

Municipal Lawyer

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

A Message from the Chair

"There is no better place than the Otesaga in Cooperstown."

So wrote one of our Section members, after our annual Fall Meeting held on October 10-12, 2008. I would throw in on a perfect weekend, with a crisp blue sky and warm sun, and trees ablaze with color. Not to mention the fine food and class of the hotel itself, and the camaraderie of our members. It's amazing we did any work at all. But we did.



Robert B. Koegel

Many thanks to our Program Co-Chairs, Sharon Berlin and Tom Myers, who put together the panel and topics for presentation and discussion. We began Saturday morning with a warm welcome from the State Bar President-Elect, Michael Getnick. Michael did far more than deliver a fancy hello; he stayed with us all weekend, attended and contributed comments during our program presentations, and listened to what we had to say. We look forward to a good year with him.

Tom Myers led the panel on financing economic development opportunities, with Empire Zones, IDAs, LDCs, and tax-exempt financing. Little did any of us know months ago that by the time this topic was presented, our nation would be debating a \$700 billion bailout package to rescue lenders and lubricate the economy in the wake of the subprime mortgage loan meltdown and the impact of leveraged derivatives. Nevertheless, Tom and his panelists, Ken Bond and George Cregg, forged mightily ahead with their informative materials. Attendees told me they

were particularly interested in this topic and were well-satisfied with its content and presentation.

The Saturday morning program also included a panel on amendments to the Wicks Law and an update on construction claims litigation. We were pleased to have Thomas Welby, a private practitioner from White Plains, review the latest cases, and Mitch Morris of the State Comptroller's Office, go through the Wicks Law amendments in depth. Municipal involvement in construction law matters is a perennial concern of our members which we review from time to time, and again, our attendees were impressed with the knowledge of the presenters and the depth of their materials. I thank Tom and Mitch, as well Tom Myers, Ken and George, for their hard work.

Following our traditional protocol, we took Saturday afternoon off to enjoy ourselves. Some played golf, others toured beautiful Otsego Lake on the Glimmerglass Queen, others shopped and poked

Inside

From the Editor	3
<i>(Lester D. Steinman)</i>	
Green Building	5
<i>(Christina Hawkins)</i>	
Running a Local Municipal Ethics Board: Ten Steps to a Better Board	9
<i>(Steven G. Leventhal)</i>	
Charitable Use Property Tax Exemptions: When "Exclusively" Means "Primarily"	16
<i>(Christina Hawkins)</i>	
Reducing Municipal Legal Costs Through Shared Legal Services	19
<i>(Lester D. Steinman)</i>	

around Main Street with all of the baseball paraphernalia, and some hung out, relaxing on the lavish Otesaga grounds overlooking the lake. I don't think anyone was bored or disappointed. The highlight for many was a private cocktail reception in the Hall of Plaques of the Baseball Hall of Fame. It was quite special to have that room, so hallowed with the adoring memories of so many fans of the nation's pastime, all to ourselves. Without our cocktail sponsors, this event would not have happened. I want to thank again the law firms of Hodgson Russ, Lamb & Barnosky, Jacobowitz & Gubits, and the Orrick firm, as well as the consulting firms of Environmental Capital and Clough Harbour for underwriting this event. We closed Saturday with a sumptuous dinner at the hotel, as delicious as the night before.

Our Sunday morning program covered three topics. I gave a SEQRA case law update that I hope was interesting (some were kind enough to say so). Robert Coughlin of the State Comptroller's Office reviewed new regulations regarding the classification of professionals, including attorneys, as independent contractors instead of as employees for the purpose of benefits. These regulations arise from the Attorney General's investigation into apparent abuses by a handful of school district attorneys who were collecting exorbitant benefits from multiple school districts

and not doing any work. I've gone off on this topic before, noting that the proper response to the abuse of the few should not bring about a system of control that will stifle the ability of municipalities to retain competent legal service by the most efficient means, which is often by employment rather than independent contracting. I urge you to get involved and make a difference through our Bar Association. We closed with an ethics presentation by Steven Leventhal on municipal law ethics and running a local municipal ethics board. Steve gave a thorough and enjoyable presentation, as always.

Once again, I urge you to attend our Section Fall meetings held annually throughout the State and our Section Winter meetings held as part of the State Bar Association's Annual Meeting, which takes place near the end of each January in New York City. These meetings are far more than a means to get mandatory CLE credits. They are an opportunity to get to know your fellow practitioners in a social way, join committees on subjects of particular interest for writing and discussion, learn about and shape the course of future legislation that affects your lives, and have some fun away from home with family and friends. Come on out.

See you in New York!

Robert Koegel

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact the *Municipal Lawyer* Editor:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/MunicipalLawyer

From the Editor

At the intersection of federal copyright law and New York State's Freedom of Information Law lie the questions of whether municipalities may obtain copyright protection for their works, and if so, whether they can restrict the public dissemination of those works. As more municipalities invest substantial sums to develop geographical information systems (GIS), the resolution of these inquiries becomes paramount in determining whether such works may be appropriated by others for commercial use without the municipality's permission.



In *County of Suffolk v. First American Real Estate Solutions*,¹ The Second Circuit Court of Appeals held that under federal law (Copyright Act)² a municipality may obtain copyright protection for its works and such right is not abrogated by New York State's Freedom of Information Law (FOIL).³ As long as the Town does not restrict initial access to a copyrighted document, it may impose reasonable restrictions on the redistribution of its copyrighted works. Thus, "an agency's choice to notify the recipient that a portion of the record is protected by copyright law or an agency's requirement that a recipient enter into a licensing agreement if it wishes to distribute the record commercially does not restrict initial access but only what the recipient may do once it acquires access."⁴ In this way, the Town can comply with its obligations under FOIL and preserve its rights under the Copyright Act. Note, however, that the Committee on Open Government has opined that initial access may not be conditioned on the prior execution of a contractual agreement regarding redistribution.⁵

First American involved a lawsuit by Suffolk County for copyright infringement based upon the commercial redistribution of County tax maps. To be entitled to copyright protection, the protectable elements of the work must be original. However, the level of creativity to demonstrate that the work is original "is extremely low; even a slight amount will suffice."⁶ Suffolk County sufficiently alleged that its tax maps contained a substantial amount of original material, research, organization and compilation to survive a dismissal motion. Citing its earlier ruling in *Streetwise Maps, Inc.*

v. Vandam, Inc.,⁷ the Court in *First American* noted that although street locations and landmarks were "physical facts" and not protected elements, "the presentation of such physical facts could be original."⁸

The *First American* Court also addressed the claim that Suffolk County's tax maps were in the public domain, like statutes and judicial decisions, and not copyrightable. Whether a work is in the public domain depends on "(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law."⁹

Denying *First American's* motion to dismiss, the Court remanded the issue to the District Court for further fact finding on whether the first prong of the test, incentive to create, can be established by Suffolk County. Relevant to this inquiry will be the originality of the tax maps and whether the existence and content of those maps were mandated by law. Although unable to decide as a matter of law whether the Suffolk County tax maps met these tests, the *First American* Court observed that "many works of government, however, due to their expense, may require additional incentives in order to justify their creation . . . and GIS may well be such an example."¹⁰ As to the second prong of the test, the Court found that notice of the tax maps was not necessary to have notice of the law.

Ultimately, the litigation between Suffolk County and First American was settled without further judicial opinions addressing whether the tax maps were sufficiently original and creative to merit copyright protection and not within the public domain. However, in *Seago v. Horry County*,¹¹ the Supreme Court of South Carolina held that the creation of the County's digital database system (at a cost of \$7.5 million, with annual updating costs of \$1 million), combining several layers of information onto one digital photographic map of the County and enabling the creation of specific local or regional maps identifying the location of parcels, bodies of water, streets, buildings, hydrology and topography, met the tests of originality and creativity to warrant copyright protection. Although not specifically mentioned in the case, presumably the expense incurred by the County would have satisfied the "incentive to create" standard to negate any claim that the information was in the public domain and therefore not copyrightable.

Inside

Combating global warming is another area in which municipalities are concentrating their efforts and resources. In this issue, Christina Hawkins, a third year law student at Pace Law School, provides an overview of legislative initiatives undertaken by municipalities in New York State and elsewhere to promote more energy efficient, “green” building. Also, in this issue, Ms. Hawkins reviews recent Court of Appeals decisions concerning the eligibility criteria for charitable use property tax exemptions.

In “Running a Local Municipal Ethics Board: Ten Steps to a Better Board,” Steven G. Leventhal of Leventhal and Sliney, LLP provides a template for the operation of a local municipal ethics board. His 10-step approach focuses on the importance of understanding the ethics board’s mission, how to analyze a government ethics problem and how the board should conduct its business.

In his Message from the Chair, Robert Koegel reviews the many highlights of the Municipal Law Section’s recently concluded Fall Meeting at the Ote-

saga in Cooperstown. Finally, apropos of the economic downturn and the renewed emphasis on government cost-cutting, I have included a case study on how municipalities can successfully share legal services.

Lester D. Steinman

Endnotes

1. 261 F.3d 179 (2d Cir. 2001).
2. 17 U.S.C. §§ 101 *et seq.*
3. Public Officers Law, Article 6.
4. *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 192.
5. FOIL-AO-15695.
6. *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 188.
7. 159 F.3d 739 (2d Cir. 1998).
8. 261 F.3d at 188.
9. *Id.* at 194.
10. *Id.*
11. 663 S.E.2d 38 (S.C. 2008).

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Green Building

By Christina Hawkins

Communities throughout the country are becoming a part of the effort to combat global warming through resolutions and policies aimed at making their everyday actions and decisions “greener.” Municipalities are creating task forces to develop recommendations and comprehensive plans to institute sustainable land use, energy, transportation, and waste-reduction programs. Westchester County assembled a Global Warming Task Force whose objective was to create a plan containing short-term and long-term goals for reducing greenhouse gas emissions. The resulting document is the Westchester Global Warming Action Plan 2008. The Plan contains recommendations for efforts at every level of the community, from individuals, businesses and schools, to county and municipal government. This article explores one of the ways in which municipalities are creating a more environmentally friendly, sustainable future—by adopting green building legislation.



Throughout New York State municipalities have adopted green building ordinances. Ordinances vary from municipality to municipality. Differences include the standard used to assess green building; to whom or to what type of building the standard applies, whether green building is required or optional, and, what type of incentives exist, if any. This article will provide a basic survey of some existing green building legislation, highlighting the differences between municipalities.

Standards

In creating green building legislation, a municipality must decide what standard it will use in assessing whether the building is “green.” Many communities use the Leadership in Energy and Environmental Design (LEED) rating system of the U.S. Green Building Council (USGBC). This system evaluates performance in five key areas: sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality.¹ In order to achieve certification, buildings must meet certain requirements and must receive a minimum number of points for each of the certification levels. There is a LEED rating system for nearly every type of building, including existing structures. Certification levels are certified, silver, gold and platinum. Buildings achieving platinum certification will receive a rebate on certification fees.

Individuals seeking certification must first register with the USGBC in order to receive materials and information to guide them through the certification process. Certification for new construction involves both a preliminary and final review by the USGBC. Upon certification, a structure will receive a plaque, as a symbol of its achieving the sustainable building standard.

The Town of Babylon has instituted a progressive policy requiring all building permit applicants for new construction of commercial buildings, office buildings, industrial buildings, multiple residences or senior citizen multiple residences with an area equal to or greater than 4,000 square feet to provide a complete LEED-NC checklist upon filing of the application. The Town adopted the LEED-NC, Version 2.2, and further, included a provision automatically adopting newer versions of the ratings standard.²

Applicants must pay a fee of \$0.03 per square foot of the proposed project, which will be refunded upon achievement of LEED certification. Permits will not be issued unless the documentation demonstrates that the project will attain LEED certification. The Town Building Inspector is charged with ensuring compliance and enforcement, inspecting the premises at each stage of construction and prior to issuing a certificate of occupancy.

Other communities choose to implement legislation requiring new homes to meet Energy Star standards. Energy Star is a joint program of the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE). Perhaps most well known for the Energy Star label found on appliances and home electronics meeting the program’s standards, the Energy Star program aims to reduce energy use, increase efficiency and help save money. To become an Energy Star home, a home must be three stories or less and must be constructed in accordance with energy efficiency guidelines set by the EPA. Features of an Energy Star home include tight construction and insulation, reducing draft, high-performance windows, and efficient heating and cooling systems as well as appliances. Energy Star homes are generally 20 to 30% more energy efficient than standard houses.³

The New York Energy Star Labeled Homes Program is a New York Energy Smart program run by the New York State Energy Research and Development Authority (NYSERDA).⁴ NYSERDA is a public benefit corporation that administers System Benefits Charge funds under an agreement with the Public Service Commission. System Benefits Charges are paid by the

electric distribution customers of companies like Con Edison and Rochester Gas and Electric.⁵ Individuals interested in constructing a New York Energy Star Labeled Home must contact an Energy Star Labeled Home Builder. Builders work with Home Energy Rating System (HERS) Raters who are certified and participate in the Energy Star program. Raters provide an objective evaluation of the energy efficiency of a home, starting with technical assistance to builders in the planning stages and then at a final evaluation of the built house. Owners of Energy Star homes realize financial benefit in the form of savings on energy costs, while builders may be eligible for incentives of financial and technical support as well as marketing and sales support through the NYSERDA program. Incentives are also available to purchasers of Energy Star Labeled Homes from the State of New York Mortgage Agency (SONYMA).⁶

The Town of Greenburgh in Westchester County and the Town of Brookhaven on Long Island have both chosen to use the New York Energy Star Labeled Homes Program to promote more energy efficient, green building. In the Town of Greenburgh, the issuance of a building permit is contingent upon the applicants certifying that the home meets the requirements for a New York Energy Star Labeled Home.⁷ Homes must achieve an energy rating of 86 or higher under the home energy rating system established by the National Association of State Energy Officials pursuant to the National Home Energy Rating Technical Guidelines. In addition to achieving a minimum energy rating, homes must include 300 kilowatt hours of estimated savings from lighting and appliances that are Energy Star labeled, and must include the capability to deliver certain automatically controlled mechanical ventilation results. The requirements apply to all new construction of one- or two-family houses and multi-family residences of three stories or less.

On Long Island, the New York Energy Star Labeled Homes Program is run by the Long Island Power Authority (LIPA).⁸ The Town of Brookhaven requires that any new single and multi-family housing, Planned Retirement Community or Planned Retirement Congregate Housing Community must be built to comply with the LIPA New York Energy Star Labeled Homes Program.⁹ Buildings must be three stories or less in height and multi-unit development must contain four units or less, with each unit having a separate entrance, separate electric meter and a minimum of one heating facility per four units.

Prior to the issuance of a building permit a New York State-licensed architect or engineer must certify that the residence will comply with the program. To satisfy the Energy Star requirements, a home must be in compliance with either the Builder Option Package established by LIPA, or must achieve a home energy

rating of 84 or higher on the current Home Energy Rating System (HERS) Scoring System adopted by the state. Other compliance requirements include: 500 kilowatt hours of electricity savings per unit, an automatically controlled mechanical ventilation system, and compliance with "Combustion Safety Testing Standards and Procedures for New York Energy Star Labeled Homes" standards as tested by a trained analyst prior to issuance of a certificate of occupancy.

The Town of Brookhaven requires that plans submitted as an application for a building permit for buildings higher than three stories, or containing more than four units, must show compliance with certain Energy Star requirements. A licensed architect or engineer must certify that the building will be in compliance with thermal envelope, electrical savings and ventilation requirements and equipment efficiency requirements of the LIPA Builder Option Package.

Many other towns on Long Island have followed Brookhaven's lead and adopted Energy Star Labeled Homes Program requirements. Those towns include Babylon, Oyster Bay, Huntington, Riverhead and Southampton, among others.

To Whom Do Standards Apply?

In drafting green building legislation, municipalities must decide to whom the standard applies, where it applies and whether compliance will be mandatory or optional. The examples used above, of the Town of Greenburgh, the Town of Brookhaven and the Town of Babylon, all apply their standards to all individuals seeking to build certain types of structures in the town. Other municipalities, such as the Village of East Aurora, choose to limit required green building to government facilities. The Village of East Aurora has chosen to require that all major facility projects attain LEED certification.¹⁰ "Public facility" is defined as "any facility, owned by a public governmental entity, that is generally open to the public without restrictions." The City of Syracuse requires that all new construction and major renovations of municipal buildings, including those of the school district, achieve the LEED silver standard.¹¹

In the City of Peekskill, green building legislation is aimed at individuals seeking to develop hotels and motels,¹² while in the Towns of Southampton and Blooming Grove, the legislation covers only specifically zoned districts.¹³

Incentives

Some municipalities seek to encourage green building by offering incentives to those who choose to build sustainable buildings. As mentioned above, the Town of Babylon charges building permit applicants

\$0.03 per square foot of a proposed green building project and keeps the money in the Town of Babylon Green Building Fund. Upon LEED certification of the completed building the fee is refunded.

The Town of Blooming Grove offers an adjusted base lot count incentive to developers seeking to build in designated Rural Residential Districts. A 10% increase over the base lot count is awarded for compliance with NYS Energy Star guidelines, low-impact development guidelines or USGBC LEED standards.¹⁴

Within a certain specific planned development district, the Town of Southampton allows for an increase in maximum gross floor area of up to 25% (but not to exceed a total gross floor area of 510,000 square feet) of a building if the entire building is built and certified to the LEED gold standard. In addition to the increase in floor area, the Town Planning Board may allow other “minor dimensional changes to achieve site plan design objectives.”¹⁵

The Town of Malta does not require that new construction be built to a green standard, but it does require that applicants for the establishment of Planned Development Districts show consideration of the possible construction design and management of all buildings within the district in compliance with LEED certification standards.¹⁶ Final submission of an application for a major subdivision or a special use permit must also include a review of the possible construction of buildings in accordance with LEED standards.¹⁷ The Zoning Ordinance states that the proposal of LEED certified building will be a “strong positive factor” in the evaluation of applications for Planned Development Districts or special use permits.¹⁸

The City of Peekskill offers several incentives to developers who achieve LEED certification. LEED-certified hotels and motels are allowed reduced lot area for each guest room, the minimum square footage of guest room size is reduced and the maximum floor area ratio is increased, compared with bulk standards for non-certified hotels and motels. Certified hotels and motels must provide 0.50 parking spaces per employee on the maximum shift, as opposed to 1 per employee for other hotels and motels.¹⁹

Outside New York

As mentioned above, municipalities generally choose to apply a nationally recognized standard such as LEED or Energy Smart in their green building legislation. The City of West Hollywood, CA, created its own green building rating system.²⁰ The program requires all new development, remodels and tenant improvements to comply with a set of general requirements, including water conservation measures, energy

efficiency and plans showing how building roofs could accommodate photovoltaic systems. New commercial and residential development projects with three or more units must meet a minimum of 60 points on the West Hollywood Green Building Point System Table, which assigns points for various sustainable building choices. Certification to a LEED standard will exempt a project from compliance with the City’s rating system. The program offers incentives for developments that achieve a point system rating of 90 or higher, such as one additional unit for multi-family residences, increased floor area ratio (FAR) for commercial or mixed-used projects, and expedited processing of building permits.

The Office of Sustainable Development of the City of Portland, Oregon, a leader in sustainable initiatives, has proposed a new High Performance Green Building Policy for residential new construction that would penalize developers for not meeting green building standards by exacting a carbon fee. Homes that meet a green building standard, such as LEED or Energy Star, and exceed the 2008 Oregon energy code by at least 30%, would receive a one-time carbon reward, calculated by an equation using, among other things, the square footage of the house and the average residential energy use intensity. They would also be eligible for financial incentives from the Energy Trust of Oregon, and other tax credits. Homes that meet green building standards and exceed the 2008 Oregon energy code by 15% would receive a carbon fee waiver from Energy Trust of Oregon and tax credit incentives. Those not meeting either of the two standards would pay a one time fee calculated by an equation similar to the reward.²¹

Finally, green building is not simply about the final product, but also about the construction itself. The City of San Francisco, CA, has passed an ordinance that will require all public works contracts for major City projects to require clean construction. Clean construction means that all work performed utilizes off-road equipment and engines fueled by biodiesel meeting California’s off-road engine standards, or an effective diesel emission-control strategy.²²

Useful Resources

- U.S. Green Building Council, <http://www.usgbc.org/>
- New York Chapter, <http://www.usgbcny.org/>
- New York Energy Star Labeled Homes, <http://www.getenergysmart.org/SingleFamilyHomes/NewConstruction/HomeOwner.aspx>
- LIPA Energy Star Homes, <http://www.lipower.org/efficiency/nyesh.html>

- Town of Greenburgh, Save Energy, <http://www.greenburghny.com/Cit-e-Access/webpage.cfm?TID=10&TPID=1872>
 - City of Portland, Oregon, Office of Sustainable Development, Green Building Program, <http://www.portlandonline.com/osd/index.cfm?c=41481>
 - U.S. Environmental Protection Agency, <http://www.epa.gov/greenbuilding/>
 - NYSERDA Green Building Services, http://www.nyserda.org/programs/Green_Buildings/default.asp
 - New York Department of Environmental Conservation, Green Buildings, <http://www.dec.ny.gov/energy/218.html>
9. Town of Brookhaven Code, Chapter 16: Building Construction Administration, § 16-4.1.
 10. Town of East Aurora Code, Chapter 108: Building Construction and Fire Prevention, Art. II Green Building Standards.
 11. City of Syracuse Code, Chapter 52: City of Syracuse Green Buildings Ordinance.
 12. City of Peekskill Code, Chapter 575: Zoning, Art. VI Industrial Districts, Art. VII Special Districts.
 13. Town of Blooming Grove Code, Chapter 235: Zoning, § 2355-14.1(A)(3), Town of Southampton Code, Chapter 330: Zoning, § 330-248(A)(5).
 14. Town of Blooming Grove Code, Chapter 235: Zoning, § 2355-14.1(A)(3).
 15. Town of Southampton Code, Chapter 330: Zoning, § 330-248(A)(5).
 16. Town of Malta Code, Chapter 167: Zoning, § 167-26(E)(5).
 17. Town of Malta Code, Chapter 143: Subdivision of Land, § 143-6(A)(7).
 18. Town of Malta Code, Chapter 167: Zoning, § 167-38.1(F).
 19. City of Peekskill Code, Chapter 575: Zoning, Art. VI Industrial Districts, Art. VII Special Districts.
 20. City of West Hollywood, CA. Municipal Code, Title 19: Zoning Ordinance, 19.20.060 Green Building.
 21. Office of Sustainable Development, City of Portland, OR, Residential New Construction High Performance Green Building Policy, Staff Draft, <http://www.portlandonline.com/osd/index.cfm?c=45879&a=196409>.
 22. City of San Francisco, CA. Administrative Code, Chapter 6: Public Works Contracting Policies and Procedures, Art. II Construction Contracting, § 6.25 Clean Construction.

Endnotes

1. U.S. Green Building Council, <http://www.usgbc.org/>.
2. Town of Babylon Code, Chapter 89: Building Construction, Art. VIII Green Building Certification.
3. Energy Star Qualified New Homes, http://www.energystar.gov/index.cfm?c=new_homes.nh_features.
4. New York State Energy Research and Development Authority, <http://www.getenergysmart.org/>.
5. New York Energy Star Labeled Homes Program Brochure, <http://www.getenergysmart.org/Files/Brochures/ESLHconsumer.pdf>.
6. State of New York Mortgage Agency: Energy Star Labeled Homes, <http://www.sonyma.org/home/index.asp?page=745>.
7. Town of Greenburgh Code, Chapter 100: Building, Fire and Plumbing, §§ 100-4, 100-15.
8. Long Island Power Authority: Energy Star Labeled Homes, <http://www.lipower.org/efficiency/nyesh.html>.

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NEW YORK STATE BAR ASSOCIATION

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Municipal Law Section Program

Thursday, January 29, 2009

Running a Local Municipal Ethics Board: Ten Steps to a Better Board

By Steven G. Leventhal

The members of a local municipal ethics board are often respected members of the community with no background in government. They may be drawn from the clergy, and have strong grounding in the principles of their respective faiths; they may be accomplished members of the Bar, thoroughly versed in the code of professional responsibility that governs the practice of law, or they may be civic minded citizens, committed to public service and confident in the wisdom of their own moral compasses.



But even with these impressive credentials, board members may be uncertain of the board's purpose and function, unaware of the standards of conduct applicable to municipal officers and employees, and unfamiliar with the structure, operation and language of government.

This article is intended to offer them guidance in organizing and running their boards.

Step 1: Understand Your Mission

Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing. The dual goals of a municipal ethics program are to assist municipal officers and employees in avoiding ethical missteps before they occur, and to assure a skeptical public that the decisions of its government are based on the public interest and not on the private interests of the decision makers.

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

To illustrate the difference between morality and ethics, consider that an honest municipal employee, recognizing that she has a conflict of interest in a particular matter, may choose the official action that advances the public interest, even at the expense of

her own personal interest. Has she acted immorally? Certainly not. However, our well-meaning municipal employee has acted unethically, because even an innocent conflict of interest tends to undermine public confidence in government and justifies the suspicion that an official action was motivated by personal considerations rather than by the public interest.

It is unhelpful to think of government ethics in moral terms, because doing so implies a moral failure among municipal officers and employees, and breeds resentment among the honest majority, who take rightful pride in their personal integrity.

"Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing."

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

Similarly, a local municipal ethics code does not prohibit conduct because the conduct is morally wrong.¹ Rather, it regulates official conduct in order to achieve the dual goals of assisting honest officers and employees in avoiding ethical missteps before they occur, and inspiring public confidence in government by encouraging high standards of conduct among municipal officers and employees. Ethics regulations are the rules of the road for official conduct.

Step 2: Learn How to Analyze a Government Ethics Problem

So where do you find these rules of the road? They are scattered about in many legal nooks and crannies, including the State Constitution, various state and local statutes, published court decisions, and agency regulations. But don't be discouraged. In New York, most ethics problems can be analyzed by considering three questions:

- Does the conduct violate Article 18 of the New York General Municipal Law?
- If not, does the conduct violate the local municipal code of ethics?
- If not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.² Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in certain municipal contracts that he or she has the power to control individually or as a board member,³ from accepting gifts or favors worth \$75 or more where it might appear that the gift was intended to reward or influence an official action,⁴ from disclosing confidential government information,⁵ from receiving payment in connection with any matter before his or her own agency,⁶ and from receiving a contingency fee in connection with a matter before any agency of the municipality.⁷

If you find that the conduct under review violates Article 18, you are finished with your analysis. The conduct is prohibited by state law and you need go no further. But if you find that the conduct does not violate Article 18, you must ask yourself the second question: Does the conduct under review violate the local municipal code of ethics?

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.⁸ A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18. It may prohibit conduct that Article 18 would allow.⁹ Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the “revolving door” (post-employment contacts with the municipality), establishing rules for the wearing of “two hats” (the holding of two government positions, or moonlighting in the private sector) and, in some cases, prohibiting “pay to play” practices and the political solicitation of subordinates, vendors and contractors.

If, after determining that the conduct under review does not violate Article 18, you find that it does violate your local ethics code, your analysis is done. The conduct is prohibited by local law. But, if you find that the conduct neither violates Article 18 nor the local code of ethics, there is yet another question that you must consider.

Ethics regulations are not only designed to promote high standards of official conduct, but also to

foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts in some cases have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.¹⁰

Accordingly, the third question in this protocol for analyzing government ethics problems—Does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?—may well be posed instead as: How will this conduct look on the front page of the local newspaper?

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited, and what conduct is not. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. When the board finds that there is a prohibited appearance of impropriety, the finding should have a rational basis, and the board’s reasoning should be clear and convincing. Such a finding should be reserved for the rare cases involving conduct that is contrary to public policy, and that raise the specter of self-interest or partiality. It should not be found in cases where the improper appearances are speculative or trivial.¹¹

Where a contemplated action by an official might create an appearance of impropriety, the board should recommend that the official refrain from acting. But ethics boards should be restrained in finding, after the fact, that an official’s conduct violated the implied duty to avoid appearances of impropriety. They should be especially restrained in finding that a member of a voting board, and in particular a legislator, was required to refrain from participating in a matter called for a vote, because an abstention by a member of a voting body will normally be counted as a “nay” vote,¹² and because the recusal of a legislator disenfranchises voters.

Step 3: Set the Right Tone—Be Credible

By setting the right tone, the board can better advance the dual goals of helping the municipal workforce avoid ethical missteps before they occur and inspiring public confidence in government decision making.

One clear lesson of recently publicized scandals is that an otherwise forgiving public will not abide hypocrisy. Board members should scrutinize their own investment, business or political activities, and rid themselves of conflicts. They should avoid entanglements that might cast doubt on their objectivity.

A board that is perceived as politically motivated will have no credibility as the source of ethics advice or the arbiter of ethics disputes. Rather than inspire public confidence, it will reinforce public cynicism. Board members should avoid partisanship in their official and unofficial activities. They should banish political considerations from their deliberations and decision-making.

Most ethics inquiries escape public notice. But some draw intense public attention and attract press inquiries. The board is a deliberative body and speaks only through its duly rendered opinions and decisions. Individual board members should avoid public statements that may send mixed messages, and may undermine the force and credibility of the board's determinations.

According to Socrates, there are four things that a judge must do: listen patiently, speak wisely, deliberate soberly, and decide impartially. This ancient admonition is a worthy guide for the members of a municipal ethics board in the discharge of their official duties.

Step 4: Empower the Board to Control Its Own Business—Be Independent

There is an understandable tendency for a municipal administration to exercise direct or indirect influence over its appointed boards and commissions. This may occur with the best of intentions. For example, a municipal attorney or other official appointed to a board may feel that he or she is in the best position to call meetings, set the agenda, or guide the board in its deliberations. But an ethics board dominated by administration insiders cannot exercise independent judgment and oversight.

To ensure both the reality and the perception that the board can and does operate independently, the board should select its own chair. Like all boards, the ethics board must conduct its business at meetings attended in person by a quorum of its members.¹³ Meetings should be called by the chair, or by a majority of the members.

A clerical employee should be appointed by the municipality to serve as secretary to the board, under direction of the chair. The secretary should be responsible for sending notices, receiving inquiries and complaints, keeping minutes, maintaining the transactional, applicant and annual disclosure statements filed with the board,¹⁴ and keeping an indexed file of the board's opinions and decisions.

Under normal circumstances, the municipal attorney will serve as counsel to the board. The board should have a modest but sufficient budget to obtain independent legal advice on the rare occasions when the municipal attorney may have a conflict of interest,

and to allow for the services of a stenographer when a hearing is conducted. Because the activities of the board may sometimes be controversial, its expenditures for these purposes, within the limits of a modest budget, should not be subject to external approval.

Step 5: Get the Message Out—Be Proactive

Many local ethics boards never meet, and are completely ignored by their respective municipalities. But because the municipal ethics program is designed to help officers and employees avoid inadvertent ethical violations, it is essential that the board actively promote awareness among them of their ethical obligations, and encourage them to seek ethics advice when questions arise.

Ethics codes tend to be drafted by lawyers, written in *legalese*, and unintelligible to the common reader. Yet the municipal workforce is mostly composed of non-lawyers, all of whom must adhere to the code of ethics. Therefore, every municipality should prepare and distribute a plain-language guide to government ethics no more than two or three pages in length.¹⁵

The plain-language guide should include a short and simple statement of purpose. It should note that the guide was prepared to assist officers and employees in avoiding actual or potential conflicts of interest, but that it is not intended to replace the actual text of the local code of ethics. It should incorporate—in plain language—the mandates of Article 18 and the standards adopted by the local municipality in its code of ethics, and should advise against conduct that creates an appearance of impropriety.

The plain language guide should inform municipal officers and employees that they may obtain free, confidential ethics advice from the board of ethics, and provide the board's contact information. It should encourage officers and employees to resolve any doubts they may have about their ethical obligations by obtaining the board's advice before acting.

Ethics training is another important means of getting the message out. A regular series of educational programs should be conducted at convenient times and places so that they may be widely attended by the municipal officers and employees. Experience indicates that daytime programs will be widely attended by employees, even if attendance is not mandatory. Evening programs are generally more convenient for the members of boards and commissions, many of whom hold full-time outside employment.

Step 6: Master the Art of Giving Ethics Advice

The day will come. You may be at a cocktail party, or at a community event. You will be approached by an acquaintance who has heard of your appointment to

the ethics board and wishes to discuss an ethics question. But beware. You probably won't have all the facts that you will need to give a proper answer. Certainly, you don't want to be cited as having approved a code violation. Ethics inquiries often involve the exercise of judgment. The exchange of opinions among board members is an important part of the decision-making process. All ethics inquiries should be referred to the full board for determination.

The board should respond only to written requests for ethics advice, and should only decide actual "cases and controversies." Fact-finding is a critical step in rendering ethics advice. Only the facts of a particular case will determine the issues that you must consider. The particular facts of an actual case will often determine the outcome of an ethics inquiry. When a request is made for general information about the ethics code, the board should respond by providing the inquiring party with a copy of the plain-language guide.

The board of ethics should maintain a record of the question that was posed, and the information that it relied on in reaching its opinion. It should carefully consider whether it has all the facts that it needs to form an opinion. Ethics questions are often more complicated than they appear. If an employee holds a civil service title, you may need to review the job description associated with that title. But perhaps the employee is working "out of title," performing functions that are not part of his or her job description. Conflicts may sometimes arise based on the duties associated with a job title, or they may arise based on the duties actually performed. You may need to know whether a particular employee is a "policy maker," or is in a position to influence policy making. You may need to know how a particular agency interacts with another. Once you have gathered your facts, you still may not know the whole story. To avoid setting a bad precedent, limit the application of your opinion to the facts presented.

Article 18 authorizes a county ethics board to act with respect to officers and employees of the county, and with respect to officers and employees of a municipality within the county that has not established its own board of ethics.¹⁶ A municipal ethics board other than a county board may act only with respect to its own officers and employees.¹⁷ Ethics advice is intended to provide a shield against unwarranted criticism for honest officers and employees, not a sword for use by political or personal foes. Typically, a local municipal ethics board is authorized to give advice only to officers and employees inquiring about themselves.

The board should act promptly when it receives a request for ethics advice. Many inquiries will be time sensitive. For example, an outside job opportunity may be lost while a municipal employee waits for the ethics board to determine whether the duties of the

outside job would be compatible with the employee's government duties.¹⁸ Untimely ethics advice is useless to the inquiring officer or employee, discourages officers and employees from seeking advice before acting, and undermines the purpose of preventing ethics violations before they occur.

The board's job is to interpret the obligations of officers and employees under the code of ethics and related authorities. Not every question posed to the board of ethics will raise a government ethics issue. For example, the professional conduct of attorneys—even municipal attorneys—is governed by the Lawyer's Code of Professional Responsibility.¹⁹ Officers and employees seeking advice about the professional obligations of attorneys should be referred to the professional ethics committee of the local bar association. Inquiries that pose questions of municipal law should be referred to the municipal attorney.

In drafting your advisory opinions, remember that confidentiality advances the purposes of the municipal ethics program by encouraging officers and employees to seek advice before acting. Where possible, an advisory opinion should omit the name of the inquiring officer or employee, and any other identifying facts.

Your task will be easier if you develop a template for drafting opinions. First frame the issue presented. Next, set forth the governing authority. Discuss how the law applies to the facts, and then state the board's conclusion. Advisory opinions should identify which board members participated in the matter, and any members who may have recused themselves.²⁰ They should be dated and signed by the chair, and delivered only to the inquiring officer or employee unless he or she consents to a broader distribution.

In framing the issue, keep in mind that if the advice applies only to the inquiring officer or employee, the board's opinion is more likely to be exempt from disclosure under the New York Freedom of Information Law, and it is more likely that the board's deliberations may be conducted in executive session under the Open Meetings Law.²¹ On the other hand, determinations that are broad declarations of policy may be subject to disclosure under the Freedom of Information Law, and the proceedings that produce them may be subject to public access under the Open Meetings Law.²² Because officers and employees are more likely to seek ethics advice when their inquiries are treated as confidential, local municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of the inquiring parties.

Courts give great weight to the advisory opinions of local municipal ethics boards.²³ In giving ethics advice, be reasonable and practical. Keep in mind that inconsistent rulings encourage skepticism. But don't

ignore the lessons of experience. Respect your own precedents, but take a fresh look when warranted. Remember that your goals are to assist honest officers and employees in avoiding ethical missteps before they occur, and to inspire public confidence in government by encouraging high standards of conduct among municipal officers and employees. Treat every request for ethics advice as a teaching opportunity. Write advisory opinions that are clear, explanatory and educational.

Step 7: Adopt Rules of Procedure for Investigating Complaints

Unlike a request for ethics advice, an ethics complaint can normally be filed by anyone—even anonymously—or the board may initiate an investigation on its own. Article 18 does not provide guidelines for the investigation of complaints by a local ethics board. Particular practices vary from one municipality to another, based on the board's mandate as set forth in the local code of ethics.

Consistent with the authority conferred on the board by the local code of ethics, the board should adopt its own rules of procedure for investigating complaints, and have them in place before a complaint is received or an investigation is required. In adopting its rules, the board should be mindful of the fundamental requirements of due process: notice and an opportunity to be heard.²⁴

The board should preserve a record of the complaint, all notices to and from the board, and all evidence that it receives in the course of its investigation including documents and testimony. The board should work closely with its counsel to ensure that the result of its investigation will withstand judicial review. (For a discussion of what to expect if the board or its members are sued, see Step 9.)

If the facts alleged by the complainant or discovered by the board raise the suspicion that a crime may have been committed, the matter should be referred to the District Attorney. To avoid interfering with the District Attorney's investigation or prosecution of the case, the board should refrain from acting while the matter is under investigation or prosecution by the District Attorney's office.

Step 8: Develop Procedures for Review of Annual Disclosure Statements

In municipalities having populations of 50,000 or more, the board of ethics is usually charged with the responsibility of administering the financial disclosure law adopted pursuant to Article 18.²⁵ Depending upon the number of officers and employees required to file financial disclosure statements, the board of ethics

may not have the resources to adequately discharge this responsibility on its own without the assistance of staff assigned by the municipality to handle the daily administrative and clerical duties that such a program entails.

Even where the board of ethics has delegated the day-to-day administration of the financial disclosure law to staff, it still may be called upon to inspect the annual disclosure statements for the purpose of detecting any actual or potential conflicts that they may reveal. Undoubtedly, this task will be performed without the assistance of investigators, auditors or forensic experts. The board should exercise care in developing procedures for the review of annual disclosure statements, and in establishing the parameters of its review, in order to avoid the potential that its members will later be blamed for failing to catch an actual or potential conflict.

Step 9: Know What to Expect if the Board or Its Members Are Sued

Because they are not "final determinations," the advice given by an ethics board is not subject to judicial review and reversal.²⁶ As a result, there are few reported cases involving challenges to the decisions of local municipal ethics boards. But when an ethics board engages in the quasi-judicial function of determining whether an ethics violation has occurred, or imposes a fine or other penalty, its decisions will be subject to judicial review in a proceeding under Article 78 of the New York Civil Practice Law and Rules.²⁷

In an Article 78 proceeding, the petitioner will have the burden of proving that the board's determination was illegal, arbitrary or capricious, that the board abused its discretion, or that the decision was unsupported by substantial evidence.²⁸

Lawsuits brought against the board will normally be handled by the municipal attorney, or other counsel retained by the municipality, at no cost to the individual board members. But what if the individual board members are sued by an aggrieved party? The individual members of a local municipal ethics board are entitled to a qualified immunity from individual liability where they exercised discretion within the scope of their official duties, and where they have not violated a plaintiff's constitutional rights.²⁹

A municipality may, by local law, provide for the defense and indemnification of its officers and employees in civil claims arising out of their acts or omissions while acting within the scope of their official duties, except where the claim is brought by or on behalf of the municipality. The indemnification will not apply to judgments based on intentional wrongdoing or recklessness, or to awards of punitive damages.³⁰ Where

the municipality provides an officer or employee with defense and indemnification, any settlement of the claim is subject to approval by the municipality.³¹

The municipality may purchase insurance to fund its obligations under the indemnity,³² or it may purchase liability insurance to protect its officers and employees from liability arising out of the performance their official duties even without a local law providing for the defense and indemnification of officers and employees by the municipality.³³ Board members should inquire whether their municipality has adopted a local law providing for the defense and indemnification of its officers and employees, and whether the municipality has purchased insurance to protect them from liability arising from the performance of their official duties.

A lawsuit against the board of ethics or its members may pit the interests of branches, departments or agencies of government, or those of individual officers or employees, against one another, and may present the municipal attorney with a professional conflict of interest. It is sometimes difficult to determine whether a municipal attorney has a professional conflict of interest because he or she may, at various times, owe a duty of loyalty to one or more individual officers or employees, branches, departments or agencies of government, the government as a whole, or directly to the public.³⁴ This distinction is important because conversations with a municipal attorney will not be privileged unless they occur between the municipal attorney and his or her client.³⁵

The joint defense of a municipality and the individual members of a municipal board will give rise to a professional conflict where the defendants assert inconsistent defenses. A professional conflict would also arise where the individual board members are sued for punitive damages, because a municipality cannot be liable for punitive damages.³⁶ Clients may waive the professional conflict by giving informed consent if a disinterested lawyer would conclude that defense counsel's professional judgment would not be impaired by the joint representation.³⁷ In cases where the municipal attorney has a professional conflict of interest, the indemnified officer or employee is entitled to be represented by private counsel of his or her choice.³⁸

Step 10: Take Advantage of Ethics Resources

We are fortunate that several dedicated government ethicists have labored in recent years to organize the subject of government ethics into a coherent discipline, and to develop a body of written materials available to assist local municipal ethics boards in doing their important and difficult work.

Articles by Professors Mark Davies, Patty Salkin, Les Steinman and others are available online. For example, back issues of this publication, the NYSBA/MLRC *Municipal Lawyer*, are available to members of NYSBA's Municipal Law Section on its Web site at www.nysba.org/MunicipalLawyer. The Association's Municipal Law Section is a ready source of ethics education and support. An extensive online ethics library is available at the Web site of the New York City Conflicts of Interest Board.

An extensive library of local municipal codes is available on the Web site of "e-codes." Advisory opinions of the New York Attorney General and the New York Comptroller are available on their respective Web sites. Helpful information is available online to members of the New York State Association of Counties, the Association of Towns of the State of New York, the New York Conference of Mayors and Municipal Officials, and the Conference on Government Ethics Laws.

Congratulations and good luck. Your work is among the most important in government.

Endnotes

1. In some instances, a municipal officer or employee may engage in morally culpable misconduct. But such cases are more likely to be prosecuted by the local district attorney's office than by the local municipal ethics board, and they are more likely to be prosecuted as violations of the New York Penal Law than as violations of the state or local codes of ethics. See, e.g., Penal Law § 195.00 (official misconduct) and art. 200 (bribery involving public servants and related offenses).
2. For a helpful summary of Gen. Mun. Law Article 18, see Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC *Municipal Lawyer*, Summer 2005, Vol. 19, No. 3, pp. 10–12.
3. See Gen. Mun. Law §§ 800–805.
4. See Gen. Mun. Law § 805-a.
5. *Id.* N.B. The phrase "confidential information" is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC *Municipal Lawyer*, Spring 2004, Vol. 18, No. 2, pp. 22–24. For a suggested definition of "confidential information" in the context of Gen. Mun. Law, Article 18, see Leventhal, *Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms*, NYSBA/MLRC *Municipal Lawyer*, Spring 2006, Vol. 20, No. 2, pp. 20–21 (*Confidential Information*. Information in any format that is either (1) prohibited by federal or state law from disclosure to the public, or (2) prohibited from disclosure by local law, ordinance, or resolution of the municipality, and exempt from mandatory disclosure under the New York State Freedom of Information Law (FOIL) and the New York State Open Meetings Law).
6. *Supra*, n. 4.
7. *Id.*
8. See Gen. Mun. Law § 806.

9. See Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.
10. See, e.g., *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep't 1985); *Tuxedo Conservation and Taxpayer Association v. Town Board of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
11. See *Peterson v. Corbin*, 275 A.D.2d 35, 713 N.Y.S.2d 361 (2d Dep't 2000).
12. See Gen. Const. Law § 41.
13. Pub. Off. Law §§ 100-111 (Open Meetings Law); see Freeman, *Board of Ethics: Public Disclosure?* NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12-15; Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.
14. For a thorough discussion of the types of disclosure statements typically filed with a local municipal ethics board, see Davies, *Enacting a Local Ethics Law—Part II: Disclosure*, NYSBA/MLRC Municipal Lawyer, Fall 2007, Vol. 21, No. 4, pp. 8-17.
15. A library of plain-language guides and leaflets is posted on the Web site of the New York City Conflicts of Interest Board.
16. See Gen. Mun. Law §§ 808(2)-808(4).
17. *Id.*
18. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874).
19. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.
20. Where a board member recuses himself or herself due to a conflict of interest, the member should refrain from participating in the discussion, deliberations or vote on the matter. See 1995 Op. Atty. Gen. 2. For a helpful discussion of the principles applicable to recusal and abstention, see Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 17-19.
21. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24; N.Y. Comm. on Open Gov't. FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).
22. *Id.*; see also Freeman, *Board of Ethics: Public Disclosure?*, NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12-15.
23. See *Byer v. Town of Poestenkill*, 232 A.D.2d 851, 648 N.Y.S.2d 768 (3d Dep't 1996); *Parker v. Gardiner Planning Bd.*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992); *DiLucia v. Mandelker*, 110 A.D.2d 260, 263, 493 N.Y.S.2d 769, 771 (1st Dept. 1985), *aff'd*, 68 N.Y.2d 844 (1986).
24. For further advice on investigations and enforcement procedures, see Davies, *Enacting a Local Ethics Law—Part III: Administration*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 11-16.
25. See Gen. Mun. Law §§ 810, 811, 812.
26. See *Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30 (2005), *reargument den.* 5 N.Y.3d 824 (2005); *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003); *Scarpati-Reilly v. Town of Huntington Bd. of Ethics & Fin. Disc.*, 300 A.D.2d 404, 751 N.Y.S.2d 753 (2d Dep't 2002); *Neale v. Cohen*, 281 A.D.2d 421, 721 N.Y.S.2d 110 (2d Dep't 2001); *Hammer v. Veteran*, 86 Misc. 2d 1056, 386 N.Y.S.2d 170 (Sup. Ct. West. 1975), *aff'd*, 53 A.D.2d 629, 385 N.Y.S. 2d 1017 (2d Dep't 1976).
27. See, e.g., *Gray v. Epstein*, 2008 N.Y. Slip Op 51706U (Suff. Co. Sup. Ct. 2008) (Petitioner appealed decision of the Town of Smithtown Ethics Board that she violated the town code of ethics, and imposed a civil penalty of \$3,500; court affirmed the board's decision, but set aside the monetary penalty because the Code did not provide the Ethics Board with the authority to impose monetary penalties.).
28. See N.Y. Civ. Prac. Law & Rules § 7803.
29. See *Shechter v. Comptroller of City of New York*, 79 F.3d 265 (2d Cir. 1996).
30. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).
31. *Id.*
32. *Id.*
33. Gen. Mun. Law § 52 (Liability insurance for officers and employees).
34. See Salkin, *Beware: What You Say to Your Government Lawyer May Be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 Urb. Law 283 (2003); Salkin and Phillips, *Program On Law And State Government Fellowship Symposium: Integrity in Public Service: Living Up to the Public Trust? Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 Ind. L. Rev. 561 (2006).
35. *Id.*
36. See *Cook County, Illinois v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-260 (1981); *Sharapata v. Islip*, 56 N.Y.2d 332 (1982)).
37. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.24(c)(DR 5-105).
38. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).

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Charitable Use Property Tax Exemptions: When “Exclusively” Means “Primarily”

By Christina Hawkins

Introduction

Recently, the New York State Court of Appeals decided three cases concerning tax exemption under Real Property Tax Law § 420-a involving real property owned by charitable organizations and used as housing for low-income individuals or individuals participating in a social work program. The key issue in each of the cases was whether the property is being used “exclusively” for charitable purposes. The Court’s interpretation of “exclusive” as meaning “primary” or “principal” allowed that each of the organizations is eligible for tax exemption under § 420-a, even where not all use of the property is dedicated to charitable purposes.



Real Property Tax Law § 420-a

Real Property Tax Law § 420-a sets forth the requirements a nonprofit organization must meet in order to be entitled to tax exemption for certain real property. Real Property Tax Law § 420-a(1)(a) states:

Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

From this subsection of the statute, a two-part test for tax exemption eligibility has been derived: first, the corporation or association owning the property must be “organized or conducted” for one of the enumerated purposes; and, second, the property must be used “exclusively” for carrying out that purpose.¹ Further, § 420-a(1)(b) requires that officers, members or employees of the organization must not receive a pecuni-

ary benefit from the operations, except for reasonable compensation for services. The organization must not be used as a guise for any profit-making operations; it must be in good faith operated for the purpose or purposes claimed.² The burden of proving an exemption from taxation rests on an organization’s establishing that it is organized for one of the statutory purposes and that the real property is used exclusively for that purpose.³

In New York State, the basis for tax exemption “is the performance of ‘services which by the settled public policy of the State . . . are of such importance as to require or justify (tax) exemption’.”⁴ The Court of Appeals has held that “[w]hile an exemption statute is to be construed strictly against those arguing for nontaxability, the interpretation should not be so narrow and literal as to defeat its settled purpose.”⁵ Thus, it has been held that “incidental” or “auxiliary” uses of a property will not defeat fulfillment of the “exclusive use” requirement and the tax exemption.⁶

In *Matter of Adult Home at Erie Station, Inc. v. Assessor & Board of Assessment Review of City of Middletown*⁷ and *Matter of Regional Economic Community Action Program, Inc. v. Bernaski*,⁸ the Court of Appeals was not concerned with incidental or auxiliary uses of the property, but the main use of the property. Whether the organizations are organized and conducted for charitable purposes is not in dispute in these cases. The central question is whether the real property is being used exclusively for charitable purposes.

Court of Appeals Cases

Petitioner Adult Home at Erie Station, Inc. (AHESI) filed an application for exemption from real property tax on property owned by the organization in the City of Middletown, New York. The property is used as an “adult home” as defined by the Social Services Law § 2(25), providing both long-term residential and personal care to residents. About 10% of residents pay the market rate to live at the home. More than half of the residents are eligible for a reduced rate for care, paid for by the Social Security Administration with Supplemental Security Income (SSI). Around 30% of the residents are “contract occupants” who cannot afford full market rate and pay a reduced rate determined by their income and assets. The City denied AHESI’s application for the exemption, finding the property is not being used exclusively for a charitable purpose because

a percentage of the residents are not poor enough to be eligible for SSI and pay either the full market rate or a reduced rate.

AHESI sought judicial review under Article 7 of the Real Property Tax Law. The Supreme Court agreed with the Assessor, finding the property is not exempt. The Appellate Division reversed, holding that the property is exempt from real property taxes. The Court of Appeals granted leave to appeal and affirmed the Appellate Division's decision.

At the same time it considered AHESI's case, the Court of Appeals heard the case of Regional Economic Community Action Program (RECAP), a social work organization renting homes to individuals participating in its transitional program for low-income people who are homeless, suffering from a substance abuse problem or a similar condition. RECAP charges residents market rate rental value, which is paid in part by the tenant and part by government agencies. The City denied RECAP's application for a real property tax exemption, finding that the property is used solely as residences and that the social work activities of the organization do not take place on the property. RECAP commenced a CPLR Article 78 proceeding seeking to overturn the decision. The Supreme Court denied RECAP's petition and the Appellate Division affirmed. The Court of Appeals granted leave to appeal and reversed, holding RECAP entitled to the exemption.

At the outset of its discussion of the two cases, the Court of Appeals quoted the exemption of Real Property Tax Law § 420-a(1)(a) and narrowed the issue of the cases to whether the property was being "used exclusively" for a charitable purpose. The City argued that under Court of Appeals decisions in *Greer Woodycrest Children's Servs. v. Fountain*⁹ and *Presbyterian Residence Ctr. Corp. v. Wagner*,¹⁰ renting homes to the elderly is not a charitable purpose and therefore AHESI's property was not eligible for tax exemption. The Court distinguished AHESI as not just renting homes to the elderly, but providing housing to poor elderly people, a charitable purpose. Further, the Court relies on *Symphony Space v. Tishelman*¹¹ for an interpretation of the term "used exclusively." *Symphony Space* established that the term "exclusive" was not to be read literally, but was to be construed as meaning "primary" or "principal." AHESI's property is being "used exclusively" for a charitable purpose, as nearly 90% of its residents, those receiving SSI and contract occupants, are poor enough to make its activities "charitable."

Turning to RECAP, the Court of Appeals considered the City's argument that the property is not being used as the location of social or charitable work, but as residences for which the organization is receiving

market rents. The Court, however, agreed with RECAP, citing *St. Luke's Hosp. V. Boyland*¹² as controlling precedent. The test for whether the property qualifies for the exemption, is whether the use of the property is "reasonably incident" to RECAP's purposes. RECAP's apartments are provided solely to people participating in its social work program and are an integral part of keeping participants in the program. The Court concluded that "[t]he issue is not whether RECAP benefits, but whether the property is 'used exclusively' for RECAP's charitable purposes." Finding the use of the property to be "reasonably incident" to the charitable purpose, the Court reversed the decision of the Appellate Division and directed the Commissioner of Assessment of the City to grant the property tax exemption. This decision abrogated *Nassau County Hispanic Found.*,¹³ a Second Department Appellate Division case that had held the organization's property ineligible for tax exemption based on its receiving fair market rent, even though those rents were used to provide housing for low-income people and were subsidized by a governmental agency.

Applying its rulings in *Adult Home at Erie Station* and *Regional Economic Community Action Program*, the Court of Appeals reversed an order of the Appellate Division denying an exemption under Real Property Tax Law § 420-a in *United Church Residences of Fredonia, New York, Inc. v. Newell*.¹⁴ United Church Residences owns 39 housing units in the Village of Fredonia, in the Town of Pomfret, N.Y., which are used as residences for the "very low income" elderly. Although on average, residents pay \$200 per month, the rent, as subsidized by the U.S. Department of Housing and Urban Development (HUD), equates to approximately fair market value.

The Appellate Division held that United Church Residences had failed to meet its burden of proof establishing the property is "used exclusively" for charitable purposes. Although the record shows that United Church Residences provides housing to the "very low income" elderly, because upon receiving the HUD subsidy the rent equates to fair market value, the organization failed in establishing that the property is "used exclusively" for charitable purposes.¹⁵

Citing *Adult Home at Erie Station* and *Regional Economic Community Action Program*, the Court of Appeals stated that the Appellate Division had erred in reversing the Supreme Court and dismissing the case. Receiving HUD subsidies so as to raise the amount of rent received to fair market value does not make United Church Residences ineligible for tax exemption under section 420-a, because the organization is still "exclusively" using the property for a charitable purpose, providing housing to "very low income" individuals.

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Conclusion

Real property used as an adult care facility, as residences for participants in a transitional social work program, or as housing for the poor elderly, is considered "used exclusively" for charitable purposes and exempt from real property tax under Real Property Tax Law § 420-a, when the property is used "primarily" for charitable purposes.¹⁶ An economic benefit, in the form of market rate rents charged to residents, does not necessarily preclude tax exemption for the charitable organization owning the property, as long as the benefit is not to officers or employees personally.¹⁷ Whether a property is tax exempt is based upon "how the property is used, not whether it is profitable."¹⁸

Endnotes

1. *Association of the Bar of City of New York v. Lewisohn*, 34 N.Y.2d 143, 153 (1974).
2. RPTL § 420-a(1)(b).
3. *United Church Residences of Fredonia, New York, Inc. v. Newell*, 43 A.D.3d 1403, 1404, 843 N.Y.S.2d 897, 898 (4th Dep't 2007) reversed on other grounds, *United Church Residences of Fredonia, New York, Inc. v. Newell*, 10 N.Y.3d 922 (2008).
4. *People ex rel. Watchtower Bible & Tract Soc. v. Haring*, 8 N.Y.2d 350, 357 (1960) (quoting *Williams Institutional Colored Methodist Episcopal Church v. City of New York*, 275 A.D. 311, 313 (1st Dep't 1949)).
5. *Id.* at 358.
6. *Association of the Bar of City of New York*, 34 N.Y.2d at 153.
7. 10 N.Y.3d 205 (2008).
8. 10 N.Y.3d 205 (2008).
9. 74 N.Y.2d 749 (1989).
10. 48 N.Y.2d 885 (1979).
11. 60 N.Y.2d 33 (1983).
12. 12 N.Y.2d 135 (1962).
13. 198 A.D.2d 357 (2d Dep't 1993).
14. 10 N.Y.3d 922 (2008).
15. *United Church Residences of Fredonia, New York, Inc. v. Newell*, 43 A.D.3d 1403, 843 N.Y.S.2d 897 (4th Dep't 2007).
16. *Adult Home at Erie Station, Inc. v. Assessor*, 10 N.Y.3d 205 (2008).
17. *Id.* at 216.
18. *Id.*

Christina Hawkins is a third year law student at Pace Law School. Research for this article was conducted during a summer internship with the Edwin G. Michaelian Municipal Law Resource Center of Pace University.

Reducing Municipal Legal Costs Through Shared Legal Services

By Lester D. Steinman

For local governments, sharing legal services is not a novel idea. At Pace University's Edwin G. Michaelian Municipal Law Resource Center (or MLRC for short), municipalities in Westchester County and the lower Hudson Valley have been successfully doing just that for 30 years.



This article will focus on why municipal practice is ideally suited for shared legal services, the benefits and efficiencies that result and the keys to a successful shared services program.

The Concept of Shared Municipal Legal Services

In 1979, Edwin G. Michaelian, a former county executive of Westchester County, and Pace University's president, Dr. Edward J. Mortola, established the MLRC to provide legal assistance to local government officials and attorneys.

In 1984, I was appointed as the MLRC's first full-time director. Next year will be my 25th anniversary in that position.

The founders understood that the typical local government was legally underserved:

- Many "municipal attorneys" were friends, colleagues or neighbors of the mayor or supervisor with little background in local government law.
- Law libraries and other support services available to these attorneys were inadequate.
- The compensation they received bore little relationship to market rate for legal services.
- Not surprisingly, most municipal attorneys worked only part time for the government; those municipalities hiring full-time attorneys typically could only attract younger, inexperienced lawyers.

Unquestionably, over the years, municipal law has become a highly specialized practice. Representation of local governments has become a more significant business area for an increasing number of law firms. Technology has diminished the need for traditional on-site

law libraries and reduced the cost of maintaining those libraries. The law departments of larger municipalities have grown significantly.

At the same time, issues confronting local governments have grown increasingly diverse and complex. Municipal attorneys are confronted with a multiplicity of tasks (contract and legislative drafting, litigation, opinion writing, representation of municipal boards and counseling elected officials and department heads) in such diverse areas as labor and employment law, planning and zoning, environmental law, construction, home rule, constitutional law, telecommunications, eminent domain, etc.

Yet, from my experience, there is a certain commonality and repetitiveness of legal issues that lends itself well to a shared services model.

Given the transient tenure of most municipal attorneys, there is little or no "institutional memory" to hold down research time and expense. Nor does the typical municipal attorney have the ability to discuss issues with experienced colleagues.

Moreover, technology has sharply reduced the time to gain the expertise necessary to respond to these issues. Long gone are the days of completing a contract or a memorandum, snail-mailing the document and enjoying a few days of breathing room to address other priorities. Today, those documents are now scanned, e-mailed and faxed, prompting same-day comments and the need for rapid responses.

So for the municipal attorney, shared legal services can be a godsend. Access to research done for other communities avoids the need to "reinvent the wheel" and dramatically reduces response time. The ability to discuss new issues with an experienced municipal counsel provides invaluable prospective, insight and security.

The MLRC as a Prototypical Shared Services Model

The MLRC provides research, consulting and educational services to assist municipal attorneys and officials in resolving basic structural and operational problems.

Utilizing its specialized municipal holdings, the vast library resources of Pace Law School and law student interns, the MLRC enhances the quality of legal

services delivered by municipal attorneys to member local governments.

Today, the MLRC serves 46 member local governments, as well as several private law firms and associations representing numerous other local governments. While membership is concentrated in Westchester County and the Mid-Hudson region, over the years we have served a number of upstate communities and attorneys. With modern technology, physical distance is no obstacle to our ability to serve our members' needs.

Research requests may be initiated by subscribers on any area of municipal law. Most of the inquiries come from the municipal attorney or law department. Other times, however, the mayor or town supervisor will contact us directly.

Under my supervision, Pace University law students carefully analyze the issues and prepare informational memoranda to be sent to the subscriber. Cross-indexed by subject matter for ready future reference, MLRC research is shared with all member municipalities.

No attorney-client relationship is established between the MLRC and its subscribers. This allows the Center's research to be shared with all of its subscribers. At the request of a subscriber, however, to preserve confidentiality and privacy, identifying information can be redacted before sharing the research with other subscribers.

The Center responds to approximately 300 research requests annually. A summary of topics researched is circulated periodically to subscribers and relevant data is provided upon request. A selection of topics researched by the MLRC in 2007 is attached to this article. Summaries of recent opinions of the New York State Comptroller, Attorney General and Board of Real Property Services are also circulated to all subscribers.

The breadth of our research spans the entire spectrum from antitrust to zoning. Over the years, we have developed extensive materials on such diverse areas as adult entertainment, affordable and senior housing, telecommunications and cell towers, ethics, land use, special districts, intermunicipal agreements, and on such key federal and state statutes as the Religious Land Use and Institutionalized Persons Act, State Environmental Quality Review Act, Freedom of Information Law and Open Meetings Law, just to name a few.

Recently, we learned that regulations promulgated by the Federal Trade Commission under the Federal Fair and Accurate Credit Transactions Act of 2003 require local governments that provide utility services to establish an identity theft prevention program by

November 1, 2008. We immediately advised member municipalities of this obligation, one which they previously were unaware of. We are now updating our members regarding the Federal Trade Commission's recent decision to suspend enforcement of those regulations until May 1, 2009.

To assist municipalities with legislative drafting, our library contains the codes of more than 60 counties, cities, towns and villages. These resources, augmented by other online resources, enable the Center to rapidly provide sample legislation which can serve as models to the draftsman. Here, again, "reinventing the wheel" is avoided, saving time for the attorney and money for the local government.

MLRC research on cutting edge issues is often published in the *Municipal Lawyer*. For example, the Fall 2007 issue examined the use of video surveillance on public streets as a new law enforcement tool for local governments. In the Fall 2008 issue, the first in a series of articles will provide an overview of initiatives being pursued and legislation being adopted by local governments nationwide to combat global warming.

Recognizing that this issue has become a priority for many local governments, our Center is becoming a clearinghouse for information on climate change initiatives. Currently, we are gathering model legislation from across the country on green building, green procurement, green vehicle fleets, solar energy and transportation incentives for trip reduction and hybrid vehicle owners, just to name a few. That information will be made available to our subscribers.

Continuing legal education provides another excellent forum for sharing legal services and resources. Working with Pace Law School, the Westchester County Bar Association, the Westchester Municipal Planning Federation and other organizations, the Center's programs bring municipal attorneys together to discuss issues affecting their daily practice.

Benefits and Efficiencies of MLRC's Shared Services Model

- Access to an encyclopedic platform of local government research.
- Linkage to specialized online and associational databases and access to specialized municipal law collections.
- Research assistance by law student interns.
- Unlimited consultation with an experienced municipal attorney with institutional knowledge of a broad spectrum of approaches to municipal problem solving.

- Depoliticized research providing a municipality with non-partisan information on politically charged issues.
- Reduced hours billed for legal research.
- Expedited response time.
- Reduced library maintenance and technology costs.

Keys to Success

Content—Experience—Responsiveness

Content—Just don't do vanilla. One size does not necessarily fit all—advice should be specific rather than generic, practical rather than academic. However, the base research should be applicable to resolving problems common among municipalities.

Experience—Municipal officials and attorneys must feel confident that they are dealing with an attorney experienced in representing local governments, one who understands the legal, operational and politi-

cal components and environments of the issues to be researched. Representing counties, cities, towns, and villages in public and private practice during the last 30 years provides the experience and insight necessary to obtain and maintain such confidences.

Rapid Response—When crises arise or meetings are about to begin, responses must be timely, as well as precise. Access to an enriched database, law student research and specialized municipal collections enables our Center to meet our subscribers' needs.

Contact information:

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Lester D. Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and serves as Counsel to the law firm of Wormser, Kiely, Galef & Jacobs, LLP in White Plains.

Selected Research Topics for 2007

- | | | |
|---|---|--|
| • Adaptive Reuse | • Ethics Boards | • Paper Streets |
| • Adult Uses—Moratoria | • Fences* | • Peddling & Soliciting |
| • Administrative Searches | • Food Vendors | • Public Property—Use for Commercial Advertising |
| • Affordable Housing—Incentives & Density Bonuses | • Garbage Collection—Hours | • Public Video Surveillance Programs |
| • Alienation of Public Parking | • Generators* | • Receiver of Taxes—Abolition and Transfer of Duties |
| • Bed & Breakfast* | • Home Occupations | • Recreation Fees—Survey |
| • Bicycles* | • Household Pets* | • Religious Uses—Special Permit Criteria |
| • Billboards | • Intermunicipal Agreements | • Retaining Walls* |
| • Business Improvement Districts* | • Impoundment of Federal Vehicles | • Sex Offenders* |
| • Code Enforcement—Civil Penalties* | • Junk Vehicles Removal | • Sign Ordinances—Amortization |
| • Code Enforcement—Relocation Costs for Displaced Tenants | • Landlord Registry* | • Special Permit Renewals* |
| • Commissioner of Deeds | • Landscaping* | • Suburban Towns |
| • Copyright—ASCAP Agreement | • Library Boards—Powers of Trustees | • Teardowns* |
| • E-mail Communications between Board Members | • Mixed Use Zoning Districts* | • Town Comptroller—Contracting Out Functions |
| • Encroaching on Public Property | • Moratoria* | • Town & Village Justice—Simultaneous Service |
| | • Municipal Liability for Overflowing Sewer and Drain Systems | |
| | • Newsracks* | |
| | • Official Newspaper* | |

**Sample Legislation*

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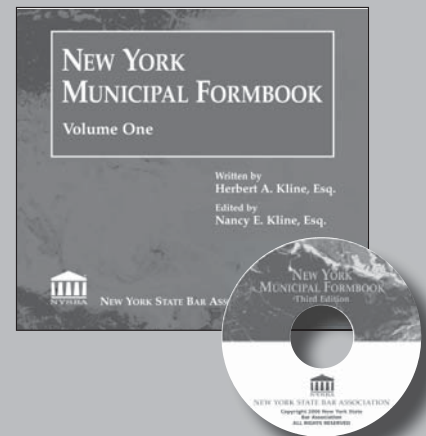
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