard look at the relevant areas of environmental concern because it did not consider the risk of a terrorist attack on the project; (2) that the selection of "build years" in the environmental impact statement was incorrect and thus improperly skewed the review of the project; and (3) that the ESDC, as lead agency, failed to adequately consider project alternatives since it did not give due consideration to the non-ATURA area real estate trends in its consideration of project alternatives.[39] The Supreme Court, New York County, rejected petitioners' challenges to the SEQRA review of the Atlantic Yards project, and the First Department affirmed.

With regard to the ESDC's obligation as lead agency to study the risk of a terrorist attack on the project, the Court held that

> SEQRA contains no provision expressly requiring an EIS to address the risk of terrorism and, indeed, it would not appear that terrorism may ordinarily be viewed as an "environmental impact *of* [a] proposed action" ([citation omitted]) within the statute's purview. We do not, however, find it necessary to determine whether consideration of the prospect of terrorism may ever lie within the scope of the environmental review mandated by the statute, and leave open the possibility that there may be a case in which a proposed action will by its very nature present a significantly elevated risk of terrorism and consequent environmental detriment, i.e., a case in which the risk and its potential adverse environmental impacts may in a real sense be said to stem from the action itself rather than an independent ambient source [citation omitted]. For now, it suffices to observe that the project at issue does not pose extraordinary inherent risks; . . . , but rather the creation of a venue dedicated to routine residential, commercial and recreational purposes [citation omitted]. These latter purposes, even when realized in the form of a major urban development situated at a pre-existing transit hub, do not so clearly increase the risk of terrorism, much less of terror-induced environmental harm, as to render the lead agency's determination not to address terrorism as an environmental impact of the proposed action unreasonable as a matter of law.[40]

Similarly, the Court refused to disturb the lead agency's determination regarding the build years contained in the environmental impact statement since the ESDC, in determining the build years, relied upon detailed construction schedules prepared by FCRC's experienced general contractor and reviewed by its own and independent consultants, and thus its determination as to the build years had a reasonable basis and was not arbitrary and capricious.

With regard to the consideration of alternatives, petitioners argued that the ESDC did not consider whether allowing the established upward trend in the real estate market in the non-ATURA portion of the project to continue uninterrupted would be a better alternative than FCRC's proposed plan for the non-ATURA portion of the project area.[41] The Court rejected that argument, reasoning that the consideration of the project was not limited to a consideration of what would be best for the non-ATURA project area, but rather was a consideration of the entire project area as a whole, and the ESDC's determination that FCRC's proposed project was the preferable project for the entire project area had ample support in the record given the many community benefits it would create, such as affordable housing, transportation hub improvements, and open space amenities both within and beyond the non-ATURA area.[42]

b. Petitioners' UDCA Claims

In addition to the challenges to the SEQRA review of the Atlantic Yards project, the petitioners challenged the ESDC's findings that the project was for the purpose of a "land use improvement project" under the UDCA on the grounds that the non-ATURA portion of the project area was gentrifying and that if left to market forces the area would continue to improve and thus was not "substandard and insanitary" as required for a "land use improvement project" under the UDCA. Before addressing the substance of this challenge, the First Department described the narrowness of the claim before it, given the recent decision by the U.S. Court of Appeals for the Second Circuit in *Goldstein, supra,* confirming the ESDC's authority to use the power of condemnation to acquire properties in the non-ATURA project area for the purposes of the Atlantic Yards redevelopment project. The First Department described the narrow issue before it as follows:

> While petitioners' challenges to the ESDC's findings authorizing the project as one for the public purposes of land use improvement (UDCA 6260[c]) and the provision of civic facilities (UDCA 6260[d]) are not legally precluded by *Goldstein,* post-*Goldstein* petitioners are reduced to arguing that although the uses of the project are sufficiently public to support a justly compensated taking of property within the project footprint by the ESDC through its power of eminent domain, the identical uses will not support redevelopment of the very same property pursuant to the UDCA.[43]

Rejecting the petitioners' claim, the Court, citing the extreme deference that it must show to a legislative determination of policy, held that a public purpose sufficient to support the condemnation of property (such as the Atlantic Yards redevelopment project) is similarly sufficient to support the redevelopment of the same property for the same public purpose. To hold otherwise, the Court reasoned, would not make sense since "[c]ondemnation is not an end in itself, but an instrument for the achievement of a social purpose, here urban redevelopment."[44]

The petitioners' final claim challenged the ESDC's designation of the project as a "civic project" under UDCA § 6260(d) based on the proposed construction of the sports arena within the project area. Petitioners argued that the arena does not constitute a "civic project" because it will be leased to a private professional sports organization for the benefit of private parties. The First Department also rejected this claim, citing precedent for the proposition that a privately owned sports arena can constitute a civic project under the UDCA and further that this facility will satisfy the need for a recreational venue within the project area.[45]

4. SEQRA: Standing

In *Bloodgood v. Town of Huntington*,[46] the Second Department provides a succinct summary of standing to challenge the adoption of a zoning amendment under SEQRA.

By way of background, for an individual party to have standing to challenge the adoption of an amendment to a zoning ordinance under SEQRA, the individual challenger must demonstrate that the proposed rezoning will have a harmful effect on him or her, that the harm is different than the harm suffered by the public at large, and that the harm is within the zone of interest protected by SEQRA, in other words, environmental harm.[47] However, when a party challenging the SEQRA review of a proposed zoning amendment owns property that is subject to the amendment, he or she has presumptive standing under SEQRA and is not required to show the likelihood of environmental harm.[48] When the challenger is an organization, it must show, in order to establish standing under SEQRA, that one or more of its members have standing to challenge the SEQRA review of the zoning legislation based on the standards set forth above, that the interest the organization asserts is germane to its purpose, and that neither the claim nor the relief requested requires the participation of individual members of the organization.[49]

With that background in mind, we turn to the facts of *Bloodgood*. In *Bloodgood*, the Town of Huntington enacted new zoning legislation which added "mixed use buildings" as a permitted use in the Town's C-6 General Business District. In its review of this zoning text amendment under SEQRA, the Town Board declared the action to be a Type I action, adopted a negative declaration and then enacted the zoning amendment.[50] The petitioners/plaintiffs, owners of property located in the C-6 General Business District, owners of property located in close proximity to that zoning district, other interested individuals, and the Alliance of the Preservation of Huntington Harbor, challenged the SEQRA review of the adoption of the zoning amendment, arguing that the Town Board failed to take a hard look at the relevant areas of environmental concern in its review of the new legislation under SEQRA.[51]

The Town made a motion to dismiss the petition/complaint on the grounds that the petitioners/plaintiffs lacked standing to maintain the hybrid Article 78 proceeding/ declaratory judgment action. Although the rezoning was challenged by several petitioners/plaintiffs who were situated differently with respect to standing, the lower court held that none had standing to challenge the SEQRA review of the rezoning.[52] The petitioners/plaintiffs appealed, and the Second Department held as follows:

> [Presumptive Standing] The Supreme Court erred in granting that branch of the respondents' motion which was to dismiss the petition-complaint insofar as asserted by Alexander Fusaro and Dennis Garetano for lack of standing. These petitioners-plaintiffs are owners of commercial property within the C-6 General Business District. "[W]here the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of the rezoning need not allege the likelihood of environmental harm" [citations omitted].
>
> [Standing Upon a Showing of Environmental Harm Different from the Public At Large] Likewise, the court erred in granting that branch of the respondents' motion which was to dismiss the petition-complaint insofar as asserted by Robert Sarducci for lack of standing. Given Sarducci's proximity to the C-6 General Business District–50 to 60 feet–and his allegations that Local Law No. 14-2006 will detrimentally impact the Town's sewage and wastewater systems, increase traffic, and negatively impact groundwater, he has the requisite standing to challenge the Town Board's SEQRA determination [citations omitted].
>
> [No Standing] However, the Supreme Court correctly granted that branch of the respondents' motion which was to dismiss the petition-complaint insofar as asserted by the remaining individual petitioners-plaintiffs and the Alliance for lack of standing. Unlike Sarducci, the remaining individual petitioners-plaintiffs are not in close proximity to the C-6 General Business District [citations omitted]. Moreover,

> their allegations of environmental impact are in no way different from those of the public at large [citations omitted]. Since the standing of the Alliance hinges on that of the petitioner-plaintiff John D'Esposito, who lacks personal standing, the hybrid proceeding and action insofar as asserted by it was properly dismissed [citations omitted].[53]

Given that this case involves many types of petitioners/plaintiffs—those with presumptive standing, those who made the requisite showing of environmental harm different than the public at large, those who did not have standing because they could not show environmental harm different than the public at large, and an organization—it offers a convenient reference on the principles of standing under SEQRA.

Endnotes

1. *Kittredge v. Planning Board of the Town of Liberty*, 57 A.D.3d 1336 (3d Dep't 2008).
2. SEQRA, Environmental Conservation Law, Article 8 and 6 N.Y.C.R.R. Part 617.
3. *Id.* at 1336.
4. *Id.* at 1336–1337.
5. *Id.* at 1336–1341.
6. *Id.* at 1337.
7. *Kittredge*, 57 A.D.3d at 1338.
8. Town Law § 276(5)(d)(i)(1) ("If such board determines that the preparation of an environmental impact statement on the preliminary plat is not required, the public hearing on such plat shall be held within sixty-two days after the receipt of a complete preliminary plat by the clerk of the planning board.").
9. A "negative declaration" under SEQRA means "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts. A negative declaration may also be a conditioned negative declaration as defined in subdivision (h) of this section. Negative declarations must be prepared, filed and published in accordance with sections 617.7 and 617.12 of this Part. 6 N.Y.C.R.R. 617.2(y).
10. A "notice of completion" under SEQRA is a determination by the lead agency that a draft environmental impact statement prepared for an action is adequate in scope and content and is ready for public review. 6 N.Y.C.R.R. 617.9(a)(3).
11. *Kittredge*, 57 A.D.3d at 1338-1339; Town of Liberty Code § 130-13(D)(3)(a)(1) ("Environmental impact statement not required. If the Planning Board determines that the preparation of an environmental impact statement on the preliminary plat is not required, the public hearing on such plat shall be held within 62 days after the receipt of a complete preliminary plat by the Secretary of the Planning Board.").
12. Town Law § 276[5](c) ("Receipt of a complete preliminary plat. A preliminary plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the state environmental quality review act. The time periods for review of a preliminary plat shall begin upon filing of such negative declaration or such notice of completion.").
13. *Kittredge*, 57 A.D.3d at 1338-1339.
14. *Id*. at 1340.
15. *BLF Associates, LLC v. Town of Hempstead*, 870 N.Y.S.2d 422 (2d Dep't 2008).
16. *Id*. at 424.
17. *Id.*
18. *Id.*
19. *Id. at* 424-425.
20. *Id.*
21. *BLF Associates, LLC*, 870 N.Y.S.2d at 426.
22. *Id.* at 425.
23. *Id*. at 426.
24. *Suffolk Asphalt Supply, Inc. v. Board of Trustees of the Village of Westhampton Beach*, 872 N.Y.S.2d 516 (2d Dep't 2009).
25. *Id*. at 517.
26. *Id.* at 517–518.
27. *Id.* at 518.
28. *Suffolk Asphalt Supply, Inc.*, 872 N.Y.S.2d at 518.
29. *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 59 A.D.3d 312, 2009 WL 465770 (1st Dep't 2009).
30. The UDCA defines "land use improvement project" as follows: "A plan or undertaking for the clearance, replanning, reconstruction and rehabilitation or a combination of these and other methods, of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act. The terms 'clearance, replanning, reconstruction and rehabilitation' shall include renewal, redevelopment, conservation, restoration or improvement or any combination thereof as well as the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight." UDCA, McKinneys Unconsolidated Laws § 6253(6)(c).
31. The UDCA defines "civic project" as follows: "A project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." UDCA, McKinneys Unconsolidated Laws § 6253(6)(d).
32. *Develop Don't Destroy (Brooklyn),* 2009 WL 465770 at 1.
33. *Id*.
34. *Develop Don't Destroy (Brooklyn),* 2009 WL 465770 at 2.
35. *Id*.
36. *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008).
37. *Develop Don't Destroy (Brooklyn)*, 2009 WL 465770 at 1.
38. *Develop Don't Destroy (Brooklyn),* 2009 WL 465770 at 2.
39. *Id*. In addition to these claims, petitioners argued that the New York State Public Authorities Control Board ("PACB") should not have approved ESDC's financial participation in the project without issuing findings under SEQRA. The Court dismissed this claim holding that no SEQRA review was necessary for the PACB to approve ESDC's financial participation in the project since "this singular, discrete financial inquiry would not have been usefully informed by the EIS's account of the project's environmental effect and, accordingly, did not trigger an obligation to make environmental findings pursuant to [SEQRA]." *Id.*

40. *Develop Don't Destroy (Brooklyn)*, 2009 WL 465770 at 3.
41. *Develop Don't Destroy (Brooklyn)*, 2009 WL 465770 at 4.
42. *Id.*
43. *Id.* at 6.
44. *Id.*
45. *Id.* at 9 (citing *Murphy v. Erie County*, 28 N.Y.2d 80 (1971)).
46. *Bloodgood v. Town of Huntington*, 58 A.D.3d 619 (2d Dep't 2009).
47. *See Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 687 (1996).
48. *Id.*
49. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 775 (1991); *see also Municipal Lawyer*, Vol. 23, No. 1, p. 9 (Winter 2009) (Land Use Law Case Law Update discussion of *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 865 N.Y.S.2d 365 (3d Dep't 2008).
50. *Id.* at 621.
51. *Id.*
52. *Id.* at 621–622.
53. *Id.*

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