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Municipal Lawyer

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A Message from the Chair

I have been monitoring a certain New York State Court of Appeals decision for more than a year now. *Sanchez v. State of New York*[1] concerned the state's liability for injuries sustained by Claimant Sanchez when he was assaulted by another inmate. The basis of Claimant's claim was negligent supervision of the inmates. The Court of Claims granted the State's motion for summary judgment dismissing the claim and denied claimant's cross-motion for summary judgment on liability.[2] The Appellate Division affirmed and dismissed finding that the attack was unforeseeable as a matter of law. The Appellate Division adhered to a three-prong test for foreseeability, finding that the State did not actually know that the Claimant was vulnerable to assault; or that the assailant in this case was dangerous; or that the State was aware that an assault was about to occur and had an opportunity to intervene and protect the Claimant.[3] This three-prong test for foreseeability has been relied upon by the Court of Claims in prisoner cases for some time.[4]

The Court of Appeals reversed the Appellate Division finding a triable issue of fact as to foreseeability. The Court opined that our comfort with the succinct test for actual notice in reality precluded consideration of the "State's constructive notice—what the State reasonably *should have known*. . . ."[5] The fact that an inmate may affirm that the attack came as a complete surprise to him will not necessarily alleviate the State's liability. Courts and the parties must delve further into the facts surrounding the incident.

Now, after applying the three-prong test for actual notice, we must consider what the State should have reasonably known. All this should sound familiar inasmuch as we are reviewing basic negligence standards. So why am I bothering all of you with a synopsis and discussion of a state prison inmate negligence claim? It appears that this particular piece of jurisprudence has made its way into general municipal law.

In *Scarver v. County of Erie*,[6] a subcontractor's employee brought a labor law and negligence action against the County, owner of the construction site, the general contractor for the project and a subcontractor. The Appellate Division, citing *Sanchez*, found

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that the defendants could only be found liable if the harm that befell plaintiff was reasonably foreseeable. In *Scarver*, workers were in the process of connecting a large iron pipe to a header below the ground floor of the County's sewage pumping station. The support for the pipe, a bottle jack, slipped out from under the pipe, pinning another worker's hand against the header. Attempting to free the hand, a second worker used a forklift to lift the pipe away. The forklift ended up tipping and the pipe and forklift extension ended up falling to the sub-basement floor. The plaintiff, working on another floor, above ground, felt the building vibrate and heard loud noises from where he was. He left his work to investigate further, deciding to climb down a ladder for a closer look. While standing on a ladder above the incident and above the ground floor of the building he was told to "look out" and he jumped from the ladder to the ground, injuring his foot. The trial court granted defendants' motions for summary judgment and the Appellate Division affirmed, finding that plaintiff's injury was the direct result of his jumping off a ladder, which in and of itself was not a foreseeable consequence of the falling pipe below where the plaintiff was standing.[7]

Take a look at *Sanchez* when you get an opportunity and refresh your recollection regarding the negligence standard. You will be happy to know that the decision also references an old favorite, *Palsgraf v. Long Is. R.R. Co.*[8] Enjoy.

Renee Forgensi Minarik

Endnotes

1. 99 N.Y.2d 247, 754 N.Y.S.2d 621 (2002).
2. 288 A.D.2d 647, 732 N.Y.S.2d 471 (3d Dep't 2001).
3. *Id.*
4. See the more recent decisions on the Court's website at www.nyscourtofclaims.state.ny.us.
5. 99 N.Y.2d at 254, 754 N.Y.S.2d at 625.
6. 2 A.D.3d 1384, 770 N.Y.S.2d 222 (4th Dep't 2003).
7. *Id*. at 1386.
8. 248 N.Y. 339 (1928).

From the Editor

Whether to be proactive or reactive presents a continuing dilemma to local government officials. For example, rumblings are heard in the community that a large commercially zoned parcel is about to be sold. The seller has occupied the parcel for many years, but recently there has been a diminution of activity on the site. The prospective purchaser will be seeking a rezoning of the property to permit a more intensive use. Should the elected officials wait for the formal filing of a petition for rezoning or should they initiate their own examination of the optimal uses of the site and amend the zoning ordinance accordingly?

Whether initiated by a developer or the municipality, a rezoning is an "action" under the New York State Environmental Quality Review Act ("SEQRA"),[1] and the legislative body, as the approving authority for any rezoning, must consider the environmental impacts that are reasonably likely to result from or are dependent on the zoning amendments.[2] The critical first step that must be undertaken is the preparation and/or scrutiny by the municipality of a full environmental assessment form ("EAF"), with supplements as appropriate, identifying and taking a hard look at potential environmental impacts. If the full EAF demonstrates that the action proposed "may have a significant effect on the environment," an environmental impact statement must be prepared.[3] In determining whether a given action may have a significant effect on the environment, "the agency should consider reasonably related effects of the action, 'including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon.'"[4]

Absent a specific rezoning application, the local government, at its own cost and expense, may initiate the preparation of a Generic Environmental Impact Statement ("GEIS") for the area to evaluate a range of potential uses for the property.[5] Conversely, the municipality could await the filing of the rezoning petition and, where the EAF reveals that any of the new uses to be permitted under the rezoning may have a significant effect on the environment, direct the applicant, at its cost and expense, to prepare an environmental impact statement to analyze those potentially significant impacts. Regardless of whether a development proposal accompanies the request for rezoning, the legislative body is obligated, at the time of rezoning, to consider the impact to be expected from future development and to compare the present state of development of the property to the range of intensity that otherwise might be permitted on rezoning.[6]

Cost considerations may deter local government officials from initiating their own zoning analysis and environmental review.[7] However, where the petition for rezoning and EIS are prepared by a developer, the proposed uses may not dovetail with the community's vision for the property. Under these circumstances, the municipality should require a developer to evaluate a range of alternative uses for the property as part of the EIS process. In weighing these competing considerations, municipal officials should remember that the entity that controls the process generally controls the outcome.

The societal benefits of proactive government policies are reflected in this issue of the *Municipal Lawyer*. The articles included in this publication highlight policies to foster open government, to protect children from lead-based paint poisoning, to train employees to be sensitive to ethical considerations in the performance of their official duties and to promote development in blighted or underdeveloped areas.

In this issue, Robert J. Freeman, Executive Director of the Committee on Open Government for the New York State Department of State, examines the case of *Newsday, Inc. v. New York State Department of Transportation*[8] currently pending before the New York State Court of Appeals. There, the DOT denied a *Newsday* reporter's request under the Freedom of Information Law ("FOIL") for records that identified hazardous intersections and highway locations in New York City and Long Island. DOT based its denial on a federal statute (23 U.S.C. § 409) which precludes, in a litigation context, the use of "such records or data compiled or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accidents . . . " Distinguishing between the rights of access conferred on the public under FOIL and those conferred upon a litigant in the use of discovery, Mr. Freeman predicts that the State's highest court will ultimately determine that requiring disclosure under these circum-

stances would effectuate the public policy underlying FOIL without being inconsistent with the intent of the federal statute.

The physiological, psychological and sociological elements of the public health crisis that is childhood lead-based paint poisoning are expertly explained by Janiece Brown Spitzmueller, an attorney with the New York City Department of Housing, Preservation and Development. Ms. Spitzmueller's thought provoking essay argues that government programs and resources to prevent children from suffering the adverse health and other effects of exposure to lead-based paint can be most effectively and efficiently targeted to children under six years of age.

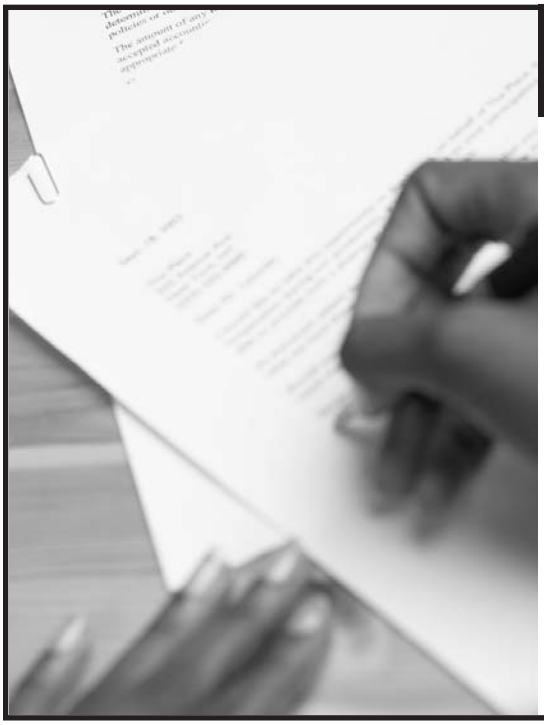
In "Communicating Ethics to Municipal Employees," Joel Rogers, Director of Training and Education at the New York City Conflicts of Interest Board, identifies strategies and practices for effectively training municipal employees on the principles of conduct underlying the municipal ethics code.

Finally, Kenneth W. Bond, of Squire, Sanders and Dempsey L.L.P. provides us with a primer on "The Use of Tax Increment Financing to Stimulate Private Investment and Development in Targeted Areas by Municipalities in New York State—Can It Work?" Mr. Bond presents a generic overview of tax increment financing ("TIF") as an economic development tool and provides examples of TIF bond projects in Louisiana, Ohio and New York, to illustrate the potential for and the legal obstacles to TIF in New York State.

Lester D. Steinman

Endnotes

1. *Neville v. Koch*, 79 N.Y.2d 416, 426, 583 N.Y.S.2d 802, 806 (1992).
2. *New York Canal Improvement Association v. Town of Kingsbury,* 240 A.D.2d 930, 658 N.Y.S.2d 765 (3d Dep't 1997).
3. Environmental Conservation Law § 8-0109(2).
4. *DeFreestville Area Neighborhoods Association v. Town Board of the Town of Greenbush,* 299 A.D.2d 631, 633, 750 N.Y.S.2d 164, 166 (3d Dep't 2002) (citations omitted).
5. 6 N.Y.C.R.R. § 617.10.
6. *DeFreestville,* 299 A.D.2d 631.
7. However, the SEQRA regulations authorize recoupment from an applicant of a share of the lead agency's costs in preparing a GEIS for the area in which the applicant's project is located. 6 N.Y.C.R.R. § 617.13.
8. 10 A.D.3d 201, 780 N.Y.S.2d 402 (3d Dep't 2004).



Request for Articles

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

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

Apples and Oranges: Will the Court of Appeals Clearly Distinguish Them?

By Robert J. Freeman

As I prepare this commentary, *Newsday, Inc. v. New York State Department of Transportation*[1] is on its way to the Court of Appeals. My question is: why is the Department of Transportation (DOT) continuing to resist disclosure?

By way of background, a *Newsday* reporter submitted a request pursuant to the Freedom of Information Law,[2] also known as "FOIL," for records that identify hazardous intersections and locations in particular geographic areas. DOT is required to maintain the records sought to comply with the federal hazard elimination program.

As a general matter, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the law.

More often than not, common sense will lead to a correct conclusion in determining rights of access, for the exceptions are intended to ensure that government agencies have the ability to withhold records to the extent that disclosure would result in some sort of harm. The general question that should be raised under FOIL or any law dealing with public access to government records is, very simply, what would happen if the government disclosed? Insofar as disclosure would constitute an unwarranted invasion of personal privacy, preclude the government from carrying out its duties in the best interest of taxpayers or provide adequate protection, or perhaps cause injury to the competitive position of a commercial enterprise, the government should and generally does have the ability to deny access. Conversely, if disclosure would not result in substantial harm, disclosure should be and generally is the rule. I note, too, that it has been emphasized time and again that embarrassment is not one of the grounds for denial of access.

In denying the request, DOT cited 23 U.S.C. § 409, which states that:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

DOT contended that the records sought are exempt from disclosure based upon 23 U.S.C. § 409 when it is read in conjunction with section 87(2)(a) of FOIL. The latter pertains to records that "are specifically exempted from disclosure by state or federal statute."

The Apple and the Orange

There is a clear distinction between rights of access conferred upon the public under FOIL and those conferred upon a litigant via the use of discovery, and the courts have provided direction concerning FOIL as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings and under the Criminal Procedure Law (CPL). The principle is that FOIL, an apple, is a vehicle that confers rights of access upon the public generally, while the discovery provisions of the CPLR or the CPL, oranges, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under FOIL by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom

of Information Law . . . is not affected by the fact that there is pending or potential litigation between the person making the request and the agency."[3] Similarly, in an earlier decision, it was determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced . . . nor restricted . . . because he is also a litigant or potential litigant."[4] The Court in the former discussed the distinction between the use of FOIL as opposed to the use of discovery in article 31 of the CPLR and held that:

> FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (*Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y. 2d 575, 581). Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of "full disclosure" article 31 is plainly more restrictive than FOIL. Access to records under the CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (*Allen v. Crowell-Collier Pub. Co*., 21 N.Y. 2d 403, 407), discovery is at the outset limited to that which is "material and necessary in the prosecution or defense of an action."[5]

In short, FOIL imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding. The materials made available in discovery to a litigant may not be available to the public under FOIL. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under FOIL.

Legislative Intent

The language of the federal statute indicates that the intent is to preclude the use of certain records in a litigation context, perhaps to the detriment of a government agency and, therefore, taxpayers. In a statement clarifying the intent of 23 U.S.C. § 409 when it was minimally amended in 1995 by inserting the phrase "or collected" after "compiled," the Congressional Record states that:

> This section amends section 409 of title 23 to clarify that data "collected" for safety reports on surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.[6]

The Appellate Division reached the same conclusion, holding that:

> By its own terms, section 409 expressly limits the disclosure of data only in the context of an action for damages involving one of the identified locales. Where material is requested for a purpose other than litigation, 23 U.S.C. § 409 is not applicable. Thus, section 409 does not prohibit disclosure of priority intersection and highway location data where, as here, the information is sought by a newspaper that is not engaged in a court proceeding involving an accident occurring at a location mentioned in such data . . .
>
> Had Congress intended to place this information beyond the reach of *all* FOIL requests, it could have done so explicitly as it has in other statutes.

> . . . While the absence of a specific reference in 23 U.S.C. § 409 to a FOIL request does not necessarily mean the Public Officers Law § 87(2)(a) is inapplicable, respondent has failed to show a clear legislative intent to establish and preserve the complete confidentiality of the information at issue. Given Congress's measured response to courts' application of 23 U.S.C. § 409, it is clear that Congress intentionally limited disclosure of hazard elimination data only to the extent necessary to ensure its exclusion from court proceedings involving accidents that occurred at locations addressed in that data.[7]

Although the Appellate Division did not cite it as precedent, the Court of Appeals has described the same principle, stating that: "Although we have never held that a . . . statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection."[8]

What Is the Harm?

Even if the records at issue are disclosed under FOIL, they cannot be obtained via discovery or used in a proceeding relating to an occurrence at a location mentioned in those records. Being informed of the direction provided in 23 U.S.C. § 409 by a wise and knowledgeable government attorney, a court would be required to ensure that any such records are not used in the proceeding. That being so, the harm sought to be avoided by 23 U.S.C. § 409 can clearly be avoided.

More importantly, when a government agency knows which intersections or areas of highways are the most hazardous, and when it is also known that the records containing that information cannot be used in litigation against the agency, it would seem that disclosure would be beneficial to the public, and to the agency, in a manner fully consistent with the principles upon which FOIL is based.

What is the harm? If there are only winners and no losers, why did DOT push the case to the Court of Appeals? I cannot conjecture as to the answer, but predict that the high court will unequivocally affirm the decision of the Appellate Division.

We shall see.

Endnotes

1. 10 A.D.3d 201, 780 N.Y.S.2d 402 (3d Dep't 2004).
2. Public Officers Law, article 6, §§ 84-90.
3. *Farbman v. NYC Health and Hospitals Corporation*, 62 N.Y.2d 75, 78, 476 N.Y.S.2d 69, 70 (1984).
4. *John P. v. Whalen*, 54 N.Y.2d 89, 98, 444 N.Y.S.2d 598, 603 (1981).
5. *See Farbman*, 62 N.Y.2d at 80.
6. H.R. Rep. 104-246 § 328, at 59 (1995); *See* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C. AN. (109 Stat) 591.
7. *Newsday*, 10 A.D.3d at 204-205.
8. *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 567, 505 N.Y.2d 576, 579 (1986).

Robert J. Freeman is the Executive Director of the Committee on Open Government for the New York State Department of State in Albany.

Childhood Lead Poisoning and the Applicable Age Test

By Janiece Brown Spitzmueller

While studying child development in college, I had the opportunity to meet a thirteen-year-old whose cognitive development had been arrested because she had eaten lead-based paint chips when she was five. Her physical appearance hinted of a girl at the threshold of womanhood, yet her eyes lacked the brightness of a young person eager to explore her world. She appeared listless and somewhat disengaged from her surroundings. I was struck by how an innocent act of curiosity could profoundly alter one's life chances.

" . . . I had the opportunity to meet a thirteen-year-old whose cognitive development had been arrested because she had eaten lead-based paint chips when she was five. Her physical appearance hinted of a girl at the threshold of womanhood, yet her eyes lacked the brightness of a young person eager to explore her world."

Lead-based paint hazards in the home are the most significant source of lead poisoning in young children.[1] Although published reports have pointed to interior lead-based paint in homes as a source of childhood lead poisoning since the 1930s, it was not until the 1960s that lead poisoning was recognized as a significant pediatric pubic health problem, and that the United States first initiated legislation regarding lead poisoning.[2] In New York State, mandatory lead screening is required for all children at ages one and two years old.[3] In New York City, lead poisoning is concentrated in poor neighborhoods with older housing stock. "In 2002, for children 6 months to 6 years of age with environmental intervention blood lead levels: 44% lived in Brooklyn, 22% in the Bronx, and 22% in Queens. In fact, five out of 42 neighborhoods accounted for 35% of our cases requiring environmental investigations. These neighborhoods are: Williamsburg-Bushwick, Bedford-Stuyvesant, East Flatbush-Flatbush, West Queens and Fordham-Bronx Park."[4]

The New York City Council, after finding that lead poisoning—a preventable childhood disease—remains a public health crisis,[5] sought to protect children by enacting the New York City Childhood Lead Poisoning Prevention Act of 2003, also known as Local Law 1 of 2004.[6] Major distinctions of the NYC Childhood Lead Poisoning Prevention Act of 2003 from prior lead laws,[7] are the expanded coverage from residential dwelling units to common areas of residential buildings and to day care services caring for children under six years of age, and expanding the applicable age of children in dwelling units from six to seven years of age.[8] This article will examine cognitive development, how lead poisoning impacts cognitive development and why the applicable age under the Housing Maintenance Code ought to revert to children under six years old.

Cognitive Development in Young Children

At birth, the human brain is the most undeveloped organ and, with stimulation, it undergoes a rapid development during the first three years,[9] enabling children to undergo rapid language development in the first three to five years.[10] The brain forms synapses that connect brain cells to each other and form the pathways that constitute its wiring.[11] Nurturing stimulates critical processes in the central nervous system, affecting cognitive and emotional development,[12] and is the first step to learning.[13]

From birth to two years, children learn through movement and the senses, especially hearing, sight, and feeling with the hands and mouth.[14] As the brain develops, the mind unfolds physically, cognitively and socio-emotionally.[15] Since experience activates brain cells, stimulation is essential for the acquisition of each new skill that a child develops during the first three years of life.[16] Between 18 and 36 months children become aware of their ability to sense, perceive, feel, think and remember, to develop their problem solving skills, mental imagery and deferred imitation,[17] readying them for the next stage of learning.[18]

Between two years and seven years, child's play evolves from character imitation to character director. They develop the ability to work with symbols: words, letters, numbers and toys, which now represent concepts.[19] From 3 years to 9 years, they can handle more complex concepts, i.e., follow directions with 3 or 4 points, think further into the future, and mentally resolve abstract problems. Their cognitive growth enables them to think about solutions and consequences before reacting to a problem.[20]

Age Appropriate Behavior and Lead Poisoning

Age is the most significant risk factor for lead poisoning, with levels being the highest between ages 12 months and 36 months, and diminishing thereafter.[21] As toddlers become more ambulatory, they explore previously unavailable areas of their environment that are sources of lead contamination, inhaling lead dust and ingesting lead chips through age appropriate hand-to-mouth activity; 30% to 50% of lead ingestion occurs among children in this age cohort.[22]

The very behavior that readies children for the progressive stages of learning can put them at risk of lead poisoning. Factors putting them at risk include: brain immaturity, an increased tendency to ingest non-food toxins, a higher absorbency rate than adults and, among low-income children, a higher likelihood of dietary calcium and iron deficiency.[23] As a rapidly growing organ, the brain is more susceptible to the toxic effects of lead poisoning. Lead poisoning slows the electrical brain activity conducive to synaptic development, and causes central nervous system dysfunction.[24]

Ingested lead absorbs better with liquid, making orally inclined toddlers more susceptible to gastrointestinal lead absorption,[25] especially since lead-based paint is sweet to the taste.[26] In addition, calcium, iron and zinc deficiencies enhance lead absorption from the gut.[27] While 60% of ingested lead circulates through the kidneys in a process known as first-pass elimination,[28] daily intake leads to progressively higher accumulations of lead in the system. "When ingested lead in sizes as small as the fingernail on the fifth finger, a single paint chip can contain enough lead to raise blood lead levels by more than 10ug/dL. Repeated ingestion of such paint chips can result in fatal lead poisoning."[29]

Pulmonary absorption of lead dust is rapid and efficient, and the degree to which it is absorbed is contingent upon particulate size and chemical composition. Larger lead dust particles are trapped in mucus secretions, swallowed and ingested.[30] Since pulmonary absorption does not undergo first-pass elimination, it enters the circulatory system upon inhalation. "Small particles of lead paint dust commonly found inside window casings and released with repeated window openings and closings are an important source of lead exposure in children."[31]

Once absorbed, lead is distributed to the blood, soft tissue and bone, with various half-lives depending on the distribution. Circulating lead has a half-life of 35 days. Daily pulmonary absorption, however, ensures that constant recontamination occurs at the highest and most rapid concentrations. Soft tissue distribution has a half-life of 40 days that, depending on the type of absorption, could also mean constant recontaminations at high concentrations. Bone distribution has a half-life of 3 to 5 years or 30 years, depending on location.[32]

The Applicable Age Test

Pursuant to section 27-2056.18 of the Housing Maintenance Code, "the term 'applicable age' shall mean 'under seven years of age' for at least one calendar year from the effective date of this section. Upon the expiration of such one-year period, ***in accordance with the procedures by which the health code is amended***, the board of health may determine whether or not the provisions of this article should apply to children of age six, and based on this determination, may redefine 'applicable age' for the purpose of some or all of the provisions of this article to mean 'under six years of age' but no lower."[33] This one-year period expires on 1 August 2005. Section 173.14 (h) of the Health Code provides that the Health Commissioner or designee may amend the health code where strict application presents practical difficulties or unusual hardships, and modification is consistent with general purpose.

That the most rapid brain and language development occur within the first five years of life supports focusing on this age cohort to advance the City Council's goal to eliminate "childhood lead poisoning by the year 2010,"[34] and the mission of the Lead Poisoning Prevention Program of the New York City Department of Health and Mental Hygiene (DOHMH) "to prevent and control childhood lead poisoning."[35] In keeping with that mission, Thomas R. Frieden, MD, MPH, Commissioner, DOHMH, reported a 79% decline in the number of children under six years of age with blood lead levels of 10 micrograms per deciliter (mcg/dL) or greater, amounting to an 18% annual reduction in cases between 1995 and 2002.[36] He further notes that expanding the applicable age to under seven years increases the cost of childhood lead poisoning prevention by fifteen percent.[37] While older children

may be at risk of lead poisoning from pulmonary absorption of lead dust created from friction surfaces,[38] toddlers are primarily at risk of lead ingestion through gastrointestinal absorption of peeling paint from impact and other surfaces.[39] Although recontamination from gastrointestinal absorption may result in a lower level of lead in the blood, that toddlers by nature have a higher level of brain immaturity than older children suggests that more harm to the central nervous system is likely, as well as a higher severity of brain damage. Lead poisoning could arguably result in the pruning away of more brain synapses than are developed. In addition, the earlier in life that a child is poisoned, the more likely that he or she would not attain the requisite readiness to progress to the next stages of learning.

Conclusion

In order to most effectively use the City's resources to prevent "children from suffering the adverse health and other effects of exposure to lead-based paint,"[40] it is feasible to redefine "applicable age" for the purposes of enforcing the Housing Maintenance Code to mean children under six years old. On average, by the time children reach six years old, they have the ability to follow directions, think abstractly and access the consequences of behavior. In addition, seven-year-olds are less likely to engage in behaviors that are most conducive to lead poisoning.

New York City's significant decrease in lead cases over recent years, and the increase in funding required to protect a population least likely to be exposed to conditions conducive to lead poisoning, warrant reconsideration of the applicable age test as it pertains to the Housing Maintenance Code. The expanded age application dissipates funds where they are not needed and creates a practical difficulty in preventing and controlling childhood lead poisoning among those most at risk. Reversion to children under six years of age could generate a fifteen percent increase in funding for programs concentrating on neighborhoods where childhood lead poisoning is highest, on children between one and two years of age, on mandated testing of two-year-olds, on education and nutrition for targeted populations. Furthermore, special education classes are often used to address the types of developmental difficulties associated with childhood lead poisoning. Concentration on the age cohort most at risk could save the city in future expenditures when these children enter elementary school and produce school-aged children better equipped for their academic careers.

Endnotes

1. Stephanie Pollack & Jeanne M. Sole, *Lead-Based Paint Legislation, in* Lead Poisoning In Childhood 181, 182 (Siegfried M. Pueschel, et. al. eds, 1996).
2. Siefried M. Pueschel et al., *Lead Poisoning: A Historical Perspective, in* Lead Poisoning In Childhood 1, 7-8 (1996).
3. Housing Maintenance Code (HMC) § 27-2056.1 (referring to state mandate); *see also* Testimony of Thomas R. Frieden, MD, MPH, Commissioner, New York City Department of Health and Mental Hygiene (DOHMH), on Intro 101-A: Childhood Lead Poisoning Prevention, before the New York City Council Committee on Housing and Buildings, June 23, 2003, City Hall, New York City, *available at* http://www.nyc.gov/html/doh/html/public/testi/testi20030623.html (hereinafter "Frieden June 23, 2003 Testimony") (Dr. Frieden notes that of "New York City children born in 1999, 86% were tested at least once before their third birthday, but only 31% were tested at both age 1 and 2.").
4. Frieden June 23, 2003 Testimony.
5. HMC § 27-2056.1.
6. The City Council enacted the New York City Childhood Lead Poisoning Prevention Act of 2003 on December 15, 2003. On December 17, Mayor Bloomberg vetoed the bill, and on February 4, 2004, the City Council overrode the Mayor's veto. Local Law 1 of 2004 became effective on August 2, and amends Subchapter 2 of Chapter 2 of Title 27 of the Administrative Code of the City of New York, also known as the Housing Maintenance Code. Local Law 1 of 2004 also amends section 173.13 of the Health Code, and repeals and re-enacts section 173.14 of the same.
7. New York City Childhood Lead Poisoning Prevention Act of 2003 §§ 2-4.
8. HMC § 27-2056.18.
9. Charles E. Schaefer & Theresa Foy Di Geronoimo, Ages & Stages: A Parent's Guide to Normal Childhood Development 67 (2000).
10. Linda C. Mayes & Donald J. Cohen, The Yale Child Study Center Guide To Understanding Your Child: Healthy Development From Birth To Adolescence 229-30 (2002).
11. Schaefer & Di Geronoimo, *supra* note 9, at 19 (The authors note that "new synapses are formed while others are pruned away, depending on stimulation.").
12. Mayes & Cohen, *supra* note 10, at 90 ("A child's experiences, first by reacting to love and care, 'switches on' critical processes that prepare him or her to make use of the attention and caring that adults provide.").
13. *See generally* Mayes & Cohen, *supra* note 10, at 201.
14. *Id.* at 90-91.
15. *Id.* at 112-123.
16. *Id.* at 117-118; *see also* Schaefer & Di Geronoimo, *supra* note 9, at 19-20.
17. Schaefer & Di Geronoimo, *supra* note 9, at 67.
18. The four main stages of cognitive development are: 1) Sensorimotor (birth – 2 years); 2) Preoperational (2 years – 7 years); 3) Concrete operational (7 years – 11 years) and 4) Formal operational (11 years through adulthood). See Mayes & Cohen, *supra* note 10, at 90-91. This article focuses on the sensorimotor and the preoperational stages of learning.
19. Schaefer & Di Geronoimo, *supra* note 9, at 127-28; *see also* Mayes & Cohen, *supra* note 10, at 214-28.

20. Schaefer & Di Geronoimo, *supra* note 9, at 179-82.
21. Michael W. Shannon, *Etiology Of Childhood Lead Poisoning, in* Lead Poisoning In Childhood 37, 50 (Siegfried M. Pueschel, et al. eds, 1996).
22. *Id.*
23. Angela Anderson, et al., *Pathophysiology of Lead Poisoning, in* Lead Poisoning In Childhood 75, 78 (1996) (Children from middle and upper-middle class households are more susceptible to pulmonary absorption of lead dust caused during home renovations.).
24. *Id.* at 81-86.
25. *Id.* at 75-76.
26. Michael W. Shannon, *supra* note 21, at 45.
27. Angela Anderson, et al., *supra* note 23, at 76.
28. *Id.* at 77; *see infra* pp. 89-90 (First-pass elimination is conducive to kidney damage.).
29. Michael W. Shannon, *supra* note 21, at 45-46.
30. Angela Anderson, et al., *supra* note 23, at 76.
31. *Id.*
32. J. Julian Chisolm, Jr., *Medical Management, in* Lead Poisoning In Childhood 141, 143 (Siegfried M. Pueschel, et al. eds, 1996); *see also* Angela Anderson, et al., *supra* note 23, at 88 (Lead interferes with bone formation.).
33. HMC § 27-2056.18 (emphasis added).
34. HMC § 27-2056.1.
35. DOHMH, Lead Poisoning Prevention Program, *available at* http://www.nyc.gov/html/doh/html/lead/lead.html.
36. Frieden, June 23, 2003 Testimony.
37. Testimony of Thomas R. Frieden, MD, MPH, Commissioner, DOHMH, on Intro 101-A: Childhood Lead Poisoning Prevention, before the New York City Council Committee on Housing and Buildings, November 17, 2003, City Hall, New York City, *available at* http://www.nyc.gov/html/doh/html/public/testi/testi20031117.html. (Dr. Frieden further notes that the Centers for Disease Control recommends "and New York State laws focus on children under 6 years of age; NYC housing laws should do the same.").
38. *See* HMC § 27-2056.1(4).
39. *See* HMC §§ 27-2056.1(5) and (10).
40. HMC § 27-2056.1.

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Communicating Ethics to Municipal Employees

By Joel Rogers

In the world of governmental ethics, much hay gets made about the ethics code as prophylaxis. Naturally, if the objective of ethics rules is to preserve the public trust, then a steady dose of violations splashed across the local paper will undermine that objective. Communicating the message of the ethics code to public employees *before* they get themselves into conflicts, therefore, is one of the most critical tasks of a municipal ethics board.[1] Arguably, having an ethics code without some means of conveying its requirements to public servants may be worse than not having one at all.

Facing the issue of how to train government employees in ethics can generate a number of practical and philosophical questions. Who will conduct training, especially with a minimal budget? How will we reach everybody? Will it be classroom-style training, or will we create tools for self-directed learning? What are we trying to teach? Ethics? Morality? Rules?

What to Teach

A good ethics code—New York City's Conflicts of Interest Law is one example among many—is generally not about "ethics." It is really about the financial or political conflicts that can exist between a person's private life and his or her responsibilities as a public servant. It would seem, therefore, that teaching employees to be "ethical" could not really be the objective of this kind of training. It is tempting, then, to assume that if you're not teaching "ethics" *per se* (or, more correctly, "morality"), you must be simply teaching employees to follow the rules. What could be more useful, after all, than giving clear guidance on what acts would constitute violations that could get them into trouble? But this dichotomy between teaching employees about right and wrong and teaching them simply to follow the rules is a false one. Neither of these approaches individually would work very well. An individual's sense of morality is forged over a lifetime, not in a one hour training class, while teaching "rules" sounds at worst like distrust of the employees themselves and also tends to generate a kind of rule-oriented (i.e., *loophole*-oriented) thinking. Moreover, as ethics professionals, we understand that "knowing the rules" is really not sufficient for avoiding conflicts of interest. Attorneys who have worked in ethics for years may agree about what the rule is but may disagree that a given case violates it.

Ethics training must be aimed first at helping public servants understand the *principles* underlying the ethics code. The task of educating employees about these principles is really the task of *selling* your "students" on the importance of these ideas. It is essential, for example, that they recognize what kind of consequences may result not only from situations where an employee's fairness and impartiality have been compromised by an outside financial interest, but from situations where there might even be the *appearance* that someone is inappropriately benefiting from his official position. To reach trainees successfully, it is critical that they *agree*—at least generally—that the public good is significantly impaired when violations of the ethics code occur. Otherwise, they are likely to view the ethics rules with skepticism, and worry more about getting caught than about why they should use the code as a guide for their actions.

Of course, providing participants with the resources to get more information and to get their questions answered is critical. Whether they are learning from classroom-style training or watching a low-budget "talking head" video, they should come away knowing whom to call for legal advice to keep themselves out of trouble. In turn, it is essential that the agency have a way of providing that support to employees who are trying to do the right thing.

How to Teach It

Classroom-style training with a competent, articulate, and knowledgeable trainer is the most effective method of instruction. However, it is also relatively inefficient, especially if you have many public employees to reach. (In New York City, we have over 300,000 public servants.)

In those municipalities where it would not be practical to reach every public servant through a formal training class, the focus should be on those individuals in each agency who are at the critical nodes where agency culture is established. Senior staff and agency attorneys, for example, must all get ethics training in a classroom setting. Consider training

anyone involved in procurement, too, and, if possible, even vendors doing business or hoping to do business with your municipality.

Effective training is, by definition, interactive. A lecture on ethics rules is an invitation to top executives to sit glued to their Blackberries. Fortunately, the subject of conflicts of interest lends itself beautifully to real discussion because its underlying principles cannot be illustrated except through consideration of cases—actual or hypothetical. Once participants understand the most basic tenets—that using your public position for private advantage or that creating the appearance that your fairness and impartiality may be compromised by a private interest both undermine the public's trust—they are well qualified to join in a discussion of hypothetical cases you have prepared for them in advance. I have a personal favorite in the classes I teach:

> Carole is in charge of the Health Department's contract with Acme Pharmaceuticals. She knows they are looking for a research director, and her brother happens to have excellent credentials in that field. Carole calls her contact at Acme to set up an interview.

If participants in your training classes are the least bit spirited, you can get a lot of mileage from this simple scenario. No, it shouldn't be a violation, many of them will argue, because it's done all the time. After all, it's not like Carole asked Acme to give her brother a job. She simply asked if they would be interested in interviewing a guy who is well credentialed, right? Naturally, there will be some in the group who understand that there is at least the appearance of an implicit *quid pro quo*, and they can help set the others straight.

This works well because there is a real-life scenario that most employees can relate to, and, with good facilitation from the instructor, there are few participants who won't have an opinion. It is also valuable because it easily illustrates a specific major provision of any good ethics law—that a public servant may not use or attempt to use his or her official position to obtain any financial gain for the public servant or any person associated with the public servant.[2]

Also, a solution generally proposed by participants—that Carole should have told her brother about the job opening and not reached out to her contact at Acme—generates another discussion about the misuse of confidential information. In other words, was the opening publicly posted, or is she using information she learned in her position to get her brother an unfair advantage in his job search?

Some Simple Training Tools

Whether or not you are able to conduct live instruction, there are many inexpensive ways to supplement your training program. At the lowest end, you would do well to consider a 30 minute "talking head" video that employees can be required to view.[3] Ideally, the video would present hypothetical examples that illustrate the main provisions of the ethics code, and discuss real life enforcement cases where public officials have been sanctioned for misusing their positions.

While it is wise to navigate the political minefield of your municipality cautiously, there is substantial training value in presenting enforcement cases that have been brought against very high-level public officials. Not only does this help to establish that your ethics board is independent from top government officials (to the extent that the board actually enjoys such independence), but it also helps to communicate that your ethics code is and will continue to be fairly applied to all public servants, regardless of rank or position. Understand that it is not uncommon for employees in lower paying positions to respond to an ethics code as if it unfairly discriminates against them. For example, if there is a fairly low cap on fines against violators, such fines will be more onerous for the lower paid public servant. Also, a prohibition on being paid twice for doing your municipal job (the prohibition on accepting gratuities) can generate some resentment from government workers who believe they are not even being paid *once* for all their hard work. So it is important to communicate that your ethics board recognizes that high-level public officials have an even greater responsibility for the public trust than other public servants, and pursues their violations accordingly.

A basic publications program will also be cost effective in communicating ethics. While a large city's ethics agency might have numerous written publications aimed at helping employees navigate the ethics code, even the smallest ethics board should have some basic materials. If your ethics code is contained in your municipality's governing legislation—in other words, if it's in *legalese*—you must have a "plain-language guide" to help employees understand clearly what's required of them. This may be in the form of one or two bulleted pages of highlights, or a booklet spelling out in some detail each of the code's provisions. It should be written at a fairly general level, not only so that it avoids the nuts and

bolts of specific scenarios (this can't, after all, replace your giving legal advice), but also because you don't want to create a document that needs to be modified every time your ethics board issues an opinion or a finding of violation. In New York City, we also have over 20 plain-language leaflets that spell-out in greater detail specific areas of the ethics law (post-employment, political activities, real estate matters, and the like) which are of great value to employees. Whatever you do, don't ambitiously produce materials that will then be difficult to keep current. Out-of-date publications can be a greater liability to your ethics board than no publications at all.

Nowadays, your organization cannot be on the map if it is not on the web. A website for your ethics agency needn't be a big production, but your code should be available for downloading, as should your plain-language materials. Most importantly, your website (and all of your materials) should serve as a resource for public servants seeking further information about ethics. While many issues arising for employees are clearly addressed in your ethics code, many more will be difficult situations with which they will need assistance in the form of legal advice. The single most important message your site can offer is who to talk to resolve specific questions. It is also valuable to stress the confidentiality of such requests for advice, to the extent that your ethics agency ensures it. Visit our website for New York City employees at http://nyc.gov/ethics for additional ideas.

Technology can be used in other ways to supplement your training program. Obviously any live training can be made more professional in appearance by including a well-designed PowerPoint presentation. But there are other tools you might consider that can make live training more engaging (and even fun!) using just your laptop and an LCD projector. Consider, for example, a Jeopardy style ethics game that we've played to acclaim with thousands of NYC public servants. A well-known company called Learning Ware, Inc. (http://www.learningware.com) makes a product called "Gameshow Pro" that provides, for only a few hundred dollars, excellent training-game templates into which your content can be easily incorporated.

There are many more sophisticated uses of technology available, if you have the means to do it. A mandated certification program for all employees could be built around a program of web-based training modules tailored to your municipality. This can be an excellent tool because it is quite interactive—each employee would have to answer review questions successfully in order to have his or her name sent to a database of "ethics certified" employees—and would be an efficient means of reaching all of your public servants. There are a number of companies that could consult with your municipality to create such a program, usually at considerable expense. But if you can do it, an ideal might be to require all employees to complete the program once a year (a requirement you could easily audit using the database component), and to continue to provide live training for at least senior staff at all agencies or departments.

Most municipal ethics boards operate in a highly austere fiscal environment, and there's nothing wrong with creating a training program out of "construction paper and tape." While I have offered some low-budget—and some not-so-low-budget—ideas, these are just a fraction of the tools and methods available to you. Let your imagination run wild with games, videos, bookmarks, or even an ethics comic book. Reach as many people as possible, but particularly those people most empowered to establish an ethical culture in the agency and at greatest risk of conflicts of interest. Give public servants not only the information they need to stay clear of ethics violations, but also the tools to evaluate their own potential conflicts as they arise. Most importantly, when the municipal official both understands *and believes* that his or her actions have a direct impact on the degree of trust that the citizenry has for their local government, then and only then have you effectively communicated ethics.

Endnotes

1. Although this article assumes that your municipality has an ethics board, the techniques discussed in this article will work even if you have no such board.
2. *See* NYC Charter § 2604(b)(3).
3. A simple video may be filmed inexpensively in a TV studio if you have access to one, or can even be a one-person job with a hand-held digital video camera. Duplication of videotapes or DVDs is not expensive.

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The Use of Tax Increment Financing to Stimulate Private Investment and Development in Targeted Areas by Municipalities in New York State—Can It Work?

By Kenneth W. Bond

I. What Is TIF?

A. General Definition

Tax increment financing (TIF) is an economic development tool that municipalities can use to stimulate private investment and development in targeted areas by capturing the increased tax revenue generated by the private development itself and using the tax revenues to pay for public improvements and infrastructure necessary to enable development.

In a few jurisdictions TIF financing can even be used to pay for private improvements under certain circumstances. In general, authorizing legislation and constitutional amendments need to be in place at the state level before a municipality can engage in this type of financing.

B. History

Although TIF is different from traditional methods of financing public investments, it still is a form of public debt requiring state enabling legislation. The first state law to authorize tax increment financing was passed by California in 1952. Other states were slow to follow. By 1970, just six more states had enacted laws authorizing TIF—Minnesota, Nevada, Ohio, Oregon, Washington, and Wyoming.

By 1997, however, 48 states had enacted TIF laws, and the District of Columbia joined the list in 1998. New York's TIF law (General Municipal Law §§ 907-a *et. seq*.) was passed in 1984. As of today, there are only one or two states that have not authorized the use of tax increment financing.

C. Purposes

- Aid municipalities in combating or preventing blight by enabling a municipality to incur or reimburse a developer for many of the redevelopment project costs that would normally fall upon the developer.
- Aid developers in constructing projects by shifting the burden of all or part of certain construction costs onto a municipality.
- Aid the general public by redeveloping depressed areas, thereby improving the community and its economy without the necessity of raising property taxes.

II. How Does TIF Work?

A. TIF is a "bootstrapping" type of economic development tool that enables a municipality to use the expected future benefits of a development or redevelopment (i.e., the increased real estate tax revenue or sales or utility tax revenue) to pay for specified current expenditures to aid financing of a desired development or redevelopment project. The municipality establishes a TIF area, with specified boundaries and duration, and dedicates the increase in specified taxes from the area from the establishment date forward (the "tax increment") to the support of one or more development and/or redevelopment projects, usually within the TIF area.

B. The municipality issues bonds to obtain funds which enable it to pay for certain initial costs of the projects(s). As an alternative, the municipality and the developer can agree that the developer will pay for the costs initially and be reimbursed by the municipality over time as tax increment is produced. If this alternative is used, the municipality's obligation to reimburse the developer usually is evidenced by a promissory note, which may or may not be interest-bearing.

C. Generally, each year after the redevelopment is complete, until the TIF area terminates, the municipality uses the incremental tax revenue to amortize the debt. After the TIF area terminates or the debt is paid, whichever occurs first, the municipality and other taxing districts reap the benefits of the increased tax revenue, a larger tax base and, presumably, the increased economic activity arising from

the development (jobs, sales tax, etc.) of the once blighted area.

III. The TIF Process

- The municipality first must determine how it wishes to administer tax increment financing and exercise its powers to encourage targeted development or redevelopment.

- The municipality must then designate the TIF area or footprint from which the initial tax assessment is to be measured and from which the incremental tax is to be drawn.

  In order to designate a TIF area, the municipality first must determine that the proposed TIF area qualifies for designation under the applicable statute. Many TIF statutes require a finding of the municipality that the proposed area is "blighted." Some municipalities require simply that the TIF area is appropriate for economic development. Sometimes the TIF area will be limited to the footprint of the project to be developed or redeveloped; often, however, the TIF area is a broader area within which TIF-supported projects will be built.

  After, or simultaneously with, creating the TIF area a redevelopment plan serving as an outline for the redevelopment project needs to be adopted. Components of the plan typically include estimated costs of the project, assessment of the potential impact of the project, scope of the debt obligation to be issued and the time for termination of the TIF area. Usually this is done is through local legislation.

- Generally, municipal statutes require a public hearing before going forward with the development or redevelopment plan. This may, depending on the statutory requirements and the development or redevelopment plan impact, result in a review or comments being needed from other taxing districts in whose jurisdiction the TIF area lies.

- After a required hearing and review (if needed), the municipality must enact legislation authorizing the use of TIF in order to implement the development or redevelopment plan in the development or redevelopment site. The legislation will empower the municipality, either directly or through a redevelopment agency, to take the necessary steps (e.g., contract, constitute boards, incur long-term debt) to effectuate the development or redevelopment.

- The municipality must next establish the base tax year, against which incremental tax revenue will be measured. The base tax year is usually the year immediately preceding the designation of the redevelopment area. To determine the incremental tax revenue generated by the TIF area, tax revenue from the assessment for the base tax year is subtracted from the total tax revenue generated by the TIF area for every subsequent year during the existence of the TIF.

- After solicitation of project proposals for a designated TIF area, or the designation of a preferred developer, the municipality will choose a developer or developers to develop or redevelop the site and enter into a development or redevelopment agreement with the developer(s). The development or redevelopment agreement sets forth the terms and conditions on which the municipality will provide TIF support and the developer(s) will construct and maintain the project(s).

- In order to contribute to the financing of the development or redevelopment, the municipality will incur long-term debt in the form of a bond issue or, alternatively, a promissory note that evidences the municipality's obligation to reimburse the developer for certain initial expenditures made by the developer.

- If the redevelopment project is successful, the increased assessed value of the TIF area will produce incremental tax revenue. The municipality then uses the incremental revenue to pay off the debt it incurred in contributing to the development or redevelopment.

- After a statutory period of time or when the debt is retired, the TIF area will terminate and the municipality will receive both the base tax revenue and the incremental tax revenue from the former TIF area.

IV. Typical TIF Timeline

Day 1:	Begin feasibility study and qualification for TIF area designation report. Depending upon the local law, begin solicitations of and negotiations with developers for projects within TIF area. Initiate bond counsel involvement or preparation of promissory note.
Day 30:	Set date for public hearing and comply with notice requirements.

Day 75:	Public hearing.
Day 100:	Municipality enacts an ordinance or resolution approving the development or redevelopment plan, designating the redevelopment area, and authorizing the TIF area and the actual financing.
Day X:	Development or redevelopment agreement signed. Municipality issues bonds or executes the promissory note.
Beyond Day X:	Construction begins and is completed. Year after year the incremental tax revenue is allocated to retire and pay off the municipality's debt.
Beyond Day X:	TIF area terminates.

V. TIF in New York

While TIF has been used extensively throughout the country in cities such as Chicago, Los Angeles, and Washington, D.C., it has never been used in New York City. In fact it has been used only twice in the State of New York.

The State of New York's TIF law provides a governmental means to eliminate "blight," subject to the constraint that a municipality can only engage in redevelopment which ". . . cannot be accomplished by private enterprise alone . . ." (General Municipal Law § 970-b Legislative findings and declaration). The law stops short of saying how this private enterprise condition should be satisfied, however, and gives the municipality significant discretion in defining blight. Relatively few state laws provide quantitative criteria to be applied in identifying blight. Some state laws explicitly allow the use of TIF for economic development without a finding of blight.

Under New York State's law, a municipality has the power to issue TIF bonds. Similar to TIF bonds in other states, New York TIF bonds are not secured by the "faith and credit" of either the city or the state like general obligation bonds, and the TIF debt does not count against the municipality's constitutional debt limit. Like general obligation debt, however, interest on TIF debt may be tax exempt if it satisfies certain criteria set out in the federal Tax Reform Act of 1986.

Although some states allow municipalities to use sales or personal property tax revenue to finance TIF debt, the law in New York and most other states allow only real property taxes to be used. Specifically, the New York law requires that property taxes for the TIF district be divided as follows: the municipality receives an amount equal to the current property tax rate applied to the last assessed property value for the TIF district before the TIF district was formed; once the municipality has been paid, the remaining revenue can be used to pay the service on the TIF debt; if there is any excess revenue, it must be returned to the municipality.

In some states in which entities other than the municipality have claims on local property taxes (school districts and counties, in particular), state laws require that these other entities get a share of the tax increment. For example, California requires that a TIF district allocate a fixed percentage of the tax increment to the other tax entities, and the required percentage rises with the age of a project. Such provisions allow the other tax entities to benefit from growth within the TIF district. The major obstacle with New York's TIF statute is that it does not require school district property taxes to be included in the tax increment calculation. Since school district taxes are usually the largest portion of the total local property tax, the absence of that portion significantly reduces the amount of TIF debt which can be leveraged.

Other rules for TIF projects are relatively flexible under New York State's law. Industrial, commercial, and residential development can all be included in a redevelopment plan for a TIF district. Unlike some states, which impose size (acreage) or time limits on specific TIF projects, New York imposes neither.

VI. Analyzing TIF

Although TIF has been in the statutes of most states for many years, its application as a tool in project finance where the financial assistance of the public sector is combined with economic development initiatives of the private sector has had a checkered career.

From the outset it needs to be recognized that TIF is the financing tool of optimists. The TIF concept is predicated on the idea that from a blighted, underused parcel attended by dilapidated houses and vacant commercial buildings found in older neighborhoods of older cities, economically feasible commercial and residential activity can be born. In this respect, the governmental proceedings which bring TIF to life resemble urban renewal law. The TIF area is both the subject of the contemplated redevelopment and the source of a stream of revenues which will pay for the debt service on the new debt (i.e., TIF bonds), the proceeds of which will be applied, usually with other sources of funds, to improve the blighted parcel. The unique attribute of TIF is not that it creates new revenues in the sense of imposing

a new tax, but rather it creates new debt—TIF bonds. The proceeds of that debt then improve the parcel, causing it to generate incrementally greater taxes and fees compared with the parcel in its unimproved state. The increment is the revenue which pays debt service on TIF bonds. If you're not an optimist, at least about the economic activity to spring from the parcel to be improved, it's hard to get excited about TIF.

Because TIF requires incrementally greater taxes and fees to work, those persons and property owners subject to the greater taxes and assessments are afforded their due process rights to be heard. Just as in urban renewal law, a redevelopment plan must be created and a redevelopment area needs to be determined and mapped, all subject to approval at a public hearing. Further, the limited purposes for which TIF bonds may be authorized and issued under state law needs to be considered in applying TIF bond proceeds to project costs. A popular referendum may also be required to approve the redevelopment plan but usually enabling legislation enacted by the local government or issuer legislature will suffice to authorize financing and transactional arrangements. State oversight approval of TIF is not usually required to form the redevelopment area. However, state laws requiring making environmental impact determinations, amending zoning laws, and applying to change or close streets within the redevelopment area, among other things, require further administrative tasks in gaining government approval for TIF. Each participating local government or school district in the TIF area must approve the transaction documents and financing documents through enactment of an ordinance or form of authorizing resolution.

However, redevelopment does not happen in a vacuum. The initiative for TIF may originate from the good intentions of municipal officials and leading citizens. But the catalyst comes from a developer with the vision to see a parking ramp or a shopping center or a residential complex where blight and despair abound, and further see that in his or her lifetime he or she will earn a profit from the undertaking. The developer, usually a real estate developer with a substantial business infrastructure and proven track record of success, approaches the local government or is selected thereby through an RFP process. Once the governmental proceedings are out of the way, the tough work of negotiating a redevelopment agreement between the developer and the local government or several local governments and issuer of TIF bonds (if different from the local government) moves in earnest.

Several elements factor into the redevelopment agreement:

First, is the legal analysis usually overlooked by all but a few old bond lawyers, as to whether the local government with the TIF statutory authority can authorize and issue TIF bonds or enter into financing agreements for the payment of TIF bonds. Care must be taken to insure that the TIF bonds are not general obligations of the local government, or could be characterized as such. Whatever revenues are generated from the local government—incremental real estate taxes, incremental sales taxes or general budgetary appropriations—must not fall into the category of revenues pledged under state constitutional provisions to secure "full faith and credit" debt. Likewise, the TIF bonds must be special obligation revenues bonds payable and secured from specific sources other than the general taxing power of the local government. In addition, the purpose of the project, while it might also be a purpose for which the local government's general obligations may be issued (i.e., parking) must derive from special enabling legislation, not from the state statutes which grant general powers to local governments. For example, economic development (the underlying purpose of TIF) as public purpose, is not usually a purpose for which a local government can incur debt except under the special fund doctrine where expressly authorized. To overcome the absence of a public purpose, the use of a conduit—an industrial development agency, port authority or local development corporation (a 501(c)(3) not-for-profit corporation with quasi-governmental functions)—may be designated the issuer of TIF bonds.

Second, interests in property affected by TIF need to be addressed. In a large area, some parcels may need to be acquired through condemnation. Persons and businesses remaining in the TIF area need to be compensated for moving out or relocated—this requirement being sometimes statutory. The appraisals of parcels and the fixing of the "base" value or base tax rate needs to be determined, subject to statutory provisions, usually with the advice of consultants knowledgeable in valuating property.

Third, the sources of revenue to pay TIF bonds must be identified. By statute they are the real estate taxes or sales taxes in excess of a pre-determined "base" rate or appraised property value fixed at a time the parcel is in its blighted state. Through some mechanism such as exempting taxes above the base and imposing a payment-in-lieu of taxes agreement ("PILOT") or depositing taxes assessed and collected above a certain amount or a certain rate in escrow, an amount of future special revenues may be deter-

mined to pay debt service on TIF bonds. This mechanism is easier to describe than execute. In the case of incremental real estate taxes or PILOT payments, the underlying appraisal of the parcel subject to TIF; the setting of tax rates by local officials; and the timing of levying, collecting and paying over these special revenues needs to be hammered out with precision. The number of units of government participating in the tax increment program must be substantial. If school districts, which often levy the lion's share of real property tax, are not involved with the municipalities, incremental tax revenues may be insufficient to support TIF bond debt service. In the case of incremental sales taxes, a feasibility study is often required to demonstrate the predicted future economic activity sufficient to generate additional sales tax carved out for TIF bond debt service. The failure of these mechanisms to work properly is a major bondholder risk since TIF bonds are generally unpopular credits with bond insurers and bank letter of credit providers. In some cases other sources of special revenues—special assessments and general local government appropriations—may be added to the incremental revenues to provide greater security for TIF bonds. If state or federal funds are available to assist financing development, these must be identified and applied for as well.

Fourth, the priority of revenues pledged to the payment of TIF bonds needs to be clarified and worked out among parties, often with competing interests. Obviously, TIF bonds holders would like a perfected first priority interest to all revenues relating to the development at all times. But revenues which are pledged to payment of local government general fund expenses, or revenues which look like real property taxes but (like PILOTS) unlike taxes are not secured by a lien on the underlying real property, must be evaluated as to their likely "future value" and supplemented with other dedicated revenues to the extent legally permitted. The issue of security for revenues varies depending on state law provisions. Once the priority of revenues is determined, the financing documents need to provide escrow funds or trust funds to segregate revenues and pledge them for the benefit of TIF bondholders.

Fifth, the nature of the project itself must effectively bootstrap onto other adjacent economic development activity to ensure that property values and economic activity increase as required to meet expectation of TIF bondholders. Improving a small parcel in isolation of other economic development activity is not likely to attract TIF bonds. Rather, combining several adjacent projects into a large development appears to be the popular application of TIF where it becomes one of many financing tools employed to finance a particular aspect of the overall scheme. For example, a parking ramp next to a big-box store or a residential complex next to a retail shopping center are the kinds of developments likely to have economies of scale to generate incremental revenues sufficient to satisfy debt service on TIF bonds.

Sixth, the developer's contribution to the project is important. Local governments and school districts which are giving up valuable future tax revenues need to obtain a *quid pro quo* for their participation in a TIF deal. That may come in the form of developer cash contributions to local governments to soften the impact of not receiving future incremental tax, contributions from the developer for promotion or "pouring" rights, and return of a portion of the excess incremental revenues to the local government if and when bond payments and indenture requirements are satisfied.

Seventh, something about the uses of TIF bond proceeds is usually worked in the redevelopment agreement. The major portion of bond proceeds is applied to the construction and acquisition of the project. But the developer may want its "development fees" paid as a project cost; and invariably as much of the proceeds as can be applied to capitalized interest during (and perhaps after) construction is highly desired by the developer. The local government (or issuer, if different) and investment bank will want to ensure that a structure is in place to capture incremental revenues and other sources of periodic payments in the flow of funds to pay debt service on the TIF bonds, fund reserves and an early redemption account, and to generally keep the revenues in trust for bondholders well beyond the grasp of the developer.

VII. Examples of TIF Deals

Consider three examples of TIF bond projects or concepts in three states: Louisiana and Ohio, where the statutory framework has resulted in recent financings, and New York, where the statute has impeded the use of TIF bonds, but the creativity of public finance professionals has produced something akin to the TIF concept.

Wal-Mart in the French Quarter. New Orleans (the "City") in 2003 provided TIF bonds to finance the construction of a 1,238-unit rental apartment complex for low- and moderate- income and market-rate tenants adjacent to a 217,000 square-foot Wal-Mart Supercenter.[1] Here the TIF bonds have nothing to do with financing the Wal-Mart project—nor should they because these TIF bonds are revenue bonds of the City and their purpose must be confined to city purposes (not the purpose of assisting a

private commercial enterprise). It is not uncommon for municipalities to directly or indirectly finance housing as a city purpose in most states. But it would be questionable whether the City could issue its bonds for the purpose of benefiting Wal-Mart. It is this historic prohibition against public sector entities borrowing to assist private sector entities which requires that the bonds financing the Wal-Mart project be issued by a conduit industrial development agency (IDA). But what connects the City's revenue bonds and the bonds of the IDA?—sections 9033.3 *et seq*. of the Louisiana Revised Statutes which permits the carving out of an increment of the City sales tax to support an economic development project financed by the City's revenue bonds. The IDA bonds supported, we assume, by the general credit of Wal-Mart, need to be issued to create the facility (i.e., the Wal-Mart Supercenter), which will generate the incremental sales taxes to pay the City's revenue bonds which are used to finance the apartment complex. And why would Wal-Mart put its credit on the line to pay for a $28 million IDA bond for the "supercenter"? Because 1,238 new low-, moderate- and market-rate persons and their families and friends will be right over to shop as soon as they move in. The Wal-Mart TIF bond is an excellent example of a revenue being legally diverted (carved out) from one public purpose to another and then leveraged to create a capital asset. Fifty years ago the state of the law would find such a carve-out unconstitutional as an unlawful diversion of public moneys to benefit the private sector. But economic development is increasingly afforded the status of a public purpose when it increases the general health and welfare of the community.[2] As to carve-outs, it has been well established for over a quarter century that even without designating certain taxes as "increments" above and beyond the regular taxes applied for public purposes, income and sales taxes may be carved out and "given" to another public body with hardly a question asked.[3]

Cincinnati Mall. In Ohio another type of TIF bond was issued by the port authority of Cincinnati to finance a 2,700 space parking ramp and other infrastructure improvements adjacent to a 96-acre shopping mall which was separately undergoing extensive renovation.[4] Like most malls, this one was nowhere near the downtown but spread across two small suburban cities and three suburban school districts. None of these entities clearly possessed a public purpose to finance parking for a shopping mall, nor did any of them possess a debt limit required to absorb the $20 million needed for the project without interrupting their normal capital requirements. For an issuer, the public entities looked to a regional development authority whose purposes, which include the financing of economic development projects, made it the perfect conduit. The genius of this transaction is how the various parts were put together. Through municipal ordinances, real property in the TIF area was granted a 100% tax exemption above a certain assessed value pursuant to sections 5709.40 *et seq.* of the Ohio Revised Code. Instead of future real property taxes, the public entities imposed "service payments" (i.e., PILOTs) on the exempted property. To back up service payments, the cities also imposed special assessments pursuant to Chapter 727 of the Ohio Revised Code which are to be credited to the assessed property to the extent service payments are sufficient to pay debt service on authority bonds. The service payments and assessments, referred to as "city contributions" through ordinances and cooperative agreements are pledged to the authority for payment of its TIF bonds. While service payments, like all PILOTS, are not generally enforceable against the charged real property, under Ohio law assessments are. So in a sense, the authority issued a back-door doubled-barreled revenue bond which might, from a credit analysis standpoint, rise to a general obligation given enforceability of assessments against benefited property. But this financing was strictly a limited special obligation of the authority in strict observance of the special fund doctrine. All of which leaves the question: how did the authority get all this revenue to support its bonds? Unlike the New Orleans financing where city sales taxes are carved out to pay for city revenue bonds, here the carve out and augmentation of revenues through assessments is assigned to a regional authority. Some have argued that the assignment of municipal funds is *ultra vires* when it is made to an entity which does something indirectly, as an *alter ego*, the assignor local government cannot do directly. But these arguments have generally failed.[5] And lest anyone doubt that the doctrine of assignment of public moneys as many times as necessary to avoid constitutional infirmities is alive and well, one need only read the March 4, 2004 decision of New York's Court of Appeals in *Local Government Assistance Corporation v. Sales Tax Asset Receivable Corporation*.[6] Here the court sanctioned payments from LGAC to New York City which the city will assign to a not-for-profit corporation it created (STARC) to pay for bonds to be issued by STARC which the city could not legally issue, the proceeds of which will be used to advance refund bonds of a public benefit corporation, the payment of debt service of which was, but will be no more, the obligation of the city.

Ithaca-Cornell Parking. Finally, we come to New York where TIF bonds, though authorized, are never

used in substantial redevelopment projects. Without a school district's tax base, such as in the Ohio financing, the base upon which the increment is calculated won't support much debt. And unlike Ohio, unless the local government is a village or a town or county improvement district, there is little to no authority in New York to levy assessments on benefited property. Like Ohio, municipalities and school districts may act jointly and cooperatively by agreement but strictly only for their respective public purposes. Economic development generally and parking specifically are credible municipal purposes but hardly educational ones. Nonetheless, without an effective TIF statute, the legal inability of local governments to issue revenue bonds (New York's local revenue bond law was repealed in 1942), and the general judicial view that lease purchase agreements are *ultra vires* as unconstitutional debt,[7] the city of Ithaca set about in 2003 to finance construction of a parking ramp adjacent to new research buildings in the downtown area being constructed by Cornell University. However, the city could ill afford to finance the parking ramp through its general obligations because to do so would wipe out its constitutional debt limit. The financing solution turned out to be a crude version of a TIF bond. City property was conveyed to its urban renewal agency (URA) and a preferred developer was selected, thereby relaxing certain public bidding restrictions. The bonds were issued by the county IDA as qualified 501(c)(3) bonds using a qualified 501(c)(3) developer.[8] To generate a credible revenue stream the city leased its existing parking ramps to the URA with the proviso that existing city debt on the parking ramps and operating costs be paid back to the city from parking revenues and only new incremental parking rents be pledged to payment of the IDA bonds—this is the proto-TIF aspect of the deal. The icing on the cake was a financial assistance agreement (FAA) from the city wherein the city would, at its discretion, appropriate annually to the URA any shortfalls in parking revenues for debt service on IDA bonds requested and certified to the city by the URA. Initially, the FAA raised concern about unauthorized and unconstitutional city debt. But the city had an out—it was merely giving money to the URA subject to annual appropriation. In New York, it turns out one public sector entity can give money to another to support the other's debt without violating the state's "lending of credit" constitutional prohibitions.[9] Indeed, without the "gift" under the New York constitution, the state courts in the 1970s and 1990s could hardly have sanctioned the appropriation-backed debt issued to finance the eradication of state and New York City operating deficits.[10]

VIII. Reflections

TIF will always be a somewhat controversial financing tool because its source of repayment depends on the heart of the source general public revenues—taxes and assessments. It will continue to be somewhat state specific because laws affecting taxes, assessments, liens, and tax levies, among other things, are matters of state concern unlikely to ever be pre-empted by a uniform federal law. Developers, investment bankers and bond lawyers will continue to be challenged to make TIF or proto-TIF work in the statutory and constitutional frameworks they find themselves for one simple reason: the wall between public purposes and private purposes is coming down. In the post-NAFTA "outsourcing" domestic climate, economic development is as much a public purpose as paving a street or building a new jail. The financial assistance the public sector provides is an essential ingredient in large-scale development which stabilizes neighborhoods, attracts business, creates jobs and provides a decent place to live. As suggested, state laws in many cases need substantial revision to facilitate TIF. Members of the bar can keep busy and do the public good pursuing the TIF area.

Endnotes

1. $20,000,000 City of New Orleans Sales Tax Revenue Bonds (St. Thomas Economic Development District), Series 2003, dated October 30, 2003.
2. *See Common Cause v. Maine*, 455 A.2d 1 (Me., 1983).
3. *See Quirk v. Municipal Assistance Corporation for the City of New York,* 41 N.Y.2d 644, 394 N.Y.S.2d 842 (1977).
4. $18,000,000 Port of Greater Cincinnati Development Revenue Bonds (Cooperative Public Parking and Infrastructure Project), Limited Offering Memorandum, dated February 10, 2004.
5. *See City of San Diego v. Rider*, 47 Cal App. 4th 1473, 55 Cal. Rptr. 2d 422 (Cal Ct App, 1996).
6. 2 N.Y.3d 524, 780 N.Y.S.2d 507 (2004).
7. *See Marine Midland Trust Co. v. Village of Waverly*, 42 Misc. 2d 704, 248 N.Y.S.2d 729, *aff'd,* 21 A.D.2d 753, 251 N.Y.S.2d 937 (3d Dep't 1964), and *Commissioner of Education v. Corning City School District*, April 1, 2003.
8. $19,035,000 Variable Rate Demand Civic Facility Revenue Bonds (Community Development Properties Ithaca Inc. Project), Series 2003A, dated December 16, 2003.
9. *See Comereski v. City of Elmira*, 308 N.Y. 248 (1955).
10. *See Wein v. State of New York,* 39 N.Y.2d 136, 383 N.Y.S.2d 225 (1976) and *Schultz v. State*, 84 N.Y.2d 231, 616 N.Y.2d 343 (1994).

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