NYSBA FALL 2006 | VOL. 20 | NO. 4

# 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

I was asked recently what I would like to see in the quality of written materials produced by new lawyers. After discussing this with several of my partners we agreed that clarity and precision were two key components. Quantity does not necessarily produce the desired result. It is hard sometimes to deal with an issue or aspect of the law in which you have great confidence while keeping it short. The temptation is to try and explain all aspects of the issue when a short concise explanation will do. As many of you know, there are often times when case law, state comptroller's opinions, attorney general's opinions and even the legislation itself will not directly address a question presented to you. I am tempted many times to demonstrate my knowledge of some aspect of an issue, with which I have dealt many times, by dwelling too much on that aspect—such as explaining legislative history or the genesis of a particular provision of the constitution—when my exegesis could certainly be pared down to get to the point. It also helps make my argument or explanation that much more helpful to the reader.

As Winston Churchill once said, "This report, by its very length, defends itself against the risk of ever being read." A famous author also once stated that "making the simple complicated is commonplace; making the complicated simple, absolutely simple, that's creativity." I would urge all to reexamine the manner in which briefs, responses, legal memos, etc., are handled with this thought in mind—to try and improve upon the manner in which we all practice law.

On a final note, I would implore all in our Section to try and devote more time to pro bono work. This has been an area that I am guilty of dismissing as simply too much more than I can handle with the mistaken impression that agencies have been set up to adequately handle this matter. As with many practicing attorneys, the time demands on us are enormous but the needs of the poor are also much more significant than we can truly imagine. Too frequently we rely on associates to handle pro bono matters as it is a way to improve and expand their skill sets without running up billable time. Many of the pro bono organizations run training sessions to help those who wish to participate. If you are unable to use your area of expertise to help, you can learn something new by participating in one of these programs and use that knowledge to help those in need. Not only can

## Inside

participation provide a sense of personal satisfaction, it can also open you up to an entirely different area of the law than that with which you are usually accustomed to.

The great Albert Einstein was quoted as having once said, "Try not to become a man of success, but rather try to become a man of value." I look forward to seeing many of you at our Annual Meeting at which yet another fabulous program has been put together by our Executive Committee and subcommittee members for your benefit.

**Thomas Myers**

## Save the Dates

## New York State Bar Association

# 2007 Annual Meeting

## January 22-27, 2007
## New York Marriott Marquis

## Municipal Law Section
## Annual Meeting
## Thursday, January 25, 2007

# From the Editor

Municipal attorneys and officials should take note of two significant enactments by the Legislature. First, effective August 16, 2006, the Freedom of Information Law ("FOIL") has been amended to make it easier for courts to assess costs and attorney's fees against a municipality based upon an improper denial of a FOIL request.[1] Second, on January 1, 2007, mandatory minimum training requirements for members of municipal planning boards and zoning boards of appeal will take effect.[2]

## FOIL

In litigation under FOIL, the Legislature has carved out an exception to the general public policy requiring that each party to litigation bear its own litigation costs and attorney's fees. Chapter 492 of the Laws of 2006 amends § 89(4)(c) of the Public Officers Law to authorize recovery of fees and litigation costs incurred by a person judicially challenging a denial of records under FOIL where such person substantially prevailed and the municipality (1) had no reasonable basis for denying access; or (2) failed to respond to a request or appeal within the statutory time.

Prior to the 2006 amendment, any recovery of attorney's fees or costs under § 89(4)(c) required judicial findings that the municipality lacked a reasonable basis in law for withholding a record and that the record involved was "of clearly significant interest to the public." In a 2005 ruling, the Court of Appeals emphasized that "the records themselves must be of significant interest to the public, not just the events to which they relate."[3] The new legislation eliminates this significant public interest requirement.

Nevertheless, an award of costs and attorney's fees under § 89(4)(c) lies within a court's sound discretion and may be denied even when the preconditions are satisfied. Absent an abuse of discretion, a denial will not be overturned.[4]

Accordingly, the person or entity responding to a FOIL request must always be cognizant of the time limits in which action must be taken and the reasons for the withholding of any records requested.

## Mandatory Training for Planning and Zoning Board Members

Currently, State law authorizes local legislative bodies of counties, cities, towns and villages to establish training and continuing education requirements for members of their planning and zoning boards of appeal. Amending General Municipal Law § 239-c, General City Law §§ 27 and 81,[5] Town Law §§ 267 and 271 and Village Law §§ 7-712 and 7-718, Chapter 662 converts this enabling legislation into a mandatory training program for these officials.

Under the new legislation, each board member must complete a minimum of four hours of training annually. Training in excess of four hours in any one year may be carried over into succeeding years to meet annual requirements. Completion of training is a prerequisite to a board member's eligibility for reappointment.

All training must be approved by the legislative body and may include training provided by a municipality, regional or county planning office or commission, county planning federation, state agency, statewide municipal association, college or other similar entity. In addition to traditional classroom training, approved training formats include electronic media, video, and distance learning.

The legislation contains two safety valves. First, the local legislative body, by resolution, may waive or modify the training requirements if it deems such waiver or modification to be in the best interest of the municipality. Second, a failure to comply with the training requirements shall not constitute grounds to invalidate any planning or zoning board decision.

According to the sponsor's memorandum in the Senate, free training is readily available throughout the State and online. Thus, from the Legislature's perspective, the bill will have "minimal" fiscal impact on municipalities.

## Fall Issue

Turning to this issue of the *Municipal Lawyer*, Joseph K. Gerberg, Associate Counsel, New York State Office of Real Property Services, examines the recent United States Supreme Court decision addressing the government's obligation to provide notice to a property owner of the initiation of a tax foreclosure proceeding and the new, more stringent notification requirements imposed upon tax districts enacted by the Legislature in response to that decision.

Recent pronouncements by the New York Court of Appeals on rezoning protest petitions and the accrual of SEQRA claims are the subject of an article by Adam Wekstein of Hocherman, Tortorella & Wekstein. In our regular feature on ethics, Sung Mo Kim, Associate Counsel, New York City Conflicts of Interest Board, reviews the applicability of restrictions on political activity contained in the federal Hatch Act to municipal officers and employees.

Municipal Briefs synopsizes the Court of Appeals decision striking down a New York City local law, prohibiting city agencies from contracting with firms that do not provide equal employment benefits to its employees' spouses and domestic partners, as preempted by the State's competitive bidding statutes and the federal Employment Retirement Income Security Act of 1974 ("ERISA"). Litigation arising out of the exclusion of educational uses from non-residential zones, the battle between Cablevision and Verizon over municipal cable franchising and the right of an appraiser to conduct an interior inspection of a property where the owner refuses to permit access to the premises for such purposes, are also summarized.

## Endnotes

1. Ch. 492, L. 2006.
2. Ch. 662, L. 2006.
3. *Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005).
4. *Legal Aid Society of Northeastern New York, Inc. v. New York State Department of Social Services*, 195 A.D.2d 150 (3d Dep't 1993); *see Powhida v. City of Albany*, 147 A.D.2d 236, 238 (3d Dep't 1989).
5. The General City Law amendment does not apply to New York City.

**Lester D. Steinman**

## Request for Articles

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

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

# Return to Sender, Addressee Not Home:[1] The *Jones v. Flowers* Decision and New York State's Response

By Joseph K. Gerberg

Earlier this year, the United States Supreme Court issued a decision addressing the government's responsibility when a property tax foreclosure notice which was sent by certified mail is returned by the Postal Service as "unclaimed." In response to that decision, the New York State Real Property Tax Law (RPTL) has been amended to impose more stringent notification requirements upon tax districts that foreclose delinquent real property tax liens under Article 11. The Supreme Court decision is *Jones v. Flowers*,[2] issued April 26, 2006. The new legislation is Chapter 415 of the Laws of 2006, enacted July 26, 2006, and effective November 23, 2006. This article will review each of these developments in turn.

## Overview of *Jones v. Flowers*

It is settled law that in a tax foreclosure proceeding, the tax district need not prove that the property owner actually received notice of the proceeding as long as it can show that a reasonable effort was made to provide such notice.[3] Though personal service would be required if the proceeding were *in personam* (i.e., directed against a person), a tax foreclosure proceeding is *in rem* (directed against an object), and is thus subject to the "balancing of interests" analysis set forth in a line of Supreme Court decisions starting with *Mullane v. Central Hanover Bank & Trust Co.*,[4] and including *Mennonite Board of Missions v. Adams*.[5] A question that occasionally arises, of course, is whether the notification effort in a particular case was reasonable.

That was the issue presented in *Jones v. Flowers*, a real property tax foreclosure case from Arkansas.[6] The Commissioner of State Lands had sent a notice of tax sale by certified mail to a property owner at the property's street address and published notice in a local newspaper, as Arkansas law required. The owner no longer resided on the premises, having given possession to his estranged wife and their daughter, but the Commissioner did not know that at the time. After attempting to deliver the certified letter but finding no one at home, the Postal Service returned the item as "unclaimed."[7] Later, a second notice was sent to the owner by certified mail, with similar results. The Commissioner, viewing the attempted mailings as sufficient under Supreme Court precedents and Arkansas law, made no further effort to notify the owner and proceeded with the foreclosure.

Writing for a 5-3 Supreme Court majority, Chief Justice John Roberts found that the Court's precedents were distinguishable because in this case, the government had clear evidence that its notification effort had not been successful. As a result, he concluded, "the State should have taken additional reasonable steps to notify Jones, if practicable to do so." While he asserted that it was not the Court's responsibility to prescribe a specific notification protocol, he did find that reasonable additional steps were available,[8] such as "resend[ing] the notice by regular mail, so that a signature was not required." Other possible alternatives he offered were posting notice on the premises, or mailing it again but addressing it to "Occupant." Justice Roberts drew the line, however, at endorsing an "open-ended" search of external sources such as telephone directories or income tax records, because he viewed such a search as unduly onerous, especially where the statute obliges the owner to notify the tax authorities of address changes.

So in the wake of *Jones v. Flowers*, it is clear that when the government sends an owner a tax foreclosure notice only by certified mail, and the notice is returned promptly thereafter as unclaimed, additional efforts must be made to notify that owner if reasonably practical. What is less clear is what efforts the Court would consider to be reasonably practical. The decision leaves it to the States to come up with the particulars (subject, of course, to judicial review).

Chapter 415 of the Laws of 2006 seeks to do just that for those tax districts which enforce delinquent property tax liens pursuant to Article 11 of the RPTL. Tax districts which opted-out[9] of Article 11 and which instead enforce tax liens pursuant to local charters, administrative codes or the like, are not directly affected by Chapter 415, as it does not amend any such local legislation. However, those jurisdictions may find Chapter 415 instructive nonetheless, to the extent it offers guidance for dealing with undelivered foreclosure notices.

## Overview of Chapter 415

Under the pre-*Flowers* version of Article 11, when a foreclosure proceeding was initiated, enforcement officers were required to send notice to the owner only by certified mail, and to other parties only by either

certified or ordinary first-class (commonly called "regular") mail (RPTL § 1125(1)).[10] If the Postal Service returned the item as undeliverable for any reason, the statute did not require the enforcing officer to make further efforts to bring the matter to the owner's attention (though many did so anyway). The unstated premise was that the notice was reasonably calculated to reach the owner when sent, so the owner could be charged with constructive notice by virtue of the required newspaper publication (RPTL § 1124), and that would suffice under the *Mennonite* line of cases. Obviously, this assumption became problematic once *Jones v. Flowers* was handed down, so the Legislature revisited the issue, with Chapter 415 being the result.

Chapter 415 amends Article 11 to generally require notices of foreclosure to be sent *both* by certified *and* regular mail when a foreclosure proceeding is commenced. The tax district would be permitted to proceed with the foreclosure without making further efforts to notify that party **if** (1) *neither* mailing is returned within 45 days, **or** (2) *only one* of the mailings is returned during that period (i.e., the certified mailing comes back but the regular mailing does not, or the regular mailing comes back but the certified mailing does not). If, however, *both* mailings are returned within the 45-day period, further obligations are imposed upon the tax district.

- In the case of an owner, the tax district must check with the Postal Service for an alternative mailing address.[11] If that proves unsuccessful, it must post the notice on the premises (and may charge an additional $100 for the service). In either case, the owner would be guaranteed another 30 days to respond.
- In the case of a non-owner, the tax district must also check with the Postal Service for a more current address, but if that proves unsuccessful, it must post the notice in the offices of the enforcing officer and the court clerk, rather than on the premises. As with an owner, the addressee would be guaranteed another 30 days to respond.

Chapter 415 also imposes an affirmative duty upon such parties to notify the enforcing officer of address changes, and expressly permits a court to take into account the failure of a party to do so when weighing the adequacy of a notification effort. Among the new law's other notable features: It specifies how notice is to be given to "unknown" owners,[12] it supplies a definition of the term "public record"[13] (a term which previously had been the source of some uncertainty), and it describes the process to be followed when posting is required.[14] The amendments take effect November 23, 2006, and apply to tax enforcement proceedings commenced pursuant to Article 11, Title 3 of the RPTL on or after that date.

Sending the notice both by certified mail and regular mail should be an effective and inexpensive way to reduce incidents of non-deliverability. As the *Flowers* Court noted, there is no need to obtain a signature for an ordinary first-class letter; it may simply be left on the premises for the addressee or occupant to see when going through the day's mail.[15] Thus, if a properly addressed notice sent by regular mail is not returned within a reasonable time, the tax district should be entitled to presume it was delivered, regardless of whether the certified mailing is returned. On the other hand, where *both* the certified and regular mailings are returned, no such presumption is available so it is reasonable to expect the tax district to go further, to the extent further steps are practical. When further steps are warranted, the graduated approach embodied in the legislation (first, try to get a better address from the Postal Service, then as a last resort, post notice on the premises) also seems reasonable, especially given the Court's disinclination to require an "open-ended" search.

The provision limiting the waiting period to 45 days likewise seems quite defensible in the context of the Article 11 timetable.[16] While there is no language in the Court's opinion expressly supporting this or any other specific time constraint, neither is there language suggesting that officials must wait indefinitely for postal returns that may never come. In fact, the holding in *Flowers* was at least partially predicated on the notion that the authorities learned "promptly" that the notification effort did not succeed.[17] If ever called upon to review this issue, the Court would presumably acknowledge that the matter must move forward at some point, and that a predictable waiting period of reasonable duration is a practical necessity.

Thus, Chapter 415 appears to strike a very fair balance between the public and the private interests in a manner consistent with all relevant Supreme Court precedents, up to and including *Jones v. Flowers*. There can be no guarantees, but given the reasonableness of its provisions and the general inclination of the courts to defer to legislative policy judgments when appropriate, it seems more likely than not that this legislation will survive judicial scrutiny.

The real property tax has long been the primary source of revenue for school districts and local governments in New York State. Not coincidentally, it has also become a substantial and growing source of concern to the State's homeowners. As the pressure mounts, it is conceivable that more and more residents may reach the point of despair and begin searching for ways to delay the inevitable. To some extent, *Jones v. Flowers* gives them a new avenue to explore (or, as some might say, to exploit). After all, if one could keep foreclosure at bay indefinitely by simply declining to sign for certified mail from a certain sender,[18] an untold number

of property owners might come to view prolonged or perpetual delinquency as a viable option.

If property tax nonpayment were to become commonplace, local governments could be forced to consider various painful measures to keep afloat, such as raising tax rates, which would drive even more homeowners into distress, or curtailing services, to the detriment of all. Clearly, to the extent that a door to disarray was opened by *Jones v. Flowers*, the public interest demands that it be closed quickly and effectively. With the prompt passage of Chapter 415, New York State's lawmakers deserve credit for recognizing and rising to meet this challenge.

## Endnotes

1. My apologies to Elvis Presley and songwriters Otis Blackwell and Winfield Scott for mangling the lyrics of their 1962 classic.
2. The official citation is 547 U.S. _, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). A copy of the decision is posted online at http://www.supremecourtus.gov/opinions/05pdf/04-1477.pdf.
3. *See, e.g.*, *Harner v. County of Tioga*, 5 N.Y.3d 136 (2005); *Kennedy v. Mossafa*, 100 N.Y.2d 1 (2003). It is true that not long ago, one distinguished observer posted that an obligation had been imposed upon tax districts to prove that property owners had actually received notice (Wilkes, David, *Enhanced Notice Requirements in Property Tax Foreclosure Cases Give Owners More Protection*, New York State Bar Journal, March/April 2002, p. 48). He reasoned essentially that then-recent amendments to RPTL § 1125 (i.e., L.2000, c.358) required foreclosure notices to be sent to owners "by certified mail with a return receipt requested," and the return receipt mandate implicitly abrogated the presumption of receipt that had previously existed. However, while the legislation in question *did* require that certified mail be used to notify owners, it did *not* require return receipts to be used in connection therewith. As a result, the presumption of receipt was not affected by that legislation.
4. 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).
5. 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). *Mennonite* led to a substantial revision of New York State's tax enforcement laws (L.1993, c.602), followed by a line of court cases, mostly at the State level, generally upholding the new requirements. *See, e.g.*, *Harner v. County of Tioga*, 5 N.Y.3d 136 (2005); *Kennedy v. Mossafa*, 100 N.Y.2d 1 (2003); *see also County of Clinton v. Bouchard*, 29 A.D.3d 79 (3d Dep't 2006); *Barnes v. McFadden*, 25 A.D.3d 955, 957 (3d Dep't 2006); *Maple Tree Homes, Inc. v. County of Sullivan*, 17 A.D.3d 965 (3d Dep't 2005), *appeal dismissed*, 5 N.Y.3d 782 (2005); *Luessenhop v. Clinton County* 378 F. Supp. 2d 63 (N.D.N.Y. 2005), *reversed and remanded* _ F.3d _ (2d Cir., Oct. 11, 2006).
6. Though *Jones v. Flowers* arose under Arkansas law, to the extent the decision represents the Supreme Court's reading of the Due Process clause of the United States Constitution, it is applicable to all 50 states.
7. One might suppose that the letter carrier had left a delivery notice (i.e., the peach-colored PS Form 3849) on the premises each time delivery was attempted, but it seems there was no proof of this in the record (*see* slip op. at p. 12 ("In any event, there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street."); *see also* Dissent at p. 3, note 1, which cites the Postal Operations Manual to show that letter carriers are obliged to leave such notices, but does not contend this was actually done). Without such evidence, the Court's majority was apparently unwilling to infer what the Commissioner must have considered obvious: that Mr. Jones or his family knew of—and chose not to call for—the letters in question. One can only speculate whether the Court might have viewed the matter differently if the record had been more complete on this point.
8. Note that he did not say that any of these additional steps would have been sufficient, just that they were available.
9. The opt-out window generally closed in 1994, shortly before the current version of Article 11 took effect. A list of tax districts which duly opted-out is posted at http://www.orps.state.ny.us/legal/localop/1104.htm.
10. Under the original version of § 1125 as enacted in 1993 (c.602), regular mail was sufficient for *all* parties, including owners. The requirement that certified mail be used to notify owners was added in 2000 (c.358).
11. This is an indirect reference to the fact that government entities may file Requests for Change of address of Boxholder Information with the Postal Service pursuant to 39 C.F.R. § 265.6(d)(5). It has been reported that even when a forwarding order has expired, the Postal Service will attempt to provide a current address for the addressee within a matter of days, and that this proves to be fruitful about 90% of the time.
12. Where the owner is listed as "unknown" on the tax roll and the owner's name cannot be found in the public record, a certified mailing is not required. Instead, the notice is to be mailed by regular mail (addressed to "Occupant"), and a copy posted on the premises.
13. The legislation defines "public record" to "consist of" the County Clerk's real property records, the Surrogate Court's records, and the tax rolls in the possession of the enforcing officer from the applicable lien date forward (new RPTL § 1125(1)(e)).
14. Under new RPTL § 1125(1)(c), a posting will be considered adequate if the notice is either affixed to a door of a residential or commercial structure on the premises, or attached to a tree, post, stake or other vertical object, and plainly visible from the road. The notice may also be hand-delivered to an occupant of suitable age and discretion, if one is there at the time the posting is attempted.
15. *See* slip op., at p. 13. Once the letter has been delivered to a valid address, constitutionally adequate notice has been achieved. Though the Court does not specifically address the issue, efforts by an addressee to negate delivery, such as those recounted by Elvis in the tale alluded to in note 1, *supra* (she put his unopened letters right back in the mail, marked "No such number, no such zone"), would undoubtedly be ineffective.
16. Though a foreclosure cannot occur sooner than two years after the tax became a lien (RPTL § 1110(2)), the time between the formal commencement of the foreclosure proceeding (which is when notice is sent) and the issuance of a judgment of foreclosure can be as short as three months (*see, e.g.*, §§ 1123(1), 1124(3), 6th par.). This may be contrasted with the lag at issue in *Flowers*, which was said to be *two years*. Slip op. at p. 9.
17. *See* Slip op. at p. 9, on which the word "promptly" appears three times, and p. 11, where it appears twice.
18. I.e., from the official who is responsible for enforcing unpaid taxes in that jurisdiction (commonly the County Treasurer or Commissioner of Finance in counties, the clerk-treasurer, tax collector or finance officer in cities). For what it may be worth, mail from Elvis may generally be accepted without placing oneself in legal jeopardy.

**Mr. Gerberg is an Associate Attorney for the New York State Office of Real Property Services.**

# Clarity and Confusion: The Court of Appeals Addresses Protest Petitions and the Accrual of SEQRA Claims in *Eadie v. Town Board of the Town of North Greenbush*

By Adam L. Wekstein

This summer, in *Eadie v. Town Board of the Town of North Greenbush*,[1] the Court of Appeals established a significant rule with respect to the validity of "protest petitions" filed by opponents to a rezoning. Specifically, the Court found that a protest petition is ineffective where the area to be rezoned is separated from the lands of the petitioning landowners by a buffer strip of property which will retain its original zoning designation. However, in a ruling with perhaps wider implications, *Eadie* appears to put to rest existing uncertainty about the point of accrual of causes challenging a zoning decision which are premised on defective review under the State Environmental Quality Review Act ("SEQRA").[2] In actuality, the ruling may have raised as many questions as it answered.

*"Although the protest petition provisions have been part of New York law for decades, before 2005 the courts had not faced the question of what happens when a municipality rezones only part of a parcel so that land adjacent to that parcel is located more than 100 feet from the area being rezoned."*

## I. Protest Petitions—A Clear Rule

### A. Background

Under New York State law, certain categories of landowners may file a protest petition against a proposed rezoning which, if properly filed, requires the municipal legislative body to approve the rezoning by the affirmative vote of at least three-quarters of its members, rather than by a simple majority.[3] Pursuant to such provisions, the filing of a protest petition by owners of 20 percent of the land in any one of three classes of property included in or in proximity to the land being rezoned triggers this heightened voting requirement. One of these categories encompasses "the owners of 20 percent or more of the area of land immediately adjacent to that land included in such proposed change, extending 100 feet therefrom."[4] Although the protest petition provisions have been part of New York law for decades, before 2005 the courts had not faced the question of what happens when a municipality rezones only part of a parcel so that land adjacent to that parcel is located more than 100 feet from the area being rezoned.

In *Eadie* a town board's actions raised precisely such an issue. The Town Board of the Town of North Greenbush (the "Town Board") considered an area-wide rezoning which had been prompted by an application from two landowners (the Galloglys) to rezone property located in the professional business and residential zoning districts to a planned commercial district. The Galloglys sought to amend the zoning map to allow development of retail stores on their property.

As the review process under the SEQRA evolved, in response to public comment the Final Generic Environmental Impact Statement ("FGEIS") concluded that maintaining a buffer between the nearby residences and the portion of the property being rezoned for shopping center use would be appropriate. As a result, when the Town Board amended the town's zoning map, it only rezoned a portion of the site into the commercial classification and retained the existing zoning districts—professional business and residential—as a buffer zone of between 200 and 400 feet in width along the perimeter of the Galloglys' property. It approved the rezoning action by a three to two (simple majority) vote.

During the rezoning process adjoining property owners filed a protest petition, which the Town Board found to be invalid, based on the conclusion that they did not own 20 percent of the property located within 100 feet of the area being rezoned. If the protest petition had been legally effective, the vote on the rezoning would have constituted a constructive denial based on the absence of a supermajority.

In reviewing the Town Board's determination, the Supreme Court found that the protest petition was valid.[5] The lower court's decision stated that the provisions of section 265 of the Town Law were ambiguous as to the effect of maintaining a so-called buffer zone. As a basis to uphold the protest petition, the court relied on the public policy protecting the property rights of adversely affected landowners and speculated that the Legislature must have intended to foreclose the "artifice" of creating an artificial buffer zone to defeat a protest petition.

The Appellate Division disagreed.[6] The Third Department addressed the question in the following passage:

> We simply cannot agree with this analysis since the provisions of the statute are clear and unambiguous, namely, that the class of property owners necessary to force a "supermajority" must live "immediately adjacent" to the rezoned property, that is, within 100 feet . . . There can be no doubt that petitioners' properties are separated by a strip of land that is greater than 100 feet wide at all points.[7]

### B. The Court of Appeals Recognizes "Buffer Zones" as a Legitimate Means to Thwart Protest Petitions

The Court of Appeals affirmed the Appellate Division's decision, also relying on the language of the statute itself. It set forth its reasoning as follows:

> We conclude, as did the Appellate Division, that the "one hundred feet" must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part. The language of the statute, on its face, points to that result: "land included in such proposed change" can hardly be read to refer to land to which the proposed zoning change is inapplicable.[8]

Furthermore, the *Eadie* Court rejected the suggestion that its holding would disenfranchise owners of land adjacent to parcels being rezoned and found that, regardless of the underlying intent, creation of a buffer zone to insulate a rezoning against protest petitions is legal. In reaching its conclusion the Court not only relied on the plain language of the protest petition statutes, but invoked policy reasons as well. The decision stated:

> Fairness and predictability point in the same direction. The interpretation we adopt is fair, because it makes the power to require a supermajority vote dependent on the distance of one's property from land that will actually be affected by the change. Petitioners complain that this allows landowners who obtain rezoning to insulate themselves against protest petitions by "buffer zoning"—i.e., leaving the zoning of a strip of property unchanged, as occurred with the Galloglys' property here. But we see nothing wrong with this. The whole point of the "one hundred feet" requirement is that, where a buffer of that distance or more exists, neighbors beyond the buffer zone are not entitled to force a supermajority vote. If we adopted petitioners' interpretation, such a vote could be compelled by property owners within 100 feet of the boundary of even a very large parcel—though these owners might be far away from any land that would be rezoned. The interpretation we adopt also makes the operation of the statute more predictable. We see no reason why the right to compel a supermajority vote should change when the boundaries between parcels change—i.e., when parcels are merged or subdivided. Indeed, in this case, petitioners accuse the Galloglys of deeding property to themselves in order to create two parcels and invalidate the protest petition. Whether that was their original intention or not, the Galloglys now argue, and we agree, that such a reconfiguration of property lines, whether done in good faith or bad faith, should have no impact on the Town Law § 265 (1) (b) issue.[9]

Clearly, the *Eadie* decision has handed municipalities (and successful applicants for rezonings) a powerful tool with which to render ineffective protest petitions submitted under the provisions of the Town, Village and General City Laws. Where the involved property is large enough to accommodate a strip of land greater than 100 feet in width that retains its pre-existing zoning classification and the rezoning maintains such a "buffer," the owners of land adjoining or directly opposite (across the street from) the buffer will be unable to trigger the supermajority voting requirement.[10]

## II. Accrual of SEQRA Claims for Statute of Limitations Purposes—Continued Uncertainty

### A. Background—General Principles

SEQRA has no provisions addressing judicial review. It includes neither a statute of limitations governing claims based on defective SEQRA review (although in most instances it is four months under CPLR 217(1))[11] nor any specification of when the statute of limitations begins to run—the accrual point of a SEQRA cause of action. The latter question, which has been addressed at length by sometimes inconsistent case law, has generated the most uncertainty. This lack of consistency has posed a real dilemma for the attor-

ney trying to ascertain when a SEQRA challenge to a land use decision should be commenced.

Until relatively recently the substantial weight of authority established that a claim based on defects in the SEQRA review process is ripe for adjudication when the governmental agency takes substantive action to approve or fund the activity which was under review, rather than when it makes a SEQRA determination, such as issuing a positive or negative declaration or even adopting a findings statement.[12] For example, in *Save the Pine Bush v. City of Albany*,[13] the Court of Appeals putatively established a rule that litigation attacking the environmental review of zoning legislation had to be commenced within four months of the adoption of the legislation. It did not link claim accrual to the completion of the SEQRA process itself. A similar rule predominated with respect to litigation attacking SEQRA review performed in connection with subdivision approvals. Such claims were generally held to accrue within 30 days of the filing of the resolution of preliminary approval.[14]

However, some case law held that SEQRA determinations are not merely preliminary steps in the approval process, but constitute final decisions with respect to the environmental review process and, accordingly, that claims based on purported deficiencies in the environmental review accrue (and the statute of limitations begins to run) when the SEQRA determination is made.[15] Of course, this line of case law, which was inconsistent with most precedent, created doubt regarding the applicable principles.

### B. The Unsettling Effect of *Stop-the-Barge* and *Gordon*

Two Court of Appeals decisions in 2003, *Stop-the-Barge v. Cahill*[16] and *Gordon v. Rush*,[17] added to the unsettled nature of the subject area, suggesting that maybe the exceptions to the general rule were not exceptions at all. These cases held that, at least under certain circumstances, a cause of action under SEQRA may accrue on the adoption of a negative declaration or issuance of a positive declaration.

In *Stop-the-Barge*, the Court determined that the issuance of a conditioned negative declaration ("CND") was a "final action" for the purposes of judicial review under SEQRA. *Stop-the-Barge* considered a SEQRA review undertaken by two separate agencies. The New York City Department of Environmental Protection ("NYCDEP") acted as lead agency with respect to the installation of a power generating facility on a floating barge, while DEC was an involved agency with jurisdiction to issue an air permit pursuant to Article 19 of the Environmental Conservation Law. The last in a series of three CNDs issued by NYCDEP became final on February 18, 2000. After taking the requisite procedural steps, DEC issued the air permit on December 18, 2000, ten months to the day after the CND became final.

The petitioners in *Stop-the-Barge*, a group opposed to the power plant, commenced an Article 78 proceeding within four months of the December 18th issuance of the air permit, challenging both NYCDEP's adoption of the CND and DEC's issuance of the permit based, among other things, on alleged SEQRA violations. The Court of Appeals found that any challenge to the CND was time-barred by the four-month limitations period of CPLR 217(1).

In reaching its conclusion that the CND was a final agency action subject to judicial review, the Court relied on its earlier decision regarding "finality" of administrative decisions, *Essex County v. Zagata*.[18] It stated the following:

> In *Matter of Essex County v. Zagata*, we concluded that an agency action is final when the decisionmaker arrives at a "definitive position on the issue that inflicts an actual, concrete injury." We stated: "[A] determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete" [citations omitted].[19]

In dismissing the SEQRA claims in *Stop-the-Barge*, the Court rejected the petitioners' argument that the CND was merely a preliminary step in the SEQRA process, and held that it was a final agency action for the purposes of judicial review. It explained this conclusion by stating that "the issuance of the CND resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement."[20] The Court also invoked policy considerations to support its holding. It observed that allowing the petitioners to wait the ten months between the adoption of the CND and the issuance of the air permit, without commencing suit, would contravene the policy of SEQRA of "resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning."[21]

A key factor supporting the outcome in *Stop-the-Barge* would appear to be that multiple agencies were involved in the approval process. As a result, the issuance by one of the agencies of a CND was the last step in that agency's involvement, a fact militating in favor of the conclusion that its SEQRA decision was a final determination.

In *Gordon*, following a bout of severe beach erosion, a group of oceanfront property owners sought a permit from the Town of Southampton to install shore-hardening structures, a steel bulkhead, seaward of the dunes on the beach, to prevent further erosion. To proceed with the proposed improvements the petitioners also needed to obtain a tidal wetlands permit from the DEC. In the first instance, the Town's agency with jurisdiction to issue the local permit declined to act as lead agency and actually requested that DEC assume that role. Subsequently, when the landowners agreed to implement certain mitigation measures, DEC issued a negative declaration in August of 1993 and granted the requisite wetlands permit in September of that year. Following receipt of the tidal wetlands permit, the property owners submitted amended applications to the municipality to reflect the modifications that had been incorporated in their plans as a result of the DEC permitting process. The local administrative board purported to declare itself lead agency to conduct its own *de novo* SEQRA review and issued a positive declaration requiring preparation of an environmental impact statement ("EIS"). In response to the local board's actions, the landowners commenced an Article 78 proceeding to annul the positive declaration.

Again applying the test articulated in *Essex County v. Zagata,* the Court of Appeals held that even though the litigation challenged what has often been characterized as a preliminary step in the environmental review process, the petitioners' SEQRA claims were ripe for review. The decision reads as follows:

> [h]ere, the decision of the Board clearly imposes an obligation on petitioners because the issuance of the positive declaration requires them to prepare and submit a DEIS. Conducting a "pragmatic evaluation" of these facts and circumstances, the obligation to prepare a DEIS imposes an actual injury on petitioners as the process may require considerable time and expense. The Board would like us to adopt a bright-line rule, adopted by some appellate courts, that a positive declaration requiring a DEIS is merely a step in the agency decisionmaking process, and as such is not final or ripe for review . . . Here, the Board issued its own positive declaration for the project after the DEC had previously conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate. Certainly in this circumstance the bright-line rule advanced by the Board would be inappropriate. In addition, further proceedings would not improve the situation or lessen the injury to petitioners. Even if the Board ultimately granted the variances, petitioners would have already spent the time and money to prepare the DEIS and would have no available remedy for the unnecessary and unauthorized expenditures. [citations omitted][22]

As in *Stop-the-Barge*, in *Gordon* there was a sound basis in the facts under consideration and the procedural posture of approval process for finding the challenged SEQRA determination to be final. Two agencies were involved in the environmental review and the SEQRA process was finished with respect to the entity that had legitimately acted as lead agency. When the local board tried to issue the positive declaration, it arguably acted in an *ultra vires* fashion. Under such circumstances, closing the courthouse doors until the landowner incurred the expense and wasted the time necessary to complete a full EIS review process would have made little sense and been inequitable.

Some commenters saw *Stop-the-Barge* and *Gordon* as changing the governing rule as to when a SEQRA claim accrues—e.g., that a declaration of significance constitutes a final action subject to judicial challenge.[23] In the context of the unusual facts of each case, other commentators saw the decisions as raising more uncertainty as to when the statute of limitations on a SEQRA cause of action begins to run.[24]

### C. *Eadie*—Clarity or Confusion

In *Eadie*, the Town Board conducted a SEQRA review involving preparation of a Generic EIS ("GEIS") of the proposed area-wide rezoning. The process entailed the issuance of a 200-page draft GEIS with lengthy appendices, affording the public the requisite opportunity for comment (including public hearings) and adoption of a final GEIS. The SEQRA process culminated in the adoption of a findings statement on April 28, 2004. The challenged rezoning was enacted 15 days later, on May 13, 2004.

The petitioners did not commence litigation until September 10, 2004—more than four months after the adoption of the SEQRA findings, but just less than four months following the rezoning itself. Naturally,

the petitioners argued that their SEQRA claims accrued when the zoning was enacted and that since the proceeding was commenced within four months of that date, the SEQRA causes of action were timely. The respondents asserted that the statute of limitations began to run upon the filing of the findings statement and that, therefore, the SEQRA challenge was time barred.[25]

Siding with the petitioners, the Court of Appeals held that the SEQRA claims were timely because the litigation had been commenced within four months of the rezoning itself. The Court found that the petitioners had suffered no concrete injury until the enactment of the rezoning itself, as opposed to the earlier adoption of the findings, and expressly stated that *Stop-the-Barge* did not change the rule in *Save the Pine Bush*. The decision states:

> Here, petitioners suffered no concrete injury until the Town Board approved the rezoning. Until that happened, their injury was only contingent; they would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition, or by persuading one more member of the Town Board to vote their way.
>
> *We thus reaffirm the holding of Save the Pine Bush, and make clear that an Article 78 proceeding brought to annul a zoning change may be commenced within four months of the time the change is adopted*. [emphasis added][26]

In reaffirming the vitality of *Save the Pine Bush,* the Court carefully avoided casting doubt on the viability of its arguably inconsistent, though recent, holding in *Stop-the-Barge*. *Eadie* distinguished *Stop-the Barge* in the following terms:

> *Stop-the-Barge* does not control this case because it did not involve "the enactment of legislation," as *Save the Pine Bush* did and this case does; and also because in *Stop-the-Barge* the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged. Any injury to the petitioner that DEP inflicted was concrete when the CND was issued. It did not depend on the future passage of legislation and it was not subject to review or corrective action by DEP.[27]

Finally, the Court reached well beyond the facts in *Eadie*, and speculated that in some instances the point of accrual of a SEQRA challenge to a legislative zoning action could still be the adoption of the SEQRA determination, rather than the enactment of the zoning itself. The Court set forth its reasoning by constructing a hypothetical scenario in the following manner:

> This [holding] does not mean that in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which petitioner complains. This might be a different case if, for example, the Galloglys or others were contending that mitigation measures required by the final GEIS and adopted in the findings statement unlawfully burdened their right to develop their property. In that hypothetical case, the injury complained of would not be a consequence of the rezoning, but of the SEQRA process, and it would make little sense either to require or to permit the person injured to await the enactment of zoning changes before bringing a proceeding.[28]

Accordingly, while *Eadie* purports to establish a general rule and reaffirm earlier precedent, it raises new issues both by distinguishing *Stop-the-Barge* and setting forth in pure *dicta* a discussion of fictional facts not before the Court. The discussion of the hypothetical scenario in *Eadie* would appear to create only a limited exception to its general rule regarding the accrual of SEQRA challenges to rezonings. Specifically, it is hard to envision a situation in which a party not having an interest in the land being rezoned, but who seeks to attack the rezoning, could claim to have suffered concrete and final injury upon a SEQRA determination. It is highly likely that any such third party would have to await the enactment of the legislation to claim injury.

However, based on *Eadie*'s hypothetical analysis, the owner of land that is included within the area being rezoned cannot await the final legislative act if he wishes to challenge restrictions on the use of his property contained in, or mitigation measures required by, a negative declaration, CND or statement of findings. Under such circumstances, the point of accrual of any SEQRA claim would likely be the adoption of the SEQRA determination or findings. Nonetheless, this exception to the general principle of *Eadie* and *Save the Pine Bush* would appear to be limited in scope to allow (and for that matter require) only parties having an interest in land which is subject to a proposed rezoning to commence litigation within the applicable limita-

tions period following the SEQRA determination. In fact, *Eadie* could be viewed as setting an earlier accrual point for SEQRA claims of an applicant for rezoning, than for potential SEQRA challenges commenced by third parties.

What perhaps has broader implications is the manner in which the court distinguished *Stop-the-Barge*. By expressly relying on the fact that *Stop-the-Barge* did not involve the enactment of legislation, *Eadie* poses the question of whether SEQRA challenges to administrative determinations, issuing or denying a permit or approval (rather than legislation), accrue upon the decision on the permit or approval or on the often earlier SEQRA determination. At minimum, it suggests that the point at which the statute of limitations for a SEQRA challenge to administrative action begins to run can only be determined on a case-by-case, fact-specific basis under the principles of *Essex County v. Zagata*. One may legitimately ask whether *Eadie* threatens even the viability of those cases which hold that the statute of limitations for challenging subdivision approval runs from the issuance of preliminary approval.

*"What this discussion re-emphasizes is that the rule as to when the statute of limitations on a SEQRA cause of action begins to run is far from absolute and may, in certain circumstances, be outright confusing."*

An even more likely exception to the general principle that SEQRA causes of action accrue on a governmental entity's substantive action, rather than its determination under SEQRA, would arise in instances where multiple agencies participate in an environmental review, and one of those agencies completes its SEQRA review before the other agencies take final action on the project. *Stop-the-Barge* and *Eadie* can certainly be read to suggest that the statute of limitations begins running with respect to SEQRA claims when an involved agency makes its own SEQRA determination, even though the litigation may be attacking another agency's subsequent action on SEQRA grounds.

What this discussion re-emphasizes is that the rule as to when the statute of limitations on a SEQRA cause of action begins to run is far from absolute and may, in certain circumstances, be outright confusing.[29] Consequently, the careful practitioner would be well advised to assume that the statute of limitations for mounting a SEQRA challenge runs from the issuance of the determination under SEQRA—that is, the negative declaration, positive declaration, or findings statement—rather than waiting to sue until completion of the final action of the involved governmental entity, even though such an assumption may well be incorrect, particularly when the challenge is to a zoning enactment. If the assumption is wrong and the case is commenced too early, the consequence will be dismissal of the litigation as premature, a result that does not foreclose commencement of litigation pressing the same claims once the governmental entity takes a final substantive action. In contrast, instituting a proceeding which is possibly too late, by waiting to commence litigation following the SEQRA determination for a period longer than the applicable statute of limitations, might forever bar the client from maintaining claims based on the purportedly defective SEQRA review—a potentially devastating result for both the attorney and his client.

## Endnotes

1. 7 N.Y.3d 306 (2006).
2. Collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. part 617.
3. *See* Town Law § 265(1)(b); Village Law § 7-708(2); General City Law § 83(2).
4. The other two categories are:

   > (a) the owners of twenty percent or more of the area of land included in such proposed change; or . . .
   >
   > (c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

5. 9 Misc. 3d 599 (Sup. Ct., Rensselaer County 2005), *rev'd*, 22 A.D.3d 1025 (3d Dep't 2005), *aff'd*, 7 N.Y.3d 306 (2006).
6. 22 A.D.3d 1025 (3d Dep't 2005), *aff'd*, 7 N.Y.3d 306 (2006).
7. *Id.* at 1028-1029 (citations omitted).
8. *Eadie*, 7 N.Y.3d at 314. It should be noted that *Ryan Homes, Inc. v. Town Board of Town of Mendon*, 7 Misc. 3d 709 (Sup. Ct., Monroe Co. 2005), reached the same result with respect to the rezoning of 75 acres out of an 87-acre site to allow the development of luxury patio homes. In that case, the court held that the retention of a 101-foot buffer strip of land keeping its old zoning district classification was sufficient to allow passage of the zone change by a simple majority, notwithstanding the filing of a protest petition.
9. *Eadie*, 7 N.Y.2d at 315.
10. Interestingly, the North Greenbush Town Board argued to the Court of Appeals that the protest petition had been effective to invoke the supermajority requirement, and therefore, that the rezoning had been defeated. The Town's brief stated that the turnabout in the Town Board's position was due to the change in composition of that board which occurred after oral argument at the Appellate Division, in that no Town Board member who had voted for the rezoning was still a member of the board. Court of Appeals Brief of Respondent, Town of North Greenbush, 2006 WL 1930201. In other words, the Town joined those attacking its own legislative act, not the first time that politics made strange bedfellows.
11. Many statutory provisions or regulations provide shorter periods. For land use practitioners the most important of these

is the 30-day period which applies to proceedings challenging the determinations of zoning boards of appeals (General City Law § 81-c(1); Town Law § 267-c(1); and Village Law § 7-712-c(1)) and planning boards. *See* General City Law § 38; Town Law § 282; and Village Law § 7-740. In each instance, the limitations period begins to run upon the filing of the board's decision in the office of the municipal clerk.

12. For example, a number of cases have indicated that a negative declaration is a preliminary step in the environmental review process—a step which can only be challenged when the agency actually takes a final action with respect to the underlying substantive application. *See, e.g., Cold Spring Harbor Area Civic Association, Inc. v. Suffolk County Department of Health Services*, 305 A.D.2d 499 (2d Dep't 2003); *Young v. Board of Trustees of Village of Blasdell*, 221 A.D.2d 975 (4th Dep't 1995), *aff'd*, 89 N.Y.2d 846 (1996). Cases also held that a positive declaration is merely a preliminary step in the EIS process which is not ripe for judicial review. *See, e.g., Brierwood Village, Inc. v. Town of Hamburg Planning Board*, 277 A.D.2d 1051 (4th Dep't 2000); *Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation*, 260 A.D.2d 920 (3d Dep't 1999), *lv. denied*, 93 N.Y.2d 815, (1999); *PVS Chemicals, Inc. v. New York State Department of Environmental Conservation*, 256 A.D.2d 1241 (4th Dep't 1998); *see* D. Ward and M. Moore, *SEQRA Challenges and the Statute of Limitations: Sue "Early and Often,"* 6 Alb. L. Envtl. Outlook 89 (2002); M. Gerrard, *State Environmental Quality 2003: Timing, Standing, Exemptions*, 3/26/04 N.Y.L.J. p. 3, col. 1.

13. 70 N.Y.2d 193 (1987).

14. *Long Island Pine Barrens Society v. Planning Board of Town of Brookhaven*, 78 N.Y.2d 608 (1991); *Group for the South Fork, Inc. v. Wines*, 190 A.D.2d 794 (2d Dep't 1993).

15. The Appellate Division, Third Department, was most apt to deviate from the general rule. *See City of Saratoga Springs v. Zoning Board of Appeals of Town of Wilton,* 279 A.D.2d 756 (3d Dep't 2001), *lv. granted*, 9 N.Y.2d 715 (2001), *withdrawn*, 96 N.Y.2d 915 (2001) (holding that a challenge to the grant of area variances by a zoning board of appeals was time-barred where it had not been commenced within 30 days after the filing of the negative declaration issued by the town's planning board); *McNeill v. Town Board of Town of Ithaca,* 260 A.D.2d 829 (3d Dep't 1999), *lv. denied*, 93 N.Y.2d 812 (1999) (dismissing an action as untimely based on the holding that the statute of limitations began to run upon the issuance of a negative declaration).

16. 1 N.Y.3d 218 (2003).

17. 100 N.Y.2d 236 (2003).

18. 91 N.Y.2d 447 (1998).

19. 1 N.Y.3d at 223.

20. *Id.* at 223-224.

21. *Id.* at 224.

22. 100 N.Y.2d at 242-243.

23. M. Gerrard, D. Ruzow and P. Weinberg, *Environmental Impact Review in New York*, § 7.02[4][c], pp. 7-32; J. Nolon and J. Bacher, *SEQRA CHALLENGES Court Creates New Rule on Statute of Limitations*, 2/18/04, N.Y.L.J. p. 5, col. 2; *cf. Jones v. Amicone,* 27 A.D.3d 465 (2d Dep't 2006).

24. A. Wekstein, *Land Use Law Update 2003—Case Law Posing Significant Questions and Providing Limited Answers*, Municipal Lawyer, Spring 2004, Vol. 18, No. 2.

25. In light of the change in the composition of the Town Board, the Town Board argued to the Court of Appeals that the SEQRA claims were not foreclosed by the statute of limitations. Court of Appeals Brief of Respondent, Town of North Greenbush, 2006 WL 1930201.

26. *Eadie,* 7 N.Y.3d at 317.

27. *Id.*

28. *Id.*

29. For example, *In re Sanitation Garage,* 2006 WL2742691 (2d Dep't Sept. 26, 2006), does little to clarify these principles. Therein, the Second Department dismissed as untimely a SEQRA cause of action challenging the approval of a New York City Sanitation Department ("DOS") garage, finding that it accrued on the effective date of the approval of the garage by the City Planning Commission ("CPC") (as left undisturbed by the City Council), not on the issuance of the earlier negative declaration by the DOS, and that the claim could not be raised later as an affirmative defense by condemnees in a proceeding to acquire the necessary property. The court found the CPC's approval to be the "final determination of environmental issues," curiously citing, *inter alia, Stop-the-Barge* as support for its conclusion, but making no reference to *Eadie* whatsoever.

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# Applicability of the Hatch Act to Municipal Officers and Employees

By Sung Mo Kim

Municipal officers and employees in New York State, like all citizens, are encouraged to participate in the political process. However, because municipal officials are vested with the public's trust, they have the responsibility to ensure that their political activity does not compromise that trust. In particular, municipal officers and employees must comply with certain laws that were enacted to ensure that the public maintains its trust in government. Such laws may be either state, local, or even federal. Although Article 18 of the General Municipal Law, the state law regulating municipal conflicts of interest, contains no restrictions on political activity, some local codes of ethics do.[1] Moreover, many municipal public servants are also subject to the federal Hatch Act, a fact that they may not know or may not clearly understand. This article will attempt to outline some of the important provisions of the Hatch Act of which municipal employees should be aware.

## What Is the Hatch Act?

The Hatch Act is federal legislation that restricts the political activity of certain government employees. The Hatch Act, like many state and local laws that restrict a public servant's political activity, was enacted to ensure that the influence of partisan politics in government institutions was limited and to protect public servants from perceived pressure from political parties to work on political campaigns or give political contributions. The common perception is that partisan politics' influence in government institutions and on municipal employees leads to ineffective, inefficient, and partial government institutions. The provisions of the Hatch Act, which are primarily concerned with candidacy or support for candidates in partisan elections, attempt to ensure that the government institutions' impartiality and integrity are not compromised.

## How Is It Administered?

The Hatch Act is administered by the United States Office of Special Counsel (the "OSC"), an independent federal body that, in addition to the Hatch Act, administers two other federal statutes, the Civil Service Reform Act and the Whistleblower Protection Act. In its efforts to promote compliance with the Hatch Act, the OSC issues advisory opinions to persons seeking guidance about political activity under the Hatch Act, including municipal officers and employees to whom the Act might apply.

## To Whom Does It Apply?

The key to understanding the Hatch Act is to know to whom it applies. Therefore, before municipal officials determine what political activity they are prohibited from participating in under the Hatch Act, they must first find out whether they are even subject to the restrictions imposed by the Act.

*"The Hatch Act, like many state and local laws that restrict a public servant's political activity, was enacted to ensure that the influence of partisan politics in government institutions was limited and to protect public servants from perceived pressure from political parties to work on political campaigns or give political contributions."*

While the Hatch Act is a federal law, it applies not only to individuals employed by an agency in the federal executive branch[2] but also to individuals principally employed[3] by state, county, or municipal executive agencies in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency.[4]

To determine whether he or she is subject to the Hatch Act, a municipal employee must assess whether he or she performs duties in connection with a program financed by federal monies. State and local programs that typically receive federal funding include, for example, public welfare, housing, transportation, and law enforcement. If a municipal employee performs duties in connection with an activity financed in whole or in part by a federal loan or grant, it will not matter that he or she receives his or her salary from non-federal monies; that he or she has no authority or discretion on how those federal funds are spent; or that the federal monies fund only a small portion of the program; he or she will be subject to the Hatch Act. Furthermore, if a municipal employee is subject to the

Hatch Act, he or she will continue to be covered by the Hatch Act even when he or she is on annual leave, sick leave, leave without pay, or administrative leave. Therefore, an employee running for office in a partisan election may not avoid the requirements of the Hatch Act by taking a leave of absence.

In addition, the Hatch Act can apply even to employees of a private, not-for-profit organization if it receives federal funding and if federal legislation other than the Hatch Act contains a provision that the recipient not-for-profit should be treated as a state or local agency for the purposes of the Act, such as, for example, the Head Start Program[5] or Community Service Block Grant.[6]

The Hatch Act, however, does not apply to municipal employees who exercise no functions in connection with an activity financed in whole or in part by federal loans or grants. Nor does it apply to individuals employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a state or political subdivision thereof (officers and employees of school districts that are supported by state funds are thus not subject to the Act), or by a recognized religious, philanthropic, or cultural organization.[7] Note also that the Act does not apply to employees of the legislative or judicial branches.

Needless to say, any municipal employee who works in a program receiving *any* federal funding should check to see whether he or she is covered by the Hatch Act.

## What Activities Does It Prohibit?

Once a municipal officer or employee determines that he or she is subject to the Hatch Act, he or she must know what political activities the Hatch Act prohibits. The Hatch Act prohibits those municipal officials subject to its provisions from, among other things: (1) using their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office; (2) directly or indirectly coercing, attempting to coerce, commanding, or advising a state or local employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; and (3) running as a candidate for public office in a partisan election, that is, in an election in which any candidate represents, for example, the Democratic or Republican party.[8] As described earlier, these restrictions are primarily concerned with candidacy or support for candidates in partisan elections.

## What Activities Are Permissible?

While the Hatch Act prohibits some conduct by municipal employees concerning partisan elections, as described above, it does not prohibit municipal employees from: (1) running as a candidate for public office in nonpartisan elections, that is, elections where candidates are running with no party affiliation; (2) holding elective office in political parties, clubs, and organizations; (3) campaigning for candidates for public office in partisan and nonpartisan elections; (4) contributing money to political organizations; and (5) attending and giving a speech at a political fundraiser, rally, or meeting.[9]

## What Happens When a Violation Occurs?

When a municipal employee who is subject to the Hatch Act violates the Act by, for example, running for office in a partisan election, he or she could be subject to prosecution by the OSC.

The OSC has not only an advisory function, as discussed above, but also investigative and prosecutorial functions; thus, the OSC is charged not only with interpreting the Hatch Act but also with enforcing violations of the Act. Complaints alleging violations of the Hatch Act can be made to the OSC, which will then investigate the allegation to determine whether the evidence and facts warrant prosecution before the Merits Systems Protection Board (the "MSPB"), an independent quasi-judicial agency that is authorized to adjudicate Hatch Act violations brought by the OSC. Alternatively, when the severity of the violation does not warrant prosecution, that is, when the violation is not sufficiently egregious, the OSC may issue a warning letter to the employee involved.

When an alleged violation is prosecuted before the MSPB, the employee and the state or local agency employing him or her are entitled to be represented by counsel.[10] After a hearing, the MSPB must determine whether a violation of the Hatch Act occurred and, if so, whether such violation warrants the dismissal of the employee.[11] If the MSPB finds that the violation warrants dismissal from employment, the employing agency must either remove the employee or forfeit a portion of the federal assistance equal to two years' salary of the employee.[12] If the MSPB finds that the violation does not warrant the employee's removal, no penalty is imposed.

## Closing Remarks

A municipal employee who has questions about the Hatch Act is not left without help to interpret the Act's provisions. As described above, the OSC is available to provide advice and guidance to municipal employees about political activity under the Hatch Act. The easiest way to learn more about the Hatch Act and to stay clear of any violations of the Hatch Act is to seek the OSC's advice.

Additional information on the Hatch Act, the OSC, and the MSPB can be found on the following website: http://www.osc.gov/hatchact.htm.

Finally, one should emphasize that municipal employees who wish to be politically active may also be subject to restrictions imposed by their local municipal laws. The Hatch Act does not supersede nor negate the need to comply with additional restrictions imposed on municipal employees by their respective municipal laws. In New York City, for example, the political activity of a City public servant whose duties are in connection with a federally funded program must comply not only with the provisions of the Hatch Act but also with the provisions of the City's laws, including those found in the City's Conflicts of Interest Law. Many municipalities in New York State have similar restrictions on the political activities of their officers and employees.[13]

Violations of the Hatch Act can produce serious consequences, not only for the individual employee but also for the municipality. Municipal attorneys are thus well advised to instruct their clients about the provisions of the Act and the need to comply.

### Endnotes

1. *Cf.* N.Y. Civ. Serv. Law § 107 (prohibiting personnel actions based on political affiliation, activities, or contributions; compelling or inducement of political contributions; solicitation or receipt of political contributions in government offices; and promise of influence). *See also infra* note 13.
2. *See* 5 U.S.C. § 7322(1).
3. When a municipal employee has two or more jobs, his or her principal employment is that employment to which he or she devotes the most time, and from which he or she derives the most income. *See Smyth v. U.S. Civil Service Commission,* 291 F. Supp. 568 (E.D. Wis. 1968).
4. *See* 5 U.S.C. § 1501(4).
5. *See* 42 U.S.C. § 9851.
6. *See* 42 U.S.C. § 9918.
7. *See* 5 U.S.C. §§ 1501(4)(a) and (b).
8. *See* 5 U.S.C. §§ 1502(a)(1)–(a)(3).
9. *See* 5 C.F.R. §§ 151.111(a) and 151.122(e) and (f).
10. *See* 5 U.S.C. § 1505.
11. *See* 5 U.S.C. §§ 1505(1) and (2).
12. *See* 5 U.S.C. § 1506(a).
13. *See, e.g.,* Code of City of Beacon § 29-6(F); New York City Charter §§ 2604(b)(9), (11), (12), (15); Code of City of Newburgh § 34-2(B)(9); Code of City of Troy §§ 43-1(H), 43-6; Code of Town of Brookhaven § 28-6; Code of Town of Carmel § 13-3(M); Code of Town of Clifton Park §§ 17-4(A)(6), (7), (8); Code of Town of New Paltz § 15-3(J); Code of Town/Village of Harrison §§ 5-11(C), (D), 15-14; Code of Village of Hastings-on-Hudson §§ 18-3(A)(7), (B)(3). These provisions are all available on the General Codes website: http://www.e-codes.generalcode.com/globalsearch.asp. Just highlight the relevant municipality and type "ethics" into the Search box.

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# Municipal Briefs

By Lester D. Steinman

## Competitive Bidding

New York City's Equal Benefits Law which, when the value of the contract is $100,000 or more, prohibits city agencies from contracting with a firm that does not provide the same level of employment benefits to its employees' spouses and domestic partners, is preempted by New York State's competitive bidding law (General Municipal Law § 103) and the federal Employee Retirement Income Security Act of 1974 ("ERISA").[1]

Enacted by the City Council over the Mayor's veto in 2004, the Equal Benefits Law (NYC Admin. Code § 6-126) defines "Domestic partners" to include people registered as having that status under NYC Admin. Code § 3-240(a) or registered with a contractor pursuant to the Equal Benefits Law. "Employment benefits" is broadly defined to include the full panoply of benefits ranging from health, disability and life insurance to tuition reimbursement, legal assistance and adoption assistance.[2]

Soon after the Equal Benefits Law took effect, Mayor Bloomberg brought suit to declare that the law was preempted by State and Federal law and violated the City's Charter. After his motion for a temporary restraining order was denied, the Mayor's counsel advised the Court that the Mayor would not implement the Equal Benefits Law during the pendency of the litigation. The next day, the City Council instituted an Article 78 proceeding to compel the Mayor to "immediately implement and enforce the Equal Benefits Law." The Supreme Court granted the Council's petition relying on the "presumption of validity" of the local law. The Appellate Division reversed the lower court and dismissed the proceeding holding that the local law was preempted by both the General Municipal Law and ERISA. The Court of Appeals affirmed.

Notwithstanding the desirability of implementing such a social policy, and the alleged *de minimis* economic impact of compliance with the Equal Benefits Law, the Court of Appeals held that the local law, by "excluding from public contracting any 'responsible bidder' that does not provide equal benefits to domestic partners and spouses," violates the City's obligation under § 103 of the General Municipal Law to award public contracts to "the lowest responsible bidder." Moreover, the Court expressed concern that the intent of competitive bidding "to prevent 'favoritism, improvidence, fraud and corruption in the awarding of public contracts'" could be circumvented under the guise of enacting social policy:

> If municipalities are free to contract only with firms that provide certain benefits to their employees, the door is open at least to favoritism, for the municipality could design its requirements to match the benefit structure of the bidder it favored.

The Equal Benefits Law also runs afoul of ERISA, which supersedes all state laws that "relate to any employment benefit plan" within ERISA's purview.[3] In reaching this result, the Court rejects the City Council's argument that the law does not regulate benefits plans, but reflects the City's decision, as a market participant, to limit its dealings to those firms who provide the equal benefits required by the law.

Although the Court divided 4-3 in this case, the dissent did not address the Court's preemption rulings. Rather, the dissent focused on the authority of the Mayor to institute an Article 78 proceeding to challenge the validity of the Equal Benefits Law rather than to "follow a duly enacted law . . . unless and until a court nullifies it." Writing for the dissenters, Judge Albert Rosenblatt declared that executive action of this type "skews the roles of the legislative and executive branches . . . and would strip the judiciary of its power to determine, in the first instance, whether a law is valid, and thereby clothe the executive with not only legislative but judicial powers."

Upholding the Mayor's action to challenge the Equal Benefits Law, Judge Robert S. Smith opined:

> The dissent asserts, without citation of authority, that the Mayor's duty is to "follow a duly enacted law . . . unless and until a court nullifies it" (dissenting op. at 2). The assertion has a circular quality, for how can a law be "duly enacted" if the legislature that enacted it had no authority to do so? The Mayor indeed does have a duty to implement *valid* legislation passed by the City Council, whether over his veto or not, but he also has a duty to comply with valid state and federal legislation,

including state competitive bidding laws and ERISA. Where a local law seems to the Mayor to conflict with a state or federal law, the Mayor's obligation is to obey the latter as the Mayor has done here.

## Educational Uses

Provisions of the zoning ordinance of the City of Albany which exclude educational uses from certain commercial zones are unconstitutional on their face.[4]

Here, Petitioner sought to establish a private, nonparochial middle school on commercially zoned property in the City of Albany. Seventy years prior to being converted to office space, the property was used for a public school. Neither of the two commercial zones in which the property is situated permitted a school as a principal, accessory or special permit use. After unsuccessfully pursuing a rezoning and a use variance, Petitioners instituted a combined Article 78/Declaratory Judgment action challenging the Board of Zoning Appeals' ("BZA") denial of the variance as arbitrary and capricious and seeking to declare the provisions of the Albany zoning ordinance unconstitutional on their face and as applied.

The Appellate Division, affirming the Supreme Court, ruled that the zoning provisions in question were unconstitutional on their face. To reach this result, the Appellate Division concluded that the general principles articulated in *Cornell University v. Bagnardi*[5] and *Trustees of Union College v. Members of Schenectady City Council*[6] that educational uses, "because of their inherently beneficial nature," may not be entirely excluded from residential zones, also precludes the exclusion of such uses from commercial zones. Notwithstanding the fact that the zoning ordinance did not authorize a private school as a special permit use, the Appellate Division directed the Petitioner to file a special permit application and remanded the proceeding to the BZA to evaluate the proposed educational use against other legitimate interests which impact the public welfare and, where appropriate, to impose reasonable conditions to mitigate any adverse community impacts.

In a concurring opinion, Justice Spain expressed his concern "that existing precedent does not support a ruling that exclusion of private schools from designated *non* residentially zoned districts can never be upheld as an exercise of a municipality's police power to regulate land use." In his view, the rationale for the rule in residential districts, i.e., "the presumed harmony between such [educational] institutions and residential communities and the need to protect those institutions from community hostility," may not necessarily apply in other zoning districts.

## FOIL

In the context of a municipality's ongoing negotiations with a prospective new cable provider, Verizon, and an incumbent franchisee, Cablevision, to provide cable television service to its residents, premature disclosure of the draft cable franchise agreement submitted by Verizon to the municipality would provide Cablevision with an unfair competitive advantage to the detriment of Verizon, the municipality and its cable television consumers. Accordingly, where, as here, substantial injury to competitive position will result, the documents in question are exempt from disclosure under the Freedom of Information Law.[7]

Here, Cablevision, the incumbent provider of cable television services in the Village of Rye Brook, made a FOIL request to obtain all documents submitted to the Village by Verizon, a prospective provider of cable television services to the Village, in connection with preliminary negotiations for a cable franchise agreement. These documents included a draft franchise agreement proposed for the Village. Rye Brook determined that these documents were subject to disclosure under FOIL based upon their classification of such documents as public records under Public Service Law § 215(2)(a)(ii).

Nevertheless, the Village agreed to withhold disclosure of those documents for several days to allow Verizon to judicially intervene in the matter. Verizon then commenced the instant proceeding to prohibit the Village from disclosing the documents in question, alleging that the documents were exempted from disclosure under Public Officers Law § 87(2)(c) [impairment of contract awards] and § 87(2)(d) [substantial injury to competitive position].

Notwithstanding the existence of competition between Verizon and Cablevision, the Court ruled that Verizon had failed to demonstrate how the disclosure of the documents will result in substantial competitive injury. By contrast, however, given that both Verizon and Cablevision are currently negotiating with the Village to provide cable television service to its residents, the Court found that premature disclosure of the draft franchise agreement would confer an unfair advantage on Cablevision to the detriment of not only Verizon but also to the Village and its cable television consumers. In so ruling, the Court observed that the documents in question would ultimately become public documents available to Cablevision. Pursuant to Public Service Commission regulations, once Verizon filed a formal application for a franchise agreement, a copy of that application must be made available for public inspection.[8]

## Tax Certiorari

Notwithstanding the pendency of a tax certiorari proceeding instituted to review and reduce an al-

leged overassessment of Petitioner's real property, the Respondent town's appraiser has no absolute right to conduct an interior inspection of the premises where the Petitioner refuses to grant access to those premises for such purposes.[9]

Claiming that it was unable to prepare for trial or to discuss settlement without an appraisal of the premises, including an interior inspection, to ascertain a certifiable market value for the property, the Town of Ramapo moved for a court order requiring the Petitioner to permit such an inspection, or, if petitioner failed to do so, dismissing the proceeding. The Town, in making that motion, relied upon a court rule relating to the scheduling of a pre-trial conference providing that the court can "take whatever action is warranted to expedite final disposition of the proceedings."[10]

Characterizing the case as one of first impression, the Supreme Court (Thomas A. Dickerson, J.) ruled that the provision in question "does not require an interior inspection by the appraiser of the subject property." Citing established United States Supreme Court jurisprudence, the Court observed that, in the administrative context, "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it had been authorized by a valid search warrant."[11]

Here, the Court finds that such a search, without the Petitioner's permission, would not be reasonable. In support of its ruling, the Court notes that the Office of Real Property Services had previously opined that without the permission of the taxpayer, an assessor may not enter a private residence for the purpose of inspection. Under those circumstances, ORPS stated:

> In the event an assessor is unable to accurately appraise a parcel of real property without an inspection of the property, and access to the property is denied by the taxpayer, the assessor would nevertheless have to arrive at an appraisal value which most nearly reflects the probable value of the property. Such an appraisal of residential real property could be based on the improvements found in similar homes, an estimate of the interior of a home by third persons who have been there, or any other reasonable method calculated to aid the assessor under these circumstances.[12]

Moreover, the Court agreed with the Petitioner that ordering an inspection of the premises in 2005 would not accurately reflect the condition of the interior in 1999, the year for which the taxpayer brought the pending certiorari proceeding. Rather, the Court concluded, "a review of the building permits on file provide the Town of Ramapo with a reasonable, alternative means of evaluating the interior of the Petitioner's residence as it existed in 1999."

## Endnotes

1. *City of New York v. Bloomberg*, 6 N.Y.2d 380 (2006).
2. NYC Admin. Code § 6-126[b][7].
3. 29 U.S.C. § 1144(a).
4. *Albany Preparatory Charter School v. City of Albany*, 31 A.D.3d 870 (3d Dep't 2006).
5. 68 N.Y.2d 583 (1986).
6. 91 N.Y.2d 161 (1997).
7. *Verizon v. Bradbury*, 10 Misc. 3d 785 (Sup. Ct., West. Co. 2005).
8. 16 N.Y.C.R.R. § 894.2.
9. *Schlessinger v. Town of Ramapo*, 11 Misc. 3d 697 (Sup. Ct., Rockland Co. 2006).
10. 22 N.Y.C.R.R. § 202.59(e).
11. *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987), quoting *Mancusi v. Defort*, 392 U.S. 364, 370 (1968), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 529 (1967).
12. 2 Op. Counsel SBEA No. 78.

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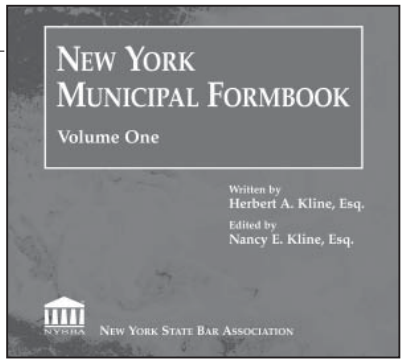


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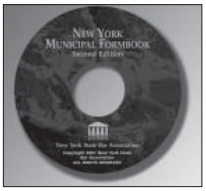


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Publication Submission Deadlines: **On or before the 1st of March, June, September and December each year.**

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ISSN 1530-3969



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