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A Message from the Chair

Patricia Salkin

I am honored to begin to serve a term as your Chair. Over the course of the next two years your Executive Committee leadership has plans to increase the number of active members of our Section, to provide more programming across the State, and to increase your access to practical and timely information. I stand on the shoulders of outstanding former Section chairs, many of whom remain as active and valued participants in our Section program planning and policy-making. Special thanks to Immediate Past Chair Robert Koegel for his leadership, partnership, dedication and commitment to this Section. He has set a high bar for the rest of us to reach.

The Section will be focusing on a number of issues over the next six months. Climate change has become a new area of law practice for municipal attorneys over the last year. Whether it is manifested in land use and environmental law matters or through contracting / procurement issues, the "greening" of local governments requires access to current developing information. To meet these demands, we have created a new standing committee on green development led by Daniel Spitzer from Buffalo. In October we will be meeting in Canandaigua in partnership with the Environmental Law Section. Outstanding CLE programming has been put together, led by Executive Committee members A. Thomas Levin and Tom Jones. Part of this meeting will focus on green development. In addition, we will be partnering with the Environmental Law Section and a number of other organizations on a green development program for municipalities to be held at Pace Law School.

One only need open the newspaper these days to read about government ethics issues front and center. In addition to ethical rules and responsibilities specific to government practice, new Rules of Professional Conduct have been adopted for the legal profession. Under the leadership of Mark Davies and Steven Leventhal, our Section will be providing increased information on the subject of ethics for municipal attorneys. A new book is also in the beginning stages of development. If you are interested in writing a chapter or have suggestions for topics that should be covered, please let us know.

The Executive Committee understands that travel budgets may make it difficult for all of our mem-

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bers to attend the Fall and Annual Meetings. We will continue to share substantive information through our flagship publication, the *Municipal Lawyer*, and our popular Municipal Law Section List Serve (if you are not on this e-communication, you are missing a lot of great practice tips shared by all participating members). We plan to devote more time to the development of a more user friendly member Web site for our Section (www.nysba.org/municipal) that will become the first place municipal attorneys will go to access information.

In October 2010, our Section will be commemorating our 60th anniversary. To mark this event, we are planning a special program in Washington, D.C. for Section members only—we have secured an opportunity for our members to be admitted to the U.S. Supreme Court. More information will be forthcoming in early 2010. The admission ceremony is a truly memorable "once in a lifetime" experience for attorneys and family members. Consider joining us for this group admission program.

This issue of the *Municipal Lawyer* contains names and contact information for members of the Executive Committee and committee leadership. I encourage you to make the time to get more involved with our Section. Join a Committee, help plan a CLE program, write an article for the *Municipal Lawyer*, author a chapter for a book, or be a part of the lifeblood of this Section in some other way.

I look forward to meeting you at an upcoming program. Please do not hesitate to contact me with your suggestions and ideas (psalk@albanylaw.edu).

Patricia Salkin

From the Editor

With this issue of the *Municipal Lawyer*, it is my pleasure to introduce the new Chair of the Municipal Law Section, Patricia E. Salkin. Patty is the Associate Dean, Raymond and Ella Smith Distinguished Professor of Law and Director of the Government Law Center at Albany Law School.

An outstanding State Bar leader, Patty is the past Chair of the Association's Committee on Attorneys in Public Service and Special Task Force on Eminent Domain. She is also a member of the House of Delegates and past Chair of the State and Local Government Law Section of the American Bar Association.

A prolific author and lecturer, Patty is a nationally recognized expert in land use issues. Her publication credits include land use treatises (*New York Zoning Law and Practice*, 4th Ed., 1999; *American Law of Zoning*, 5th Ed., 2008), a casebook, and dozens of law review articles, books, chapters and columns.

In her first Message from the Chair, Patty outlines new Section initiatives and programs to provide our membership with information on cutting-edge issues such as climate change and global warming and the new Rules of Professional Conduct recently adopted for the legal profession. Both of these timely topics are covered in this issue of the *Municipal Lawyer* and, as discussed below, will be addressed at the Section's upcoming Fall Meeting.

Government lawyers' obligations under the Rules of Professional Conduct in New York are the focus of an article by Steven B. Rosenfeld, Chair of the New York City Conflicts of Interest Board. Mr. Rosenfeld examines restrictions on current and former government lawyers and their law firms and compares and contrasts the new rules of professional conduct with the former disciplinary rules that they replace.

Red flags for local governments that want to incorporate third-party green building standards into their zoning or building codes is the subject of an article that I have written in this issue. The article discusses potential antitrust, preemption and impermissible delegation-of-authority issues that local governments should be aware of when enacting or enforcing measures to promote sustainable development.

Also in this issue, in the "Anatomy of a Layoff," Harvey Randall, former Counsel to the New York State Department of Civil Service, examines the factors that public employees and employer organizations must consider when layoffs are proposed. In "Resolving Municipal Annexation Disputes," Alyse D. Terhune, of Jacobowitz and Gubits, LLP, analyzes issues that arise when a proposed annexation is approved by one municipality and rejected by another. In their quarterly review of land use law cases, Henry M. Hocherman and Nicole V. Crisalli of Hocherman, Tortorella and Wekstein, LLP explore the boundaries of the public-use clause of the New York State Constitution in the context of the litigation over Forest City Ratner's Atlantic Yards project. The authors also discuss whether post-public hearing amendments to local legislation necessitate a new public hearing and whether an appearance at a public hearing cures a defect in the notice published for that hearing.

Finally, this year's Fall Meeting, a joint meeting with the Environmental Law Section, will take place on the weekend of October 23-25 at the Inn on the Lake in Canandaigua, New York. Among the topics to be covered are The Role of Municipalities in Promoting Green Development, Rules of Professional Responsibility and Municipal Ethics Issues, Municipal Consolidation / Dissolution Legislation, and FOIL / Open Meetings Law Update. For newly admitted attorneys, a Bridge the Gap program will be offered including presentations on the Adoption and Amendment of Comprehensive Plans and Zoning Regulations, Environmental Impact Review for Planning and Zoning and Historic and Archaeological Resources.

Complementing the outstanding educational offerings, the Section has planned a culinary demonstration at the New York Wine and Culinary Center and a Wine Tour of Keuka Lake as well as other fun activities. Be sure to save the dates and join your colleagues for an enriching and enjoyable weekend.

Lester D. Steinman

The Obligations of Government Lawyers Under New York's New Rules of Professional Conduct

By Steven B. Rosenfeld

On April 1, 2009, more than a quarter-century after the American Bar Association first adopted the Model Rules of Professional Conduct as a modern set of ethical standards to regulate the legal profession, New York finally abandoned the old Code of Professional Responsibility and became the 48th state to adopt a version of the ABA Model Rules. [1] In so doing, New York has left behind the Code's confusing mixture of aspirational ethical standards and obligatory disciplinary rules (DR) grouped with reference to abstract professional ideals, in favor of the clearer commands of the Model Rules, which are organized based on the roles lawyers play and tasks they perform.[2] Not only does this change facilitate identifying and understanding rules governing a particular topic, but it also allows New York lawyers to benefit from the nationwide body of law and commentary interpreting the Model Rules that have developed over many years.[3] Although the new Rules of Professional Conduct do not, for the most part, radically change the substance of the pre-existing ethical code, adoption of the new format provides a suitable occasion for government lawyers to brush up on the ethical strictures applicable to them, and to become aware of those few rules that are in fact new.

This article will focus on the new Rule 1.11, "Special Conflicts of Interest for Former and Current Government Officers and Employees." However, government lawyers should not lose sight of the fact that they, like all lawyers, are subject to the entirety of the new Rules, whether or not they are specifically applicable to lawyers currently or formerly in public service. Thus—and only by way of example—government lawyers should know that they are not exempt from the new Rules that now expressly require any lawyer representing a client before a court or other tribunal to correct false statements of material fact or law previously made to the tribunal, either by the lawyer, the lawyer's client, or a witness called by the lawyer, and to "take reasonable remedial measures" to prevent or cure criminal or fraudulent conduct related to the proceeding, even if such action would require disclosure of a confidential attorney-client communication;[4] that prohibit lawyers from using "means that have no substantial purpose other than to delay or prolong" a proceeding, or to cause needless expense;[5] and that require government lawyers to "adequately supervise" the work of nonlawyers in their offices over whom they have supervisory authority.[6] Moreover, many of the Rules are applicable to lawyers serving as government officials or employees, whether or not their official duties involve legal representation of or advice to a government agency.[7] Thus, for example, lawyers in government, regardless of their official positions, are subject to Rule 8.4's prescriptions against conduct "that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer," that involves "dishonesty, fraud, deceit or misrepresentation," or that "is prejudicial to the administration of justice."[8]

I. New Definitions

The chair of the New York State Bar Association standards committee that drafted the new Rules has been quoted as saying that "the most important rule is Rule 1.0," containing the definitions used throughout the Rules, and that if New York lawyers "read nothing else, they should read that and familiarize themselves with the terms that are defined."[9] That advice should be heeded by government lawyers, since several of the definitions affect their ethical obligations in certain key respects.

First and foremost is Rule 1.0(h)'s definition of the terms "firm" and "law firm," which are used in many different contexts throughout the Rules, to include a "government law office." The term "government law office" is not separately defined, and the official commentary injects some uncertainty by stating that "[w]hether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law."[10] Nevertheless, the expansion of the definition was clearly intended to subject the legal departments of government agencies, prosecutors' offices, and the offices of state attorneys general, as well as city and county attorneys, to many of the same restrictions previously applicable only to private law firms.[11]

Second, the term "matter," used throughout the rules, is defined very broadly in Rule 1.0(l) to include "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation, or any other representation involving a specific party or parties"—in short, just about anything that a government lawyer, at least *qua* lawyer, may be asked

or required to do. That definition applies not only in the specific context of conflicts of interest, discussed below, but also, for example, to the command of Rule 1.1(b) that a lawyer may not "handle a legal *matter* that the lawyer knows or should know that the lawyer is not competent to handle."[12]

Likewise, the new definition of "tribunal" in Rule 1.0(w) expands significantly the definition of that term in the old Code. Whereas the former New York definition was limited to "courts, arbitrators and other adjudicatory bodies," the new definition expressly includes "a legislative body, administrative agency or other body acting in an adjudicative capacity."[13] Accordingly, government lawyers working as or for state and county legislators, regulatory commissions and other administrative agencies must constantly be cognizant of whether their agency is acting "in an adjudicative capacity" so as to subject them, for example, to the obligations of Rules 3.3, 3.4 and 3.5, which extensively regulate the conduct of lawyers before "a tribunal."[14]

Finally, government lawyers should focus on the definition of "confidential information" in Rule 1.0(d), which differs significantly from the definitions in *both* the old Code and the ABA Model Rules. Under the new Rules, confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."[15] In addition, Rule 1.11 (the rule expressly applicable to current and former government lawyers) further defines "confidential government information" as information (whether or not relating to the lawyer's government "client") obtained under governmental authority that the government, at the time the Rule is applied, is prohibited by law or legal privilege from disclosing to the public and that is not otherwise available to the public.[16]

With those preliminaries, we now examine closely the conflict-of-interest provisions of Rule 1.11 itself. Before doing so, however, it is worth noting that, in regulating "conflicts of interest" for lawyers currently or formerly serving as public servants, the Rules of Professional Conduct do not supplant, but only complement and supplement, the conflicts-of-interest laws applicable to *all* public servants (lawyers and nonlawyers alike), such as Chapter 68 of the New York City Charter, Article 18 of the New York State General Municipal Law, the state law governing conflicts of interests of officers and employees of all municipalities outside New York City, and §§ 73–74 of the New York State Public Officers Law. Some of the parallels and contrasts between the Rules and those laws are noted below.

II. Rule 1.11's Restrictions on Current Government Lawyers

Let us look first at how Rule 1.11 affects the conduct of a lawyer currently serving as "a public officer or employee"—although those provisions are contained in the last two substantive portions of the Rule, subsections (d) and (f). Here, government lawyers[17] will be relieved to discover that the new Rule preserves, without any substantive change, the contents of the Disciplinary Rules in the Code.

Thus, Rule 1.11(d) retains, in substantially identical language, the terms of former DR 9-101(B)(3). First, under Rule 1.11(d)(1), "except as law may otherwise expressly provide," a government lawyer may not "participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."[18] Recall, though, the expanded definition of "matter" discussed above, which includes not only litigations and other contested proceedings, but also claims, applications and contracts. This means, for example, that one of several counselors to a zoning board who previously assisted a private client with an application for a zoning variance cannot participate in deciding whether the variance should be granted: the application was clearly the same "matter" as the zoning board's determination, and there are others who are "authorized to act in the lawyer's stead in the matter." On the other hand, a newly elected district attorney who might otherwise be personally disqualified from prosecuting a defendant represented by his former law firm may participate in the prosecution if a special prosecutor is not available as a matter of law.[19]

Second, Rule 1.11(d)(2) prohibits a government lawyer from negotiating for post-government private employment with a party or lawyer involved in a matter in which the government lawyer is participating personally and substantially.[20] Thus, an assistant district attorney may not seek employment with a defendant's law firm while prosecuting the defendant, nor may an agency contract lawyer evaluating bids for a government contract negotiate for a job with one of the bidding contractors.[21]

The new Rule 1.11(f) is identical to the former DR 8-101, retaining provisions that prohibit a "lawyer who holds public office"[22] from using the public position to influence other government officials to benefit the lawyer personally or his or her clients.[23] Thus, under Rule 1.11(f)(1), a government lawyer may not "use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows[,] or it is obvious[,] that such action is not in the public

interest."[24] Likewise, Rule 1.11(f)(2) prevents government lawyers from using their positions to "influence, or attempt to influence, a tribunal"—and recall the expanded definition of "tribunal"—"to act in favor of the lawyer or of a client."[25] Under both of those subsections, it is unclear from either the language of the Rule or the commentary whether "a client" was intended to refer to a client *previously* represented by the government lawyer while in private practice, or a client *currently* represented by the government lawyer in a private practice permissibly carried on simultaneously with holding public office (as must be the case with respect to numerous lawyers holding part-time local offices). What seems most likely is that the Rule means to refer to both. Thus, for example, a lawyer serving on a town board or as counsel to a state legislator may not engineer the enactment of a piece of legislation that will specifically benefit either a former or current client of that lawyer. Nor may a lawyer representing a government entity in a litigation seek to obtain a result that would directly benefit one of that lawyer's private clients.[26]

Finally, Rule 1.11(f)(3) retains the Code's unremarkable requirement that lawyers holding public office may not accept bribes—i.e., that they may not "accept anything of value from any person when the lawyer knows[,] or it is obvious[,] that the offer is for the purpose of influencing the lawyer's action as a public official."[27]

III. Restrictions on Former Government Lawyers and Their Current Firms

The remaining portions of Rule 1.11 (that is, subsections (a), (b) and (c)) govern the conduct of lawyers who have departed government service for private practice, restricting their use of information obtained during their government service and regulating the types of matters such lawyers, *and their firms*, may handle. These sections are similar in substance to former Disciplinary Rules 9-101(B)(1) and (2), but contain several changes in language and nuance.

A. Use of Confidential Information

With regard to use of information, one clear change is that Rule 1.11(a)(1) expressly requires "a lawyer who has served as a public officer or employee" to comply with Rule 1.9(c). That Rule, in turn, prevents all lawyers (i.e., whether they formerly served in government or not) who (or whose former firm) previously represented a client in a matter (recall the broad definition of "matter") from revealing, or using to the disadvantage of the former client, any confidential information—as defined above[28]—of the former client. They may, however, use such information when expressly permitted or required by the Rules (e.g., when required to prevent fraud on a tribunal)—or "when the information has become generally known."[29] As applied to former government lawyers, due to the expansion of the definition of "firm" to include "a government law office," Rule 1.9(c) would prevent use or disclosure of confidential client information learned in the course of any matter handled by the lawyer's former government office. Thus, for example, a lawyer who had previously worked in the office of the counsel to a governor, or a former assistant state attorney general whose office had represented the governor in a litigation brought against the state, would not be permitted to use confidential information learned about the governor to the governor's disadvantage or to reveal that information—unless, of course, the information about the governor had already been splashed across the front pages.

While Rule 1.11(a)(1) regulates the use or revelation of confidential *client* information obtained while in government service, Rule 1.11(c) restricts whom a former government lawyer in possession of "confidential *government* information" can represent. Recall, first, that "confidential government information" includes not only information about clients protected by obligations of client secrecy, but also any information, about anyone or anything, which has been obtained under governmental authority that the government, at the time the Rule is applied, is prohibited by law or legal privilege from disclosing to the public and that is not otherwise available to the public. Rule 1.11(c) dictates that, except as law may otherwise provide,[30] a lawyer who has obtained "confidential government information" about a person while working in government "may not represent a private client whose interests are adverse to that person [if] the information *could be used* to the material disadvantage of that person."[31] Nor may the former government lawyer's new firm accept *or continue* such a representation, *unless* the disqualified former government lawyer is "timely and effectively screened from any participation in the matter"[32] according to the screening mechanisms of Rule 1.11(b), discussed below. Thus, for example, a government lawyer who obtained confidential information about an individual in the course of a government investigation could not take on the representation of a client whose interests are adverse to the subject of the information thus obtained if there is any possibility that the information could be used to the disadvantage of the adverse party. Likewise, any firm that lawyer joined after leaving government could not take on the matter—or continue on the matter if already retained—unless the disqualified lawyer is immediately and "effectively" screened from the representation. The explication of what constitutes an "effective" screen is discussed below.

B. Disqualification of Former Government Lawyers

Like DR 9-101(B)(1), its predecessor, Rule 1.11(a)(2), prohibits a former government lawyer from representing a client in connection with any matter[33] in which the lawyer participated "personally and substantially" while in government, subject to an important exception. In that regard, Rule 1.11(a)(2) is absolutely consistent with the "post-employment" conflicts of interest laws applicable to *all* public servants of New York City[34] and to New York State officials and employees covered by the Public Officers Law.[35] The exception in Rule 1.11(a)(2)—consistent with the power of the New York City Conflicts of Interest Board to grant waivers in appropriate cases[36]—permits a former government lawyer to take on an otherwise prohibited representation if the appropriate government agency gives its *informed consent*,[37] *confirmed in writing*, and the lawyer had not acted in a judicial capacity in connection with the matter. Thus, the former government lawyer referred to above, who as a state employee defended the governor when he was sued in his official capacity, *might* be permitted to represent an individual bringing suit against the governor in a related matter, *if* the lawyer's former government law office (i.e., the office of the counsel to the governor, or the attorney general's office) consented to the representation in writing—after the former government lawyer has communicated to the former government office "information adequate . . . to make an informed decision" and "adequately explained" to the government office "the material risks of the proposed" representation, as well as the "reasonably available alternatives."[38]

This exception based on informed government consent was not explicitly contained in Code of Professional Responsibility,[39] although the New York State Bar Association Commission on Professional Ethics had interpreted the Code to permit such representation with consent in certain cases.[40] What is new is that Rule 1.11(a)(2) expressly requires that all such conflict waivers involving former government lawyers must be "confirmed in writing."[41]

The conflict-of-interest disqualification in Rule 1.11(a), based on a lawyer's "personal and substantial" participation in a matter while in government, or the lawyer's possession of confidential client information, affects not only the former government lawyer, but also that lawyer's new firm. Rule 1.11(b) expressly provides that when a lawyer is disqualified from representing a client in a matter under Rule 1.11(a) "no lawyer in a firm with which [the disqualified lawyer] is associated may knowingly undertake *or continue* representation" in the matter unless the firm adopts effective mechanisms to screen the disqualified former government lawyer from the work of that lawyer's new colleagues.[42]

Disciplinary Rule 9-101(B) of the old Code contained a similar provision disqualifying the former government lawyer's entire firm unless the "disqualified lawyer is effectively screened" from the matter *and* "there are no other circumstances in the particular representation that create an appearance of impropriety." However, the old Code did not elaborate on what would constitute "effective" screening mechanisms. Now, Rule 1.11(b)(1) sets forth four specific actions that the firm must "promptly and reasonably" take to distance the disqualified lawyer from the matter, in order to avoid firm-wide disqualification.[43] First, the firm must notify, as appropriate, "lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation."[44] Second, the firm must implement effective screening procedures to "prevent the flow of information" regarding the matter between the disqualified lawyer and others in the firm.[45] Third, the firm must ensure that the disqualified lawyer is apportioned no part of the fee from the representation.[46] Fourth, the firm must give written notice to the appropriate government agency to enable it to ascertain compliance with these requirements.[47] Finally, even if the firm takes such steps, the additional safeguard of former DR 9-101(B)(1)(b) remains in place: there must be "no other circumstances in the particular representation that create an appearance of impropriety."[48]

It remains to be seen what specific screening mechanisms employed by law firms to avoid firm-wide disqualification will be upheld by courts and Bar Association ethics panels—and what "other circumstances" they may view as creating "an appearance of impropriety" even with such mechanisms in effect. Nevertheless, both courts and ethics panels should take note of the admonition of the NYSBA Standards Committee, which drafted the new Rules, that "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government," but should be interpreted in light of the government's "legitimate need to attract qualified lawyers as well as to maintain high ethical standards."[49]

Endnotes

1. *See* Center for Prof'l Responsibility, American Bar Ass'n, DATES OF ADOPTION OF THE MODEL RULES OF PROFESSIONAL CONDUCT, http://www.abanet.org/cpr/mrpc/chron_states.html (last visited June 19, 2009).
2. *See* Comm. on Standards of Attorney Conduct, NYSBA, PROPOSED NEW YORK RULES OF PROFESSIONAL CONDUCT iii-v (2005), http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentFileID=2788.
3. *Id.*

4. N.Y. Rules of Prof'l Conduct R. 3.3(a)-(c) (2009); *see also* Press Release, New York State Unified Court System, New Attorney Rules of Professional Conduct Announced (Dec. 16, 2008), http://www.courts.state.ny.us/press/pr2008_7.shtml.

5. N.Y. Rules of Prof'l Conduct R. 3.2 (2009); *see also* Press Release, New York State Unified Court System, New Attorney Rules of Professional Conduct Announced (Dec. 16, 2008), http://www.courts.state.ny.us/press/pr2008_7.shtml.

6. N.Y. Rules of Prof'l Conduct R. 5.3 (2009). This obligation, which was contained in substance in DR 1-104(C) of the Code, is now made expressly applicable to government lawyers by virtue of the inclusion of "government law office" in the definition of "firm" or "law firm" in Rule 1.0(h).

7. For instance, all lawyers employed by the government, regardless of their particular responsibilities, must abide by Rule 5.1(b)(1) (requiring lawyers with management responsibility to ensure that other lawyers with whom they work abide by the Rules of Professional Conduct), Rule 5.5(b) (prohibiting aiding a nonlawyer in the unauthorized practice of law), and Rule 7.2 (regulating payments for referrals and recommendations). The commentary of the NYSBA Committee on Standards of Attorney Conduct on Rule 7.2 is particularly relevant to all lawyers who work in government. It explains that Rule 7.2 "prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement." Comm. on Standards of Attorney Conduct, NYSBA, New York Rules of Professional Conduct 170 (2009), http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments(April12009).pdf. Thus, all lawyers serving as government employees must consider how the political contributions they make or solicit will appear to others.

8. N.Y. Rules of Prof'l Conduct R. 8.4 (2009).

9. Joel Stashenko, *New Attorney Ethics Standards to Take Effect in New York*, N.Y. L.J., Mar. 31, 2009, http://www.law.com/jsp/article.jsp?id=1202429531699.

10. Comm. on Standards of Attorney Conduct, NYSBA, New York Rules of Professional Conduct 7 (2009), http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments(April12009).pdf.

11. Some examples of Model Rules not otherwise considered in this article which are applicable to "firms" or "law firms," and thus now appear to be applicable to "government law offices," are Rule 5.1 (governing the supervision of subordinate lawyers in a law firm), Rule 6.3 (regulating the membership in a legal services organization of lawyers working in law firm), Rule 6.5(a)(2) (governing the participation in limited pro bono legal services programs of lawyers working in law firms), and Rule 7.2(a)(1) (regulating a law firm's referral of clients to non-legal professional service firms).

12. N.Y. Rules of Prof'l Conduct R. 1.1(b) (2009) (emphasis added).

13. *Compare* N.Y. Rules of Prof'l Conduct R. 1.0(w) (2009) *with* N.Y. Lawyer's Code of Prof'l Responsibility Definition 6 (repealed 2009).

14. Rule 1.0(w) provides some assistance in that context by providing that a body acts in an "adjudicative capacity" when "a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." And Rule 1.11(e) expressly excludes "agency rulemaking functions" from the definition of "matter" as used *in that Rule*.

15. N.Y. Rules of Prof'l Conduct R. 1.6(a) (2009).

16. N.Y. Rules of Prof'l Conduct R. 1.11(c) (2009).

17. By its terms, Rule 1.11 applies to a lawyer currently or formerly serving as "a public officer or employee" and (in subsection (f)) to "a lawyer who holds public office," but – assuming any difference between those two terms was unintended -- this article uses the term "government lawyer" interchangeably with both.

18. N.Y. Rules of Prof'l Conduct R. 1.11(d)(1) (2009).

19. *See* Comm. on Standards of Attorney Conduct, NYSBA, Proposed New York Rules of Professional Conduct 168 (2005), http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Rule1.11.pdf (citing NYSBA Comm. on Prof'l Ethics, Op. 638 (1992)). Chapter 68 of the New York City Charter, the New York City Conflicts of Interest Law, places no such restrictions on public servants based on their *former* employment or client relationships; in contrast, N.Y. Public Officers Law § 74 (applicable to most New York State employees) has been interpreted by the N.Y. State Ethics Commission as requiring state employees to consider recusal from all matters concerning former employers or entities with whom they had a business relationship within the prior two years. *See* N.Y. State Ethics Comm'n, Op. 98-09 (1998).

20. N.Y. Rules of Prof'l Conduct R. 1.11(d)(2) (2009).

21. Similarly, the New York City Conflicts of Interest Law provides that no public servant (lawyers and nonlawyers alike) may "solicit, negotiate for or accept" a position with "any person or firm" involved in a particular matter "while such public servant is actively considering, or is directly concerned or personally participating in such particular matter on behalf of the city." New York City, N.Y., Charter Chapter 68 § 2604(d)(1) (2008).

22. As noted above, it is doubtful that any distinction was intended between "a lawyer who holds public office" (as per Rule 1.11(f)) and "a lawyer currently serving as a public officer or employee" (as used in Rule 1.11(d)).

23. *Compare* N.Y. Rules of Prof'l Conduct R. 1.11(f)(1) (2009) and N.Y. Rules of Prof'l Conduct R. 1.11(f)(2) (2009) *with* N.Y. Lawyer's Code of Prof'l Responsibility DR 8-101(A)(1) (repealed 2009) and N.Y. Lawyer's Code of Prof'l Responsibility DR 8-101(A)(2) (repealed 2009).

24. N.Y. Rules of Prof'l Conduct R. 1.11(f)(1) (2009).

25. N.Y. Rules of Prof'l Conduct R. 1.11(f)(2) (2009).

26. The New York City Charter contains the additional requirement that any public servant who attempts to influence proposed legislation must publicly disclose any financial or other private interest that the public servant may have in the legislation. *See* New York City Charter Chapter 68 § 2605 (2008).

27. N.Y. Rules of Prof'l Conduct R. 1.11(f)(3) (2009). The New York City Conflicts of Interest Law, § 2604(b)(5), prohibits acceptance of a "valuable gift" (defined by Rule of the Conflicts of Interest Board as anything exceeding $50 in value) from *anyone* the public servant "knows is or intends to become engaged in business dealings with the city"— regardless of whether the offer is for the purpose of influencing the offeree's action as a public official. In contrast, New York Public Officers Law § 73(5)(a) provides that a state official may not "solicit, accept or receive any gift having more than a nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part." Similarly, N.Y.

Gen. Mun. Law § 805-a(1) prohibits acceptance of gifts "having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. . . ."

28. *See* the text of Part I, *supra*, preceding n.16.

29. N.Y. RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2009). Rule 1.9(c) is generally similar to former DR 5-108(A)(2), but there are some differences. For instance, Rule 1.9(c) governs not only the confidential information of a lawyer's former clients but also the confidential information of the former clients of the lawyer's present or former firm. In addition, unlike DR 5-108(A)(2), Rule 1.9(c)(1) only prohibits the use of a former client's confidential information if that use disadvantages the former client. Finally, while DR 5-108(A)(2) only prevented the *use* of confidential information, Rule 1.9(c)(2) also prevents its *revelation*.

30. The commentary of the NYSBA Committee on Standards of Attorney Conduct notes that in addition to being subject to the Rules of Professional Conduct, lawyers must abide by statutes and other government regulations regarding conflicts of interest that may limit the effect of the Rules of Professional Conduct. *See* Comm. on Standards of Attorney Conduct, NYSBA, *supra* note 10, at 65 (cmt. 1). This applies to the disclosure of confidential government information. For example, while the New York City Charter also prohibits former public servants from disclosing or using for private advantage confidential information obtained through public service that is not otherwise available to the public, "this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity, or conflict of interest." New York City, N.Y., Charter Chapter 68 § 2604(d)(5) (2008). Likewise, an affirmative duty to disclose information (e.g., information concerning criminal activity or fraud before a tribunal) could override the requirements of Rule 1.11.

31. N.Y. RULES OF PROF'L CONDUCT R. 1.11(c) (2009) (emphasis added).

32. *Id.*

33. The broad definition of "matter" in Rule 1.0(l) still applies, although Rule 1.11(e) provides that, only as used in Rule 1.11, the term "matter" does not include or apply to agency rulemaking functions. N.Y. RULES OF PROF'L CONDUCT R. 1.11(e) (2009).

34. *See* New York City, N.Y., Charter Chapter 68 § 2604(d)(4) (2008) ("No person who has served as a public servant shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities."). Article 18 of the N.Y. General Municipal Law contains no post-employment restrictions.

35. *See* N.Y. Pub. Off. Law § 73(8)(a)(ii) (McKinney 2008) ("No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.").

36. *See* New York City, N.Y., Charter Chapter 68 § 2604(e) (2008) ("A public servant or former public servant may hold or negotiate for a position otherwise prohibited by this section, where the holding of the position would not be in conflict with the purposes and interests of the city, if, after written approval by the head of the agency or agencies involved, the board determines that the position involves no such conflict.").

37. Rule 1.0(j) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

38. N.Y. RULES OF PROF'L CONDUCT R. 1.0(j) (2009).

39. Comm. on Standards of Attorney Conduct, NYSBA, *supra* note 19, at 161.

40. *See* NYSBA Comm. on Prof'l Ethics, Op. 629 (1992).

41. Joel Stashenko, *supra* note 19.

42. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b) (2009) (emphasis added).

43. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(1) (2009).

44. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(1)(i) (2009).

45. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(1)(ii) (2009).

46. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(1)(iii) (2009).

47. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(1)(iv) (2009).

48. N.Y. RULES OF PROF'L CONDUCT R. 1.11(b)(2) (2009).

49. *See* Comm. on Standards of Attorney Conduct, NYSBA, *supra* note 10, at 66 (cmt. 4).

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The Anatomy of a Layoff

By Harvey Randall

The current fiscal pressures on municipal and school budgets have resulted in efforts to reduce expenditures. Reduction in the workforce is one of several areas being considered by municipal administrators and the layoff of personnel often results. This article explores some of the factors that administrators, employees and employee organizations must consider that are triggered in a layoff situation.

There are three basic elements to be determined in processing a layoff of personnel employed in the public service:

1. The positions to be abolished in the layoff unit or tenure area involved;
2. The personnel status of the individuals serving in the title of the position to be abolished and their "displacement," "bumping" or "retreat" rights, if any; and
3. The seniority of each individual for the purposes of the relevant layoff law, with due consideration to veteran's credit and other factors, if any, that might be available to the individual.

When courts review the lawfulness of actions taken by a public employer in implementing a layoff of personnel, the fundamental question in the court's analysis of the legal issues involved is: Did the employee involved receive all the protections and benefits provided by statute, rule and collective bargaining agreement to which he or she was entitled? Courts typically view the appointing authority's failure to satisfy any one of the several relevant elements in executing a lawful layoff as a complete failure of the process and this will result in the court granting the individual a remedy—typically reinstatement to his or her former position and back salary and related benefits.

The appointing authority in the public sector is confronted with a number of issues when it decides to reduce its workforce, including making the determination as to which position or positions are to be abolished, the layoff unit involved, and with respect to a BOCES or a school district anticipating a layoff involving employees in the unclassified service, the tenure area of the positions to be abolished. Perhaps the most critical element in this exercise is determining the "official" status and seniority of the individual or individuals in the layoff unit or tenure area in order to make correct decisions as to the specific individual to be "excessed," and typically this must be analyzed on a case-by-case basis. Further, if there is any inconsistency with respect to the "official" status of an individual in the classified service between the records of the employer and the records of the responsible civil service commission, the records of the commission control.[1]

It may be helpful to review briefly the State's personnel system at this point as the lawfulness of the layoff of a particular individual is dependent on "making the correct personnel decision the first time."

In New York State, one may be employed in either the private sector or the public sector. The public sector in New York has two components: the military service [2] and the civil service.

The civil service consists of the classified service and the unclassified service. The "classified service" comprises the bulk of "civil service employment" in New York State. Positions in the classified service are under the jurisdiction of either the State Civil Service Commission or a local Civil Service Commission or Personnel Officer. Positions in the civil service that are not under such jurisdiction are in the "unclassified service," which includes judges, elected officials, commissioners and teachers.[3] Finally, the classified service is composed of four classes, known as jurisdictional classes: the competitive class, the noncompetitive class, the exempt class and the labor class.[4]

An individual's statutory layoff rights—whether in the classified service or the unclassified service—depend upon the nature of his or her appointment by the State or a political subdivision of the State. While municipalities typically have only employees in the classified service to consider when making layoff decisions, BOCES and school districts have staffs consisting of both employees in the unclassified service and employees in the classified service. The layoff provisions set out in the Civil Service Law apply to those individuals in the classified service while the layoff provisions set out in the Education Law control in layoffs involving BOCES and school district employees in the unclassified service.

Layoff rights are a function of an individual's appointment status and the jurisdictional classification of the position in which the individual is serving. For example, provisional employees and temporary employees do not have the same layoff rights as are enjoyed by

individuals having a permanent appointment to the title; a probationary employee's layoff rights are subordinate to those of an individual having tenure in the same title. Depending on circumstances, an individual may have employment status as a permanent, contingent permanent, temporary, substitute or provisional employee.[5]

Another element that may cause some misunderstanding of the priorities in a layoff: the individual may have been appointed to what has been designated a "permanent position" or appointed to position designated a "temporary position." Individuals are sometimes under the impression that designating a position as "permanent" or "temporary" for budgetary purposes has an impact on determining an employee's rights under the Civil Service Law, the Education Law or a Taylor Law Agreement. Such is not the case. The designation of a position as a "permanent position" or as a "temporary position" is essentially a "budget concept" in terms of the expectations of continuation of the funding of the position and designating a position either "permanent" or "temporary" for budgetary purposes neither enhances nor diminishes the statutory and other layoff rights of the incumbent.

Issues involving an individual's appointment status, tenure and seniority are critical elements in many lawsuits challenging an individual's layoff. Anyone involved in the layoff process must evaluate these elements, because an employee's layoff rights depend on his or her actual, i.e., statutory, appointment status and the actual jurisdictional classification of the position to which he or she has been appointed and the actual seniority to which he or she is entitled as a matter of law.

The key word is "actual" because the failure of an employer to accurately identify the employee's statutory appointment status and seniority or the statutory jurisdictional classification of the individual's position does not affect the employee's legal and Taylor Law contract rights.[6] If an individual is going to err deciding the layoff rights of an employee, it is likely to involve some confusion of status involving the three "P" words: permanent, probationer and provisional.[7]

For example, one element, status as a probationary employee, is sometimes misunderstood. Simply put, a probationary employee enjoys permanent status insofar as his or her layoff rights are concerned.[8] While the layoff rights of employees during a probationary period are superior to those of temporary and provisional appointees, they are subordinate to the layoff rights vested in tenured employees, i.e., individuals that have already satisfactorily completed their probationary period and individuals holding a contingent permanent appointment who have completed their probationary period.[9]

To illustrate this concept, consider the following: The Civil Service Law states that for the purposes of layoff, a person's seniority is measured from his or her "original date of permanent appointment" to a position in the classified service. When is that? The answer is not the date the employee's probationary term (if any) ended. Rather, it is the day he or she was initially permanently appointed to the classified service position as a probationer.

Temporary and provisional employees have no statutory layoff rights but may enjoy layoff rights pursuant to the terms of a collective bargaining agreement. However, the terms of the collective bargaining agreement may not adversely affect the statutory rights of an individual in the layoff unit or tenure area insofar as layoff is concerned.

The employees entitled to layoff rights are those employees who are specifically granted such rights pursuant to state laws such as §§ 80 or 80-a of the Civil Service Law or §§ 2510, 2588 and 3013 of the Education Law or, with respect to those not entitled to statutory layoff rights, a contract layoff right negotiated in accordance with the Taylor Law, provided such contract rights do not adversely affect another individual's statutory layoff rights.

The important thing to remember is that the individual's employment status and jurisdictional classification control with respect to any rights or benefits he or she may enjoy or demand. Other considerations, such as the status of an individual, or an individual's spouse, as a veteran may also have an impact on an employee's rights.

It bears repeating that in order to determine the rights of a particular individual, whether by statute or by contract, it is essential to first determine that individual's status in the personnel system of the State or a political subdivision of the State. The failure to make a correct determination with respect to an individual's status could result in a court ruling that the employee was unlawfully removed from the position and the appointing authority directed to reinstate the individual with back salary and benefits.

Essentially, officers and employees are to be laid off based on their relative seniority in the inverse order of their permanent appointment. Errors in making determinations concerning "seniority" for the purposes of layoff are costly, as the redress in such cases is the payment of back salary and benefits to the individual unlawfully laid off from his or her position.[10]

Sections 80 and 80-a of the Civil Service Law and various provisions of the Education Law set out the procedures to be followed in executing a layoff of employees in the classified service and the unclassified service, respectively. These provisions, and similar stat-

utes, are becoming required reading for many. With respect to those situations where there are no statutory or contractual requirements concerning layoff applicable to incumbents of positions to be abolished, the appointing authority should consider adopting guidelines that will survive a challenge alleging that the determination as to the specific individual or individuals to be laid off was arbitrary or capricious.

As to employees in the competitive and noncompetitive classes in the classified service, the date of the individual's "original appointment" to a position on a permanent basis controls, regardless of the fact that the individual was originally appointed to a different position with a different title than the one from which he or she is to be laid off.[11]

In contrast, the Education Law provides that in the event a board of education abolishes a position, the services of the tenured teacher having the least seniority in the school district or BOCES "within the tenure area of the position abolished shall be discontinued."

This element—seniority—cannot be diminished or impaired by the terms of a collective bargaining agreement. In *City of Plattsburgh v. Local 788 and New York Council 66, American Federation of State, County and Mun. Employees, AFL-CIO*,[12] the issue concerned the application of a Taylor Law contract provision dealing with seniority in a layoff situation.

The collective bargaining agreement between Plattsburgh and the Union provided if there were to be demotions in connection with a layoff, the "date of hire" was to be used to determine an employee's seniority. However, the "date of hire" might not necessarily be the same date used to determine an individual's service for seniority purposes for layoff under State law, i.e., the individual's date of initial permanent appointment in public service.

For example, assume Employee A was provisionally appointed on January 1 and Employee B was provisionally appointed February 1 of the same year. Employee B, however, was permanently appointed on March 1 of the same year, while Employee A was permanently appointed a month later, on April 1.

Under the terms of the Local 788 collective bargaining agreement, A would have greater seniority for layoff purposes than B. But §§ 80 and 80-a of the Civil Service Law provide that the date of an individual's most recent, uninterrupted "permanent appointment" determines his or her seniority for the purposes of layoff and so, under the law, B would have greater seniority than A.

These were the critical events in the *Plattsburgh* case. The City laid off Mousseau rather than another worker, Racine. While Mousseau had been employed by the City for a longer period than Racine, Racine had received his permanent appointment before Mousseau was permanently appointed.

The Union grieved, contending that under the seniority provision in the collective bargaining agreement, Racine should have been laid off. The City, on the other hand, argued that Civil Service Law § 80 controlled and thus Mousseau, rather than Racine, had to be laid off first. The Appellate Division ruled that Plattsburgh was entitled to an order barring submitting the Union's grievance to arbitration. The Court said that § 80 of the Civil Service Law "reflects a legislative imperative" that the City was powerless to bargain away.[13]

Similarly, in *Szumigala v. Hicksville Union Free School District*,[14] the Appellate Division, citing *Union Free School District No. 2 of the Town of Cheektowaga v. Nyquist*,[15] held that a seniority clause in a Taylor Law agreement violated § 2510 of the Education Law when it permitted seniority in different tenure areas to be combined for the purposes of determining seniority with the District for the purposes of layoff.

As the Court of Appeals said in *County of Chautauqua v. Civil Service Employees Ass'n*,[16] "Once such an informed decision as to which positions are to be [abolished] is made, § 80(1) obligates the employer to respect the seniority rights of its employees."[17] The same is true with respect to layoffs of personnel in the unclassified service.

In some layoff situations, however, the Doctrine of Legislative Equivalency may be a consideration. The Doctrine of Legislative Equivalency states that only the entity that created the position may abolish it (i.e., a position created by a legislative act can only be abolished by a correlative legislative act").[18]

Layoff units or tenure area are also considerations. The elements that complicate the determination of the specific individual or individuals to be suspended or displaced as a result of a layoff include (1) the identification of the specific layoff unit(s) or tenure area(s) for layoff purposes and (2) the employee's decision with respect to exercising any "displacement," "bumping" or "retreat" rights within that layoff unit that he or she may have.

Essentially, the layoffs of individuals employed in positions in the classified service are subject to §§ 80 and 80-a of the Civil Service Law while the layoff of incumbents of positions in the unclassified service employed by a BOCES or a school district is controlled by §§ 2510, 2588 and 3013 of the Education Law. In addition, Rules of the Board of Regents must be considered. For example, 8 N.Y.C.R.R. 30-1.13 [Rights incident to abolition of positions] allows a more senior individual to "bump" a less senior individual following his or

her transfer to a position in another tenure area in the course of a layoff situation.

Some collective bargaining agreements may set out a different basis for determining seniority or grant "super-seniority" to certain individuals. As earlier indicated, in a layoff situation the statutory provisions regarding determining seniority trump those set out in the collective bargaining agreement.

Sometimes it may be necessary to break a "tie" in seniority,[19] especially in a layoff involving a school district where typically a number of educators are appointed simultaneously effective at the beginning of an academic year.[20] Essentially, any rational method of ranking to break ties in seniority may be used as long as it is consistently applied to those subject to the layoff.

Another facet in the layoff mosaic: military service may be a factor in determining seniority as well. A veteran who served in time of war may be entitled to have his or her "seniority date" adjusted for the purposes of layoff.[21] Five years of service are credited to an eligible disabled veteran's original date of permanent appointment; two years of service credit is added in the case of non-disabled veterans. Also, the spouse of a 100% disabled veteran may be eligible for five years of "additional" service credit in layoff situations if he or she meets the requirements set out in § 85.7 of the Civil Service Law. In addition, ordered military service does not constitute a "break in service" for the purposes of layoff.

Also, § 86 of the Civil Service Law provides for the transfer of veterans and exempt volunteer firemen employed by political subdivisions of the State in positions in the non-competitive class or in the labor class upon the abolition of positions in such classes.[22]

Another element that may be a factor in some layoff situations involves determining §§ 80 or 80-a seniority for individuals who attained permanent status with a public employer as a result of a "takeover" of a private institution or enterprise by a governmental employer pursuant to § 45 of the Civil Service Law or a similar law. Such employees will typically have two seniority dates to consider and it may be necessary to consider both when determining their retention rights in a layoff situation. One is their date of seniority with respect to other public employees in the layoff unit generally, usually determined on the basis of the effective date of the takeover. The second is the date of their seniority with respect to their co-workers at the private enterprise continued in public service pursuant to § 45 upon the takeover.

The "fallout" of a layoff is the preferred list. Errors in the creation and use of preferred lists could be as expensive to the employer as errors in determinations concerning the individuals laid off following the abolishment of positions.

This is further complicated by the fact that a preferred list is a "moving target." If, for example, an individual is first on a preferred list, he or she may later be displaced as "number 1" by an individual in the layoff unit having greater seniority but subsequently laid off. Further, an individual is entitled to remain on a preferred list for the statutory period authorized by law, measured from the date on which he or she was laid off and placed on the preferred list, even if he or she obtains other employment, and must be certified for reinstatement to his or her title while on the list in the event a vacancy occurs or the position must be left vacant. Significantly, the use of a preferred list is pursuant to the "rule of one," meaning the person highest on the list willing to accept the position must be offered the appointment.

As both the Civil Service Law and the Education Law provide employees with substantial rights in layoff situations, it seems clear that the employer must go forward with care in effecting layoff decisions.

Endnotes

1. *Marlow v. Tully*, 63 N.Y.2d 919 (1984).
2. New York has a military service consisting of four components: the organized militia, the state reserve list, the state retired list and the unorganized militia.
3. If all this were not complicated enough, the line between public employment and "private employment" may be blurred in quasi-governmental entities. The general rule is that the officers and employees of a public benefit corporation are employed in the "private sector" and are not subject to the provisions of the Civil Service Law. Thus, employees of an Off-Track Betting Corporation are in the private sector and may not claim rights set out in the Civil Service Law. However, the Legislature has specifically granted civil service rights to the officers and employees of certain public benefit corporations. For example, the officers and employees of the New York City Off-Track Betting Corporation are subject to the State's civil service system as a matter of law.
4. The term jurisdictional classification is sometimes confused with "position classification." Position classification deals with the duties and responsibilities of a position and, for State positions, its allocation to a salary grade.
5. In some instances an individual may be employed pursuant to a "contract of employment" having a fixed duration or his or her continuation in employment may be subject to the appointing authority receiving "grant" or similar funding from an outside source. Such employees typically do not enjoy tenure in such a position but may be on leave from a position in which they hold "tenure." Such tenure status in a position from which the officer or employee is on leave is another element that must be considered by the appointing authority in layoff situations.
6. If there is a conflict between the records of the employer and the records of the responsible civil service commission regarding the status of an individual in a position in the classified service, the record of the civil service agency having jurisdiction controls.

7. A special "appointment status" results when an individual is appointed to a position encumbered by an officer or employee absent for ordered military service. In such situations the position held by a public employee absent on military duty typically is filled by appointing a "substitute employee" to the vacancy. The substitute employee is appointed "for a period not exceeding the leave of absence of the former incumbent and . . . shall acquire no right to permanent appointment or tenure by virtue of" such service. For additional information concerning "substitute appointments, *see* §§ 242 and 243 of New York State's Military Law.

8. For example, § 63.1 of the Civil Service Law provides that "every original appointment to a position in the competitive class is subject to a probationary period." This language means that the effective date of an individual's permanent appointment to a position in the competitive class occurs on the same day that his or her probationary period begins.

9. Civil Service Law § 64.4. A "contingent permanent" employee is one who serves in a position that has been "left temporarily vacant by the leave of absence of the permanent incumbent thereof," and who has been permanently appointed or reinstated to the position in accordance with § 64.4 of the Civil Service Law. For an example of how these appointments are made at the State level, see § 4.11 of the Rules of the Civil Service Commission.

10. An employee improperly laid off due to error in determining his or her seniority is entitled to back pay without any deduction for amounts he or she might have earned prior to being reinstated to his or her position. *Civil Service Employees Ass'n, Inc., Local 1000 AFSCME AFL-CIO v. Brookhaven-Comsewogue Union Free School Dist*., 87 N.Y.2d 868 (1995).

11. *See* C.S.L. § 80 with respect to incumbents of positions in the competitive class or C.S.L. § 80-a with respect to incumbents of positions in the noncompetitive class.

12. 108 A.D.2d 1045, 485 N.Y.S.2d 618 (2d Dep't 1985).

13. *Id*.

14. 148 A.D.2d 62, 539 N.Y.S.2d 83 (2d Dep't 1989).

15. 38 N.Y.2d 137 (1975).

16. 8 N.Y.3d 513 (2007).

17. The Attorney General has opined that there must be an actual abolishment of the position in question, in contrast to merely "creating a vacancy as the result of a layoff" in order to trigger the relevant statutory layoff procedures (1976 Opinions of the Attorney General 7).

18. *Torre v. County of Nassau*, 86 N.Y.2d 421 (1995).

19. *See, e.g. CSEA, Local 1000 AFSCME AFL-CIO v. New York State Office of Mental Health*, 196 A.D.2d 276, 609 N.Y.S.2d 403 (3d Dep't 1994); *Fiffe v. Civil Service Com'n of City of Cohoes*, 262 A.D.2d 762, 691 N.Y.S.2d 658 (3d Dep't 1999).

20. *See, e.g.*, Decisions of the Commissioner of Education 12933.

21. C.S.L. § 85.

22. *See, e.g., Bartholomew v. Columbia County*, 191 A.D.2d 881, 594 N.Y.S.2d 878 (3d Dep't 1993).

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Mandating Compliance With Third-Party Green Building Standards: Red Flags for Local Governments

By Lester D. Steinman

Introduction

To combat global warming, many local governments in New York and elsewhere have considered adopting green building standards to promote sustainable development practices in their communities. In many instances, the discussion has focused on the incorporation into the zoning or building code of a requirement that new construction be certified under the Leadership in Energy and Environmental Design (LEED) Green Building Rating System[1] developed by the U.S. Green Building Council (USGBC).[2]

Municipalities that incorporate LEED certification requirements into their zoning or building codes delegate to the USGBC, a private non-profit organization, the power to determine whether its private standards have sufficiently been met so as to entitle the property owner to obtain the LEED certification.[3] The certification process is conducted without participation or oversight by municipal officials. Yet, municipal officials may be predicating their decision-making upon the results and judgment of the USGBC as to whether the USGBC's standards have been met. A property owner's entitlement to a municipally issued certificate of occupancy, or the retention or loss of other significant property rights, may be based upon the independent third-party's determination.

Against this background, a variety of legal issues should be examined prior to a municipality's decision to mandate that private construction comply with LEED or any other green building rating system. Those issues include antitrust considerations, the non-delegation of authority doctrine, incorporation by reference, preemption and options and liability relating to enforcement.

I. Antitrust Considerations

The USGBC's LEED rating system is not the only green building rating system. The Green Building Initiative ("Green Globes Rating System"); the National Association of Home Builders ("Model Green Home Building Guidelines") and Collaboration for High Performance Schools ("CHPS Criteria") have all adopted their own standards for green buildings. Also, Energy Star, the outgrowth of a joint program of the U.S. Department of Energy and Environmental Protection Agency, provides an energy efficiency rating system for commercial buildings, appliances and equipment.

Legislating compliance with a specific building rating system may raise antitrust issues for local governments. The good news is that municipalities are generally immune from damages, indeed potentially treble damages, for violations of the federal antitrust laws, based upon the Local Government Antitrust Act of 1984. However, municipalities remain liable for declaratory and injunctive relief based upon antitrust law violations, unless they can claim protection under the "state action" immunity doctrine.

The "state action" immunity doctrine, established by the U.S. Supreme Court in *Parker v. Brown*,[4] provides that states, as sovereign entities, are not liable under the federal antitrust laws for their anti-competitive activities. Municipalities, however, are not sovereign and are not automatically immune from the reach of the federal antitrust laws.

Rather, to obtain exemption, municipalities must demonstrate that their anti-competitive activities are authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service. Such state policy must be clearly articulated and affirmatively expressed.[5]

The case of *Electrical Inspectors Inc. v. Village of East Hills*[6] provides an interesting perspective on this issue. There, several Long Island municipalities adopted regulations designating the New York Board of Fire Underwriters[7] as the exclusive entity to provide government-required electrical inspection services. The Board's certification of compliance with the National Electric Code[8] was a prerequisite to the issuance of a certificate of occupancy. Thus, a municipal property owner who wanted to use or occupy a building had to submit to and pay the Board of Fire Underwriters for the Board's inspection.

Plaintiff, a for-profit corporation that also provided electrical inspection services in New York State, challenged these exclusive arrangements as a violation of the antitrust laws. Alleging that these arrangements excluded the plaintiff from the local market for electrical inspection services, plaintiff sought monetary damages against the Board and injunctive relief against the municipalities.

Both the District Court and the Second Circuit agreed that for purposes of state action immunity, New

York State, through the Uniform Fire Prevention and Building Code and its implementing regulations, had given the municipalities authority both to regulate electrical inspection services and to suppress competition by designating the Board as their exclusive agent to conduct those inspections.

Nevertheless, the Circuit Court refused to dismiss Plaintiff's antitrust claims for equitable relief against the municipalities and for damages against the Board in the absence of a finding that government officials actively supervised the Board's conduct. Whether a municipality, to obtain State action immunity, must also show that its government officials actively supervised those private parties given monopoly power by the municipality's regulations, the court opined, was an open question.[9]

The Second Circuit did not decide this issue and it remains an open issue. Rather, the court focused on the potential antitrust liability of the Board of Fire Underwriters for actively seeking and abusing monopoly powers insofar as the legislation allowed the Board to exercise exclusivity in determining price, terms and quality of services.

Accordingly, it remanded the case to the District Court to determine if the municipal supervision was lacking, whether antitrust violations by the Board of Fire Underwriters had occurred and, if so, whether a damage award against the Board would be adequate to deter future violations. If not, the District Court would have to determine whether the state action immunity doctrine would permit an injunction to issue against the municipalities for lack of supervision even though the municipalities' activities were authorized by the State.

Similar legislation enacted by the Town of Union in Broome County, mandating electrical inspections by inspectors of the New York Board of Fire Underwriters, also was held to be anti-competitive in violation of New York State's Donnelly Act, the State's counterpart to the federal Sherman Antitrust Act.[10] No "state action" exception applies under the Donnelly Act.

That court also found the Town of Union's law to be constitutionally infirm insofar as it purported:

> to designate and delegate to unnamed agents of a private entity the exercise of the police power of the Town and the right to establish and collect fees for the exercise of such power; and in failing to fix standards of reasonableness, or any standards, for the fees to be paid.[11]

Notably, standard setting organizations, such as the USGBC, have often been the subject of antitrust scrutiny. The U.S. Supreme Court has cautioned that "members of such associations often have economic incentives to restrain competition and the products standards set by such associations have a serious potential for anti-competitive harm."[12]

In sum, antitrust considerations are implicated when a municipality (1) legislates compliance with private third-party standards; (2) delegates unsupervised approval authority over compliance with those standards to that private third-party; and (3) requires such compliance as an essential prerequisite to the exercise of the police power (i.e., issuance of a certificate of occupancy).

II. Non-Delegation of Authority

Independent of antitrust considerations, requiring LEED certification by a private third-party as a prerequisite to the issuance of a certificate of occupancy, or the forfeiture of or return of funds paid to the municipality conditioned upon LEED certification, raises issues of improper delegation of the police power.

The non-delegation doctrine has multiple facets. From a due process perspective, a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property without supplying standards to guide the private parties' discretion. Such delegations, to be valid, must also be closely circumscribed and regulated so that no one could conclude that the government has yielded any sovereign power.[13]

Instructive, in this regard, is *Fink v. Cole.*[14] There, the Court of Appeals struck down, as an unlawful delegation of legislative powers, a broad statutory delegation to the Jockey Club, a private corporation, of the discretionary power (1) to license owners, trainers and jockeys for racing in New York State, and (2) to make those licenses subject to the Jockey Club's rules and regulations. In essence, the legislation ceded regulatory control over the horse racing industry to the Jockey Club. Even if the Legislature had delegated its licensing power to a government agency, the Court noted, the statute would have been struck down for lack of any proper standards.

Additionally, it is well settled that the statutory duties and responsibilities of public officials which involve the exercise of discretion or judgment cannot be discharged by contracting with, or otherwise delegating such authority to private parties, unless authorized by state legislation.[15] Generally, the duties of a building inspector involve the exercise of the police power and the performance of discretionary functions.

For example, the State Comptroller has opined that "the decision of local officials whether to enforce a zoning or building code in a given instance, or to issue a building permit, is discretionary in nature." Accordingly, a village may not contract with a private party

to perform those functions.[16] However, a municipality may contract with a private party to provide advice and assistance relative to zoning and building matters so long as the municipal officials retain ultimate responsibility for the performance of their police powers and discretionary functions.

The difference between discretionary and ministerial functions has been described by the Court of Appeals as follows:

> Discretionary . . . acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or statute with a compulsory result.[17]

The parallel here is that unless you take the position that the LEED certification process involves no discretion, incorporating LEED into the municipal building code and providing for certification of compliance by a private third-party without municipal supervision would appear to present a case of impermissible delegation of authority. Moreover, the absence of a governmental appeals process, or other procedures to petition the municipality for relief from the LEED certification requirement, strengthens the improper delegation argument.[18]

III. Incorporation by Reference

Article 3, Section 16 of the New York State Constitution prohibits incorporation by reference of existing laws into a subsequently enacted law.[19] The constitutional provision has been judicially construed, however, as limited to state statutes, but not necessarily to all state statutes, and not to apply to rules or regulations or standards prepared by private associations.[20]

Indeed, building codes have long incorporated standards of private organizations,[21] such as those promulgated by the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) and the National Fire Protection Association.[22] However, these associations, unlike the USGBC with LEED, have not themselves been required to certify compliance with those standards.

Ultimately, whether incorporation by reference is permissible may depend on whether such incorporation in the legislative scheme also constitutes an impermissible delegation of authority.

In *USA Baseball v. City of New York*,[23] the Federal Court rejected a non-delegation claim in a lawsuit to overturn New York City's ban on the use of metal bats for public and private high school competitive baseball games. The City's bat ordinance incorporated by reference rules adopted by Major League Baseball (MLB) regarding permissible types of bats.

In reaching this result, the court ruled that the ordinance did not delegate to Major League Baseball the responsibility to establish regulations for the City. Rather, the City legislation adopted "a very limited existing set of standards to a specific type of product that the City has determined to regulate in specific situations."[24]

Nor did the bat ordinance rely solely on MLB's guidance. Further, it limited bats allowed under the MLB rules by requiring that they be wood laminated or wood composite and that they contain no metal. If in the future MLB decided to approve bats containing metal, the City's ordinance would, nevertheless, prohibit the use of such bats.

The court distinguished the carefully circumscribed limits of the City's reliance on MLB rules from cases such as *Fink v. Cole* involving the standardless delegation of broad discretion and decision-making to a private entity. Also, the court noted that the incorporation by reference of MLB's bat regulations did not raise anti-competitive issues such as those raised in the electrical inspection cases.

Assuming you can surmount this legal hurdle, the question arises as to how the law incorporating LEED compliance will be affected by subsequent amendments made to the LEED standards. Will newer versions of LEED (LEED 2009) automatically be incorporated without further local legislative review? According to the Court of Appeals, the question is one of legislative intent and purpose.[25]

Yet, this precise question, the effect of a local law incorporating by reference subsequently adopted amendments to standards of a private association, led the court in *People v. Mobil Oil Corp*.[26] to strike down the local law as an impermissible delegation of authority. There, Nassau County adopted a fire prevention ordinance which incorporated by reference various standards for foam extinguishing systems, flammable and combustible liquids and the installation of oil burning equipment promulgated by the National Fire Protection Association "currently in effect or as may be amended." Invalidating the legislation, the court opined that:

> By enacting the Association's amendments, prior to their adoption, the County of Nassau has delegated to the National Fire Protection Association sovereign and legislative powers. . . The County has relinquished all control over the ordinance in question pertaining to flammable and combustible liquids to the National Fire Protection Association, and whatever standards

> might be adopted by that Association in the future are automatically the law of the County, subjecting its citizens to criminal penalties . . . Such a procedure is an improper delegation of legislative authority, and therefore unconstitutional.[27]

Regardless of whether criminal penalties may pertain to LEED non-compliance, substantial property rights and monetary considerations will be involved. Once Nassau County deleted the "or as may be amended" language, the constitutionality of incorporating the existing standards of the National Fire Protection Association into the Nassau County Fire Prevention Ordinance was upheld.[28]

IV. Preemption

A. Federal Preemption

A New Mexico federal district court has enjoined the City of Albuquerque's enforcement of certain provisions of its building code imposing energy efficiency standards for major residential and commercial appliances and equipment, including heating, ventilating and air conditioning (HVAC) products and water heaters, that exceeded federal standards for these products.[29]

Here, the City had adopted energy conservation code provisions that set forth

- Performance-based options to increase energy efficiency in residential and commercial buildings—certification at the LEED silver standard or thirty (30%) efficiency improvements over a baseline building that would utilize HVAC and water-heating products that do not exceed federal efficiency levels for these products.
- Additional compliance options for small commercial and residential buildings, also requiring the use of HVAC and water-heating products with energy efficiencies in excess of federal standards for those products.

Suit was brought by the distributors of HVAC and water-heating products and three national trade associations representing manufacturers, contractors and distributors of those products, claiming that the City of Albuquerque ordinances impose energy efficiency standards for commercial and residential buildings that are preempted by federal law. The District Court agreed.

The court held that the Federal Emergency Policy and Conservation Act (EPCA) as amended by the National Appliance Energy Conservation Act (NAECA) and the Energy Policy Act of 1992 (EPACT) established "nationwide standards for the energy efficiency and energy use of major residential and commercial appliances and equipment."[30] To the extent that the City's enactment of performance-based building codes expressly or effectively required the installation of covered products whose energy efficiency exceeded the applicable federal standards, they are preempted by those federal statutes.

Here, the court found that the City code required building owners to either

- install products that exceed federal energy efficiency standards, or
- incur additional expenses to make other revisions to the building to make up for the energy differential between a federally compliant product and a product that meets the enhanced energy efficiency requirements of the code.

B. State Preemption

1. N.Y.S. Uniform Fire Prevention and Building Code Act[31]

Article 18 of the Executive Law sets forth the N.Y.S. Uniform Fire Prevention and Building Code Act (the "ACT"). The purpose of the Act is to provide a uniform code setting forth a minimum level of protection in building construction and fire prevention.[32] The Legislature, in creating the Act, sought to "reconcile the myriad existing and potentially conflicting regulations which apply to different types of buildings and occupancies."[33] The provisions of Article 18 and of the Uniform Fire Prevention and Building Code (the "Uniform Code") supersede any other provision of a general, special or local law, ordinance, administrative code, rule or regulation inconsistent or in conflict therewith.[34]

The State Fire Prevention and Building Code Council (the "Building Code Council")[35] is responsible for reviewing local laws and ordinances that may be more or less stringent than the Uniform Code.[36] Where a municipality enacts a local law or ordinance imposing "higher or more restrictive standards for construction," the Building Code Council must be notified within 30 days.[37] Also, the municipality must petition the Building Code Council to make a determination of whether the local standard is higher or more restrictive, and if it is found to be so, to adopt the standard.[38]

The question then arises when a municipality enacts an ordinance requiring new buildings to be certified to a green building standard such as LEED, does the requirement impose more restrictive building standards than are required by the minimums set forth in the Uniform Code? Adding to the difficulty of determining which elements of LEED certification conflict with the Uniform Code is the fact that LEED certification may be achieved at several levels ranging from certified to platinum. While certain features required

at higher levels of certification may be more restrictive than the Uniform Code, at lower levels of certification the required features may not exceed the Uniform Code's standards.

Notwithstanding numerous inquiries to officials at various levels in the Department of State (DOS), a definitive answer to these questions has not been received. Nor do the regulations themselves provide that answer.

Recently, a member of the Codes Division of the DOS, who did not want to be identified, stated that the Uniform Code and LEED were "apples and oranges." In the same breath, however, he acknowledged that compliance with certain LEED standards could be more restrictive than the requirements of the Uniform Code.

The DOS representative did not recommend that municipalities incorporate LEED certification into their building codes. Rather, he emphasized municipal enforcement of a soon-to-be-updated Energy Conservation Construction Code.

2. N.Y.S. Energy Conservation Construction Code Act

The Building Code Council is also charged with reviewing and amending the Energy Conservation Construction Code (the "Energy Code").[39] Among the objectives considered in designing and amending the Energy Code is to promote "to the fullest extent feasible, the use of modern technical methods, devices and improvements which tend to minimize consumption of energy and utilize to the greatest extent practical solar and other renewable sources of energy."[40]

To this end, the Energy Code Act provides that nothing in the Act "shall be construed as abrogating or impairing the power of any municipality to promulgate a local energy conservation code more stringent than the code."[41] The Act does not contain similar language or provisions as the Uniform Fire Prevention and Building Code Act requiring adoption of more stringent local standards by the Building Code Council.

V. Enforcement and Liability

Assume that municipal regulations or land use approvals require a building to meet a specific level of LEED certification (certified, silver, gold or platinum). The building is constructed, the issuance of the LEED certification has been delegated to a private third-party, and the certification will not be issued until well after the building is ready for occupancy.

- Do you withhold the certificate of occupancy until the required certification is received?
- Do you issue a temporary certificate of occupancy to allow building occupancy pending receipt of the LEED certification?
- Do you require a performance bond to be posted which will be forfeited if LEED certification is not obtained?
- Will retention of building permit fees to be refunded upon LEED certification be a sole and adequate remedy?
- What if incentives, such as density bonuses or increased floor area ratios, have been granted but the LEED certification for which the bonuses were granted is ultimately not obtained?

What if the certificate of occupancy is issued and LEED certification is not obtained? What recourse does the local government have? Revocation of the certificate of occupancy for failure to comply with the LEED requirements? Is that feasible or practicable? Perhaps legislation providing for the payment of an additional fee or civil penalty for failure to comply with the LEED requirement?

Finally, what if the municipality allowed occupancy without LEED certification? Would it be liable for failure to enforce its regulations? On the latter question, the recent case of *Bell v. Village of Stamford*[42] is instructive.

There, a neighboring property owner sued the village for negligence and breach of contract for allowing the construction of a building and a parking lot across the street from her building without a building permit and for failing to take action to stop the construction once informed of the unauthorized activity.

Dismissing the complaint, the Appellate Division, citing well-settled Court of Appeals case law, ruled that absent a special relationship[43] creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for the injurious consequences of a failure to enforce a statute or regulation.[44]

Equally well settled is that the adoption of a zoning ordinance and building code by a municipality does not create a special relationship with its residents.[45] The code and ordinance are enacted for the benefit of the general public and do not, without more, give rise to a special relationship between a municipality and an individual resident or property owner. Additionally, in the absence of such a special relationship, a municipality's failure to act, even after being informed of alleged unauthorized conduct on numerous occasions, does not give rise to municipal liability.

Conclusion

There is an admirable desire among public officials in this region to "green" their communities. However, attorneys advising these municipal officials must be cognizant of the various legal considerations and consequences attendant to that decision.

Strategies must be developed to minimize or eliminate these legal risks. Alternatives to be considered include (1) rigorous enforcement of the State's Energy Code, as urged by the Department of State; or (2) incorporating discrete green building practices derived from LEED or other rating systems into the municipal building code. In both instances, municipal officials would be responsible for compliance with these standards.

Endnotes

1. In the context of new construction and major renovation, LEED evaluates buildings in six key areas: site selection, water efficiency, energy and atmosphere, materials and resources, environmental quality and innovative design. By meeting the standards and requirements in these areas, buildings may obtain LEED certification based upon a point system with a minimum number of points being required for each of the four certification levels—certified, silver, gold and platinum. *See generally* http: / / www.usgbc.org.
2. The USGBC is a non-profit organization consisting of individuals and organizations within the building industry.
3. In 2009, the Green Building Certification Institute (GBCI), an affiliated entity, assumed responsibility for administering the LEED certification program for commercial projects. Appeals of LEED certification determinations are also heard by the GBCI.
4. 317 U.S. 341 (1943).
5. *City of Lafayette v. La. Power and Light Co.*, 435 U.S. 389, 410-413 (1978); *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) and *Town of Hallie v. City of Eau Clair*, 471 U.S. 34, 38-40 (1985).
6. 320 F.3d 110 (2nd Cir. 2003).
7. The Board of Fire Underwriters is a not-for-profit corporation comprising insurance companies authorized to write fire insurance policies in New York State.
8. The National Electric Code is a model code promulgated by the National Fire Protection Association.
9. The Supreme Court held in *Town of Hallie v. City of Eau Clair*, 471 U.S. 34 (1985) that a municipality need not show that it is supervised by state officials when engaging in anti-competitive activities to qualify for state action immunity. But the Supreme Court, in the context of private party liability, also indicated that "[w]here state or municipal regulation by a private party is involved . . . active supervision must be shown even where a clearly articulated state policy exists." According to the circuit court, this raises the question of whether a failure to show active supervision of a private party can defeat *both* the municipality's claim of immunity and the private party's or only the private party's. 320 F.3d at 122. *See LaFaro v. New York CardioThoracic Group*, 570 F.3d 471 (2nd Cir. 2009).
10. *Atlantic Inland, Inc. v. Town of Union*, 126 Misc.2d 509, 483 N.Y.S.2d 612 (Sup. Ct., Broome Co. 1984).
11. *Id.* at 516.
12. *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).
13. *USA Baseball v. City Of New York*, 509 F. Supp. 2d 285 (S.D.N.Y. 2007); *People v. Mobil Oil Corp.*, 101 Misc.2d 882, 422 N.Y.S.2d 589 (Dist. Ct., Nassau Co. 1979).
14. 302 N.Y. 216 (1951).
15. 1987 Op. St. Comp. 14; *Hartford Insurance Group v. Town of North Hempstead*, 118 A.D.2d 542 (2d Dep't 1986) (the statutory power granted to towns to settle claims may not be delegated by a town to an insurance company); 1990 Op. St. Comp. 53 (a village may not contract with a private party to perform the function of assessing real property for the village).
16. 1990 Op. St. Comp. 53.
17. *Tango v. Tulevech*, 61 N.Y.2d 34 (1983).
18. The existence of an appeals process to a state commission to challenge the Jockey Club's horse racing licensing decisions did not save the legislation in *Fink v. Cole*.
19. The intent of the constitutional provision is (1) to prevent laws pertaining to one subject from being made applicable to laws enacted on another subject "through ignorance or misapprehension by the legislature"; and (2) to require that all acts should contain within their four corners the information necessary for the Legislature to act upon them "intelligently and discreetly." *People ex rel. New York Electric Lines Co. v. Squire*, 107 N.Y. 593, 602 (1888).
20. *People v. Kavanaugh*, 133 Misc. 2d 689, 507 N.Y.S.2d 952 (Dist. Ct. 1986); *Town of Islip v. Cuomo*, 147 A.D.2d 56, 541 N.Y.S.2d 829 (2d Dep't 1989); *People v. Halpern*, 79 Misc. 2d 790, 361 N.Y.S.2d 578 (Long Beach City Ct. 1974) (an industrial code which was not a "law" could properly be incorporated by reference into a statute); 1980 Op. Atty. Gen. 47.
21. *But see* older opinions of the Attorney General concluding that Article III, Section 16 precludes a City from incorporating by reference the National Electrical Code, a set of rules promulgated by a body of private individuals and organizations, unless that Code is fully set forth in the City's law. 1963 Op. Atty. Gen. 187; 1964 Op. Atty. Gen. 72. In one of those opinions, the Attorney General also concluded that a law requiring all electrical wiring to be in accordance with the National Electrical Code would constitute an unconstitutional attempt to delegate legislative authority. This opinion relied upon a Kansas case which was cited with approval by the New York Court of Appeals in *Fink v. Cole*, *supra* note 18.
22. *See People v. Shore Realty Corp.*, 127 Misc. 2d 419, 486 N.Y.S.2d 124 (Dist. Ct., Nassau Co. 1984); *City of Syracuse v. Penny*, 59 Misc. 2d 818 (Sup. Ct., Onondaga Co. 1969) upholding the incorporation by reference of National Fire Protection Association standards and National Electrical Code standards, respectively, into municipal codes.
23. 509 F. Supp.2d 285 (S.D.N.Y. 2007).
24. *Id.* at 300.
25. *See O'Flynn v. Village of East Rochester*, 292 N.Y. 156 (1944).
26. 101 Misc. 2d 882, 422 N.Y.S.2d 589 (Dist. Ct., Nassau Co. 1979).
27. *Id.* at 887.
28. *People v. Shore Realty Corp.*, 127 Misc. 2d 419, 486 N.Y.S.2d 124 (Dist. Ct., Nassau Co. 1984).
29. *Air Conditioning, Heating And Refrigeration Institute v. City of Albuquerque*, 2008 Wl 5586316 (D.N.M.).
30. *Id.*
31. The Uniform Code consists of several codes: the residential code, building code, plumbing code, mechanical code, fuel gas code, fire code, property maintenance code and existing building code. N.Y. Comp. Codes R. & Regs. Tit. 19, Parts 1219-1228. The actual codes are published by the International Code Council (ICC) and may be purchased from the publisher. The regulations for each code specify that standards used in the published code are incorporated by reference, and may be

obtained from the other publishers as identified in the ICC code. Further, the regulations provide for incorporation of other specific standards and corrections to the ICC code. On the face of the regulations, there is no mention of incorporation of LEED or other green building standards. The ICC building and residential codes do not contain any reference to LEED or other green building standards.

32. Exec. L. § 371(2)(B).

33. *Id.*

34. Exec. L. § 383.

35. Members of the Council include: the secretary of state (as chairman), the state fire administrator, as well as fifteen other members appointed by the governor, consisting of two commissioners of state departments, six representatives of municipal government and seven individuals representing professional classifications that the code will affect (architects, engineers, labor unions, builders, and individuals with disabilities). *Id.*

36. Exec. L. § 379**.**

37. *Id.*

38. The Act provides that the council shall adopt the more restrictive standard if it finds that the standard is "reasonably necessary because of special conditions prevailing within the local government and that such standards conform with accepted engineering and fire prevention practices and the purposes of [The Act]." Exec. L. § 379(2). The Council may accept the standard in whole or in part and may set conditions on the adoption of the standard, including its term or duration. *Id.*

39. Energy L. § 11-103(2).

40. Energy L. § 11-104(2).

41. Energy L. § 11-109(1). Although a municipality may adopt an energy code more stringent than the state Energy Code, it should be noted that the standard cannot conflict with the Uniform Fire Prevention and Building Code. Exec. L. § 383. Additionally, a copy of such code must be filed with the Building Code Council. Energy L. § 11-109(2). According to guidance from the Department of State, Codes Division, the Energy Code provides for the use of "above code programs," such as Energy Star, to demonstrate compliance with the Energy Code. That is, a code enforcement officer is permitted to accept national, state or local energy efficiency programs that exceed the energy efficiency required by the Energy Code; specifically named programs include Energy Star and LEED. However, compliance with Energy Star, by itself, does not automatically equate to compliance with the Energy Code.

42. 51 A.D. 3d 1263, 857 N.Y.S.2d 804 (3d Dep't 2008).

43. A special relationship may arise in the following ways: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when a municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *Id.* at 1264, quoting *Pelaez v. Seide*, 2 N.Y.3d 186 (2004).

44. *O'Connor v. City of New York*, 58 N.Y.2d 184 (1983); *Sanchez v. Village of Liberty*, 42 N.Y.2d 876 (1977).

45. *O'Connor, supra* note 44.

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Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

Once again we have had a relatively quiet quarter in the land use biz, but the courts have, among other things, examined the relationship between the New York State Constitution and the U.S. Constitution with respect to the exercise of the power of eminent domain, shedding some useful light on the public-use clause in the former.

In another case, the Third Department reminded us once again that the devil is in the details, annulling a variance on the grounds that notice of the hearing on the variance application was defective in spite of the fact that one of the petitioners had actual notice of, and appeared at, the hearing. This case is a bit of a cautionary tale to those of us who have long assumed that an appearance is always tantamount to a waiver of a defective notice. Although the decision may at first appear to exalt form over substance, it clearly reached the right (that is to say, just) result.

Staying on the topic of public hearings, the Second Department shed some light on when a new public hearing on a proposed ordinance is required when the ordinance as ultimately adopted differs in some degree from the ordinance as originally proposed.

None of this quarter's cases is likely to be made into a Hollywood movie, but the cases are instructive nonetheless.

I. Takings Law Under the New York State Constitution: *Goldstein v. New York State Urban Development Corporation*

In *Goldstein v. New York State Urban Development Corporation (Goldstein II)*,[1] the Appellate Division, Second Department, held, among other things, that the public use clause of the New York State Constitution[2] does not impose a more restrictive standard for the taking of private property than the Fifth Amendment to the U.S. Constitution, and that the taking of private property for the purposes of Forest City Ratner's Atlantic Yards project (which project was also the subject of the case *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*[3] discussed in our Spring 2009 column) did not violate the public use clause of the New York State Constitution.

By way of background, the Atlantic Yards project is a 22-acre redevelopment site that "proposes to bring to

Brooklyn a professional basketball team, thousands of new residential units (many of which are proposed to be affordable to low- and middle-income families), and millions of square feet of office space"[4] along with public open space and rail station improvements. A portion of the property for the proposed project is located in the Atlantic Terminal Urban Renewal Area (ATURA). Another portion of the proposed project area is in an area adjacent to the ATURA. The development of the Atlantic Yards project is a joint effort between Forest City Ratner Companies and the New York State Urban Development Corporation doing business as the Empire State Development Corporation (ESDC).[5] Before becoming involved in the project, ESDC conducted an extensive blight study of the 22-acre project site. The blight study showed, among other things, that a portion of the proposed project area that was not a part of ATURA was blighted. Based on this blight finding and the anticipated public benefits of the Atlantic Yards project, the ESDC concluded that it should exercise its power of eminent domain over certain of the non-ATURA properties in the project area in order to help implement the project.[6]

The petitioners in this case were business owners and residents of the non-ATURA properties within the Atlantic Yards project area slated to be taken by eminent domain in connection with the project.[7] Initially, petitioners brought a lawsuit in federal court challenging the taking of their property under, among other things, the Fifth Amendment to the U.S. Constitution.[8] In the federal case, captioned *Goldstein v. Pataki (Goldstein I)*,[9] the U.S. District Court and the U.S. Court of Appeals for the Second Circuit upheld the blight finding of the non-ATURA project area and any associated condemnations. After receiving an unfavorable decision in *Goldstein I*, the petitioners brought this state court proceeding pursuant to Section 207 of the New York Eminent Domain Procedure Law (EDPL) to annul the ESDC's decision to take their properties, urging the Second Department to find that in order to satisfy the public use clause of the New York State Constitution the property subject to the taking must be held open for use by all members of the public, a more stringent standard than the standard under the takings clause of the U.S. Constitution, and that this elevated standard was not met here.[10]

In support of their position, petitioners argued that this more restrictive standard was the intent of the framers of the New York Constitution. Further, the petitioners argued that case law from the late 19th and early 20th centuries is more authoritative on the interpretation of the public use clause of the State Constitution than more recent case law and that it supports their position. The Second Department disagreed, holding that the public use clause of the New York State Constitution should not be read more restrictively than the public use clause of the Fifth Amendment to the U.S. Constitution. Like petitioners, the Court also focused on case law from the late 19th and early 20th centuries to support its holding.[11] Most notably, the Court relied on the 1936 decision of *New York Housing Authority v. Muller*,[12] which held that the New York City Housing Authority could take private property by eminent domain for the construction of a public housing project. In that case the Court expressly rejected the notion that in order to satisfy the "public use" standard the property subject to the condemnation must be open to use by "anyone and everyone" and held that slum clearance is a valid public purpose under the New York State Constitution's public use clause.[13] In further support of its conclusion, the Court explained that the EDPL, which was adopted in the 1970s, authorizes the Court, when reviewing a taking by eminent domain, to consider whether "'a public use, benefit or purpose would be served by the proposed acquisition,'"[14] contemplating a broader definition of public use than simply holding property open to all members of the public in common.[15]

Finding that the New York State Constitution does not impose a more stringent requirement than the U.S. Constitution on the taking of private property for public use, the Court went on to address whether that standard was satisfied here.[16] Petitioners argued that even under this standard, the taking here violated the public use clause of the New York State Constitution because their properties are not blighted, and the public benefit from the Atlantic Yards project, including new jobs and affordable housing, may never be achieved.

Before addressing the substance of petitioners' claims, the Court explained the heavy burden that petitioners are required to overcome in order to overturn a decision by a public body to take property by condemnation. A court must uphold a decision of a public body to take property by eminent domain unless the challenger can show that the "condemnor's findings that a proposed acquisition will further a public use . . . does not rationally relate to any conceivable public purpose."[17] Turning to the substance, the Court held that petitioners had not met their burden since the blight study clearly demonstrated that the area subject to condemnation was substandard and the taking of property in substandard areas in furtherance of urban renewal is a valid public purpose.[18] The Court also cited some of the additional public benefits that will result from the Atlantic Yards project, including the production of new jobs, affordable housing, public open space, a new sports arena and public transit improvements, in further support of its holding. The Court dismissed petitioners' claims that these benefits may never be realized as speculative and conclusory.[19]

The petitioners then argued that even if the project conveyed some public benefit, such benefit was merely incidental to the private benefit that would be conveyed to the project developer. The Court dismissed this argument as well since the petitioners offered no evidence that the anticipated public benefit of the project would be illusory or that equal or greater benefit to the public would accrue without the condemnation. The Court further recognized that a taking that produces a benefit to the public will not be declared invalid simply because it also furthers a private interest.[20]

Petitioners also alleged that the Atlantic Yards project violates Article XVIII (Housing) § 6 of the New York State Constitution, which provides, among other things, that no state funds may be used to aid in any project unless the housing provided is restricted to persons of low income. Petitioners claimed that the Atlantic Yards project violated this provision since state funds were to be used to finance infrastructure improvements in connection with the project which will benefit the housing component of the project and not all of the housing included in the project will be restricted to use by low-income persons.[21] The Court rejected this argument, finding that the limitations contained in Article XVIII § 6 should be limited to projects in which eminent domain is used specifically to implement a plan to provide low-income housing. In support of its findings, the Court explained that the clearing and rehabilitation of underdeveloped and blighted land is an objective recognized in the New York State Constitution separate and distinct from the provisions of the Constitution pertaining to housing, and that courts have repeatedly upheld the use of eminent domain to enable the use of the underlying property for a variety of purposes. Since the Court had found a valid public purpose for the Atlantic Yards project beyond the development of low-income housing, the taking of property for such purposes and the use of state funds to pay for certain infrastructure improvements associated with the development of the Atlantic Yards project do not violate Article XVIII § 6 of the New York State Constitution.[22]

II. Notice of a Public Hearing

A. Adequacy of Notice

In *Benson Point Realty Corporation v. Town of East Hampton*,[23] the Second Department upheld a determination by the town board of the Town of East Hampton

to adopt an amendment to its zoning ordinance without holding a new public hearing notwithstanding certain changes to the proposed zoning amendments from those originally proposed and noticed.

In *Benson Point Realty Corporation*, the petitioner-respondent owned a 13-acre parcel of property in the Town of East Hampton which was zoned Residence District A (one-acre minimum lot size). In 2003, petitioner-respondent had an application pending before the East Hampton planning board to subdivide its property into nine residential lots. While its application was pending, the Town was considering amendments to its zoning ordinance which would rezone petitioner-respondent's property from the Residence District A to the Residence District A5 (five-acre minimum lot size). The Town provided notice of and held a public hearing on the draft rezoning on November 4, 2004. The petitioner-respondent made written submissions opposing the rezoning of its property from the Residence District A to the Residence District A5 and advocated the rezoning of its property into the Residence District A2 (two-acre minimum lot size).[24]

The Town reviewed the public input on the rezoning and the comments made on the draft generic environmental impact statement (DGEIS) prepared in connection with the rezoning and adopted a final generic environmental impact statement (FGEIS) on April 14, 2005. In response to petitioner-respondent's comments on the proposed rezoning and the DGEIS, the Town decided to rezone petitioner-respondent's property to the Residential District A3 (three-acre minimum lot size). In May of 2005, without holding a new public hearing, the Town rezoned petitioner-respondent's property into the Residence District A3. Petitioner-respondent challenged the rezoning on the ground, among others, that the Town failed to comply with the notice requirements of the Town Law, the General Municipal Law and the East Hampton Code by failing to hold a public hearing on the revised zoning amendments.[25] The Supreme Court agreed and annulled the rezoning. The Second Department reversed, holding that a new hearing on the revised zoning amendments was not required.[26]

After describing the relevant provisions of the Town Law and the General Municipal Law with regard to notice of a public hearing on a rezoning,[27] the Court described when a new notice is required.

> Where changes are made to a proposed zoning amendment following the conclusion of a properly-noticed public hearing, new notice and another public hearing are not required if the "amendment as adopted is embraced within the public notice" . . . or if the amendment as adopted is not substantially different from the amendment as noticed.[28]

Here, the Court held, the actual rezoning of petitioner-respondent's property was embraced within the notice of the initial public hearing on the rezoning and DGEIS, and, even if it was not included in such notice, the amendment as adopted was not substantially different from the proposed rezoning (increasing the zoning from a one-acre minimum lot size district to a three-acre minimum lot size district rather than a five-acre minimum lot size district as originally proposed) to require a new notice and public hearing. The Court further held that the Town's zoning code's notice provision did not require a new public hearing with notice due to the change to the proposed amendment, finding that the intent of the Town Code was to provide notice of a zoning amendment so that the public would have ample opportunity to understand and comment on the proposed changes. Here, the petitioner-respondent had such an opportunity and commented on the proposed amendments, and, as a result of petitioner-respondent's comments, its property was zoned into a three-acre minimum lot size district rather than a five-acre minimum lot size district. Because petitioner-respondent had an opportunity to comment on the zoning amendments and because such comments influenced the rezoning of petitioner-respondent's property, the Court held that no purpose would be served by requiring the Town to go through the time and expense of re-noticing and holding a public hearing on the revised zoning amendments.[29]

B. Accuracy of Notice

In *Jones v. Zoning Board of Appeals of the Town of Oneonta*,[30] the Third Department held that the public notice and individual notice to neighboring property owners of a public hearing on a use variance application were defective and thus annulled the grant of the variance.

In *Jones*, the applicant, Larry Place, owned a parcel of property in the Town of Oneonta that was an inactive sand and gravel mine. After an unsuccessful attempt to obtain a special use permit to reactivate the mining operations on the property, Mr. Place made an application to the Town's zoning board of appeals to allow a mining operation on the property. The zoning board of appeals granted the variance. Its determination was challenged by an adjacent property owner on the grounds that the notice of the public hearing on the use variance application both to the public in general and to the petitioners specifically was defective.[31]

The petitioners, Rodney and Bonnie Jones, claimed that the public notice of the public hearing was inadequate because it listed an incorrect street address for the property (although the public notice did include

the correct tax map parcel number for the property). The petitioners also claimed that the notice to them personally was defective because it failed to comply with the relevant provisions of the Oneonta Code, which, in connection with an application for a use variance, requires service of public hearing notices on owners of properties within 200 feet of the subject property at least 10 days before the hearing at the surrounding property owners' last known address based on the Town's tax records. Here, the notice was sent to petitioners' former address, notwithstanding the fact that their current address was listed on the Town's tax records (the applicant had apparently failed to keep up with the Joneses).[32] Although petitioner Rodney Jones appeared at the public hearing and objected to the application and the notice, he learned of the public hearing only two hours before it was commenced. Petitioner Bonnie Jones did not become aware of the public hearing until after it was completed.[33]

Finding that the notice was adequate and that the grant of the variance was supported by substantial evidence, the Supreme Court dismissed the petition and the petitioners appealed. The Third Department reversed the Supreme Court's determination and annulled the variance on the grounds that the notice was defective. With regard to the public notice, the Court held that the inclusion of an incorrect property address in the public notice rendered the notice ambiguous and thus defective because it could "'misl[ead] interested parties into foregoing attendance at the public hearing.'"[34] The Court further held that the failure to provide notice to the petitioners at the address shown on the tax role was fatal to the notice attempt because the notice was not sent in accordance with the Town's procedures. Further, the Court held that petitioner Rodney Jones's appearance at the hearing did not cure the improper notice because petitioner Jones objected to the notice at the hearing and the two hours notice that he was given did not afford him sufficient time to prepare to meaningfully participate in the hearing. Although the Court recognized that in certain situations a challenger's appearance at and participation in a public hearing could cure a defective notice, in this case the prejudice to petitioners was not obviated by petitioner Rodney Jones's appearance and participation in the hearing.[35]

The apparent lesson from these two cases is that in the context of public hearing notices, the law is not black and white; the context in which the notice is sent and received and the level of participation of the challenging members of the public are all factors that contribute to a decision challenging a land use approval on public hearing notice grounds. An appearance at a public hearing by a challenger may, but will not always, cure a defective notice of a public hearing.[36] Therefore, practitioners representing applicants and municipalities alike should ensure that the content of a public hearing notice is accurate and that the notice is given in accordance with New York State and local law.

C. Case Notes

In *Lagin v. Village of Kings Point Committee of Architectural Review*,[37] the Second Department held that the Village of Kings Point's Committee of Architectural Review's (the "ARC") decision to approve the architectural plans for a residence proposed to be developed in the Village was a final decision subject to challenge pursuant to CPLR Article 78 by a neighboring property owner since "the ARC had exclusive authority to issue architectural approval of the plans for a proposed building, and no avenue of appeal was provided for aggrieved persons other than the applicant to review a determination of the ARC."[38] Because the challengers were precluded from any other form of review and no agency of the Village could change the determination of the ARC, "the ARC determination was final for the purposes of CPLR Article 78 Review and established the point from which the applicable four-month statute of limitations began to run."[39]

In *Hartford/North Bailey Homeowners Association v. Zoning Board of Appeals of the Town of Amherst*,[40] the Fourth Department upheld the issuance of negative declarations by the Town's zoning board of appeals and planning board in connection with the issuance of an area variance and site plan approval for a Wal-Mart store in the Town. In this case, petitioner, an opponent of the proposed Wal-Mart store, argued that the SEQRA determinations of the boards should be annulled because, among other things, the action was improperly classified as an Unlisted action under SEQRA rather than a Type I action and because the boards failed to complete parts 2 and 3 of the full environmental assessment form (EAF). The Court, although it agreed with petitioner that the project was not properly classified under SEQRA, held that the boards' failure to properly classify the action was "of no moment" since the record demonstrated that the boards followed the proper procedural and substantive requirements for Type I actions notwithstanding the Unlisted action designation. Similarly, the Court held that the boards' failure to complete parts 2 and 3 of the EAF did not mandate the nullification of the negative declarations since the record established that the factors to be considered in parts 2 and 3 of the EAF were in fact considered as a part of the review of the proposed project.[41]

Endnotes

1. *Goldstein v. N.Y. S. Urban Dev. Corp.*, 879 N.Y.S.2d 524 (1st Dep't 2009).
2. New York Constitution article I, § 7.

3. *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 874 N.Y.S.2d 414 (1st Dep't 2009).
4. *Goldstein*, 879 N.Y.S.2d at 526.
5. *Goldstein*, 879 N.Y.S.2d at 527.
6. *Goldstein*, 879 N.Y.S.2d at 527–528.
7. *Goldstein*, 879 N.Y.S.2d at 528.
8. *Id.*
9. *Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008).
10. *Goldstein*, 879 N.Y.S.2d at 529, 531.
11. *Goldstein*, 879 N.Y.S.2d at 531–532.
12. *N.Y. Housing Authority v. Muller*, 270 N.Y. 333 (1936).
13. *Goldstein*, 879 N.Y.S.2d at 532–533.
14. *Goldstein*, 879 N.Y.S.2d at 533 (1st Dep't 2009) (quoting EDPL § 207[C][4].
15. *Goldstein*, 879 N.Y.S.2d at 533.
16. *Goldstein*, 879 N.Y.S.2d at 533 ("What qualifies as a 'public purpose' or 'public use' is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility or advantage."(citation omitted)).
17. *Goldstein*, 879 N.Y.S.2d at 534.
18. *Id.*
19. *Goldstein*, 879 N.Y.S.2d at 535.
20. *Goldstein*, 879 N.Y.S.2d at 535–536.
21. *Goldstein*, 879 N.Y.S.2d at 536. The petitioners also alleged that the taking of their properties violated their rights to due process and equal protection. The Court dismissed these claims, finding that the ESDC complied with the procedural requirements of the EDPL, and that no equal protection claim could succeed because the petitioners could not show that they were intentionally being treated differently from others with whom they are similarly situated without a rational basis. *Id.*
22. *Goldstein*, 879 N.Y.S.2d at 536–537.
23. *Benson Point Realty Corp. v. Town of East Hampton*, 62 A.D.3d 989, 880 N.Y.S.2d 144 (2d Dep't 2009).
24. *Id.*
25. *Id.*
26. *Id.*
27. Town Law §§ 264, 265; Gen. Mun. Law § 239-m.
28. *Benson Point Realty Corp. v. Town of East Hampton*, *supra* note 23.
29. *Id.*
30. *Jones v. Zoning Bd. of Appeals of Town of Oneonta*, 61 A.D.3d 1299, 879 N.Y.S.2d 592 (3d Dep't 2009).
31. *Id.* at 1300–1301.
32. *Id.* at 1301. Furthermore, there was evidence in the record that the notice mailed to neighboring property owners did not include the date or time of the public hearing. *See id.* at fn.3.
33. *Id.* at 1302.
34. *Id.* at 1301.
35. *Id.* at 1302.
36. *Compare Jones*, 61 A.D.3d at 1302 ("Nor was the failure [to properly notice the public hearing] cured by petitioner Rodney Jones' appearance at and participation in the hearing. Approximately two hours before it was to commence, Rodney Jones discovered that the hearing was due to be held. He appeared at the hearing, raised the issue of notice and voiced objections to the application before the Board voted to grant the use variance.") *with John P. Krupski & Bros., Inc. v. Town Bd. of Town of Southold*, 54 A.D.3d 899, 901, 864 N.Y.S.2d 149, 151 (2d Dep't 2008) ("In any event, the plaintiff's receipt of actual notice of, and its appearance at, the public hearing constituted a waiver of the requirement that notice be given in strict accordance with the Southold Town Code.").
37. *Lagin v. Village of Kings Point Comm. of Architectural Review*, 2009 WL 1238467 (2d Dep't May 5, 2009).
38. *Id.*
39. *Id.*
40. *Hartford/North Bailey Homeowners Ass'n v. Zoning Bd. of Appeals of the Town of Amherst*, 2009 WL 1652970 (4th Dep't June 12, 2009).
41. *Id.*

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Resolving Municipal Annexation Disputes

By Alyse D. Terhune

In April 2006, two owners of property situated in the Town of Wallkill filed petitions with the Town and with the City of Middletown seeking annexation of over 100 acres of property (including a parcel owned by the City but located in the Town) to the City. Both the City and the Town are located in Orange County, New York. The City and Town declared co-lead agency status for the purpose of compliance with the State Environmental Quality Review Act (SEQRA). On May 24, 2006, a joint public hearing was held and closed on the same night. On August 14, 2006, the City issued a negative declaration under SEQRA and approved the annexation. On August 17, 2006, the Town issued a positive declaration and denied the annexation, setting the stage for litigation.

The Town's resolution denying the annexation cited flaws in the petitions rendering them insufficient under the provisions of Article 17 of the General Municipal Law; and that the annexation was prohibited under § 716(1)[1] because it altered state senate and assembly districts. The Town also found that, contrary to the City's negative declaration, SEQRA required the preparation of an Environmental Impact Statement. Finally, the Town, for a number of reasons, found that the annexation was not in the public interest.

The City commenced a special proceeding pursuant to CPLR 7801 in Orange County Supreme Court to annul those portions of the Town's resolution pertaining to compliance with GML Article 17 and SEQRA. At the same time, it challenged the Town's public interest finding in the Appellate Division, as provided by GML § 712(2). The Second Department consolidated the actions on March 17, 2008, ruling in favor of the City as to the matters of law presented in the Article 78 proceeding.[2] The public interest issue is pending as of the time of this writing.

Annexation Procedures

Article 17 of the General Municipal Law, known as the Municipal Annexation Law (MAL), authorizes the owner of a majority of the assessed value of property proposed for annexation to petition for the annexation of that property from one or more municipalities to another.[3] The property must be contiguous with the annexing municipality's border and, if multiple parcels are involved, as was the case here, with each other. Each property owner must file a petition with the affected municipalities, the form and content of which are defined by law.[4] A substantive defect in the petition or in the procedure will defeat annexation.

If the petition is sufficient and there are no procedural errors, and if the municipal governing boards determine that the annexation serves the public interest, it is approved by resolution of each board. Post-approval procedures are set forth in GML §§ 713 and 714, and will vary depending on the type of annexation presented.

The receipt of a complete petition triggers the beginning of a 160-day statutory clock, within which the municipalities must have one or more public hearings, complete SEQRA review and make a final determination as to whether to grant the petition. Within 20 days of receipt, the governing boards must publish a notice of pubic hearing and the municipality where the property is located must mail a copy of the notice to all affected property owners and school and fire districts.[5] The public hearing must be held not less than 20 days or more than 40 days after the publication and mailing of the notice. The hearing may be adjourned, but must be concluded within ten days after the date fixed in the notice.[6] The public hearing may be held separately or jointly. Within 90 days after the close of the public hearing, each board must, by resolution of a majority of its voting strength, decide whether the petition complies with the law and whether the annexation is in the public interest.[7]

But what happens when the municipalities disagree? Annexation disputes are governed by GML § 712, which confers original jurisdiction on the county Supreme Court to decide matters of law, and on the Appellate Division to determine whether the annexation is in the public interest.[8]

Because legal and public interest challenges are directed to separate courts, it is possible that the appellate court could reach the conclusion that the annexation is in the public interest, only to have the county Supreme Court void the petitions on jurisdictional grounds. The entire annexation process might be repeated, including public interest litigation. Such a result does not serve judicial economy, or anyone else's for that matter. In a perfect world, the lower court would always reach its decision before the appellate hearings begin.

To avoid such an unproductive outcome, GML § 712(3) authorizes the appellate court, on its own motion, to consolidate the actions and issue a ruling on matters of law before proceeding on the public interest

issue. In the alternative, the parties can request a stay of proceedings in the appellate court until the lower court's decision is reached.

Jurisdictional Issues Presented

The sufficiency of a petition is governed by GML § 705(1)(a) through (d), the latter containing a directive that the petition must "substantially comply in form or content with the provisions of this article."[9] Citing GML § 705, the Town denied the annexation on the following basis: (1) that errors and omissions in the petitions rendered them insufficient; (2) that a bisecting county road destroyed contiguity; (3) that GML § 706(1) prohibited petitioners from including property owned by the City but located in the Town; (4) that GML § 716(1) prohibited the annexation because it would affect senate and assembly districts; and (5) that SEQR was incomplete.

The errors and omissions cited in the Town's resolution included the designation of one of the petitioners as a "Corporation" rather than an "LLC," the misidentification of a signatory as "Howard" instead of "Harold," and the failure of the Notary Public to identify the county in which an acknowledgement was made. In addition, the Town determined that the inclusion of a metes and bounds description for each parcel, rather than an overall metes and bounds description of the entire territory to be annexed, did not conform to the "description" of the territory required under GML § 703(1). Finally, the Town concluded that GML § 705(1) required petitioners to attest to their signatory authority at the public hearing. For these reasons, the Town declared that the petitions were not sufficient under the law.

In addition to the insufficiency of the petitions, the Town interpreted GML § 706(2), which governs the annexation of uninhabited land owned by a City or a Village, as barring any but the City from seeking annexation of its property. Section § 716(1), which states that "[a]n annexation shall not affect the boundaries of any congressional district, senate district or assembly district," was also interpreted by the Town as prohibiting the annexation because the City and Town are in different senate and assembly districts.

The City's primary legal challenge to the Town's resolution rested on GML § 705(2), which demands that any objections to the sufficiency of a petition or noncompliance with the article, i.e., grounds identified in § 705(1)(a) through (d), be set forth during the public hearing and made part of the record.[10] Because none of the objections cited by the Town were raised at the public hearing, the record contained no legal or factual basis for its denial on ministerial grounds.

The City also argued that the purpose of the public hearing is to give others an opportunity to question the authority of a signatory to the petition, and not, as the Town concluded, a forum whereby the signatories must prove their authority.

After addressing the ministerial and public hearing objections, the City challenged the Town's interpretation of GML §§ 706(2) and 716(1). The City argued that § 706(2) simply offers an alternative method of transferring uninhabited municipal-owned property without the necessity of a petition and public hearing, as is required under § 703 for inhabited properties. Otherwise, the City argued, so long as a petitioner owns the majority of the assessed value of all property proposed for annexation, he or she may incorporate the property of others.

Finally, the City argued that GML § 716(1) limits the effect of annexation on congressional districts but does not act as a prohibition where property would be moved from one district to another as a result.

The SEQRA Issues Presented

The annexation of 100 or more acres is classified as a Type 1 action under SEQRA.[11] Therefore, an annexation cannot be approved or disapproved until SEQR review is complete. The lead agency must review the Environmental Assessment Form (EAF) and determine whether an environmental impact statement (EIS) need be prepared. If not, it issues a negative declaration and SEQR review is closed. On the other hand, if it determines that the annexation will result in significant environmental impact, then it issues a positive declaration and, typically, requires the preparation of an EIS. The SEQR process is not complete until the lead agency issues a Findings Statement.

The state or local agency with primary approval authority for an action typically assumes lead agency designation. However, because only municipal governing boards can approve or deny land annexation, and because two or more municipalities are always involved, the question of which one assumes lead agency becomes an issue. Here, the issue was addressed by the assumption of "co-lead agency" status.

Not surprisingly, the City and Town reached opposing SEQRA determinations. The City issued a negative declaration determining that the transfer of land to the City would have no effect on the environment and that no EIS need be prepared. The Town issued a positive declaration determining that the annexation required the preparation of an EIS. The Town's SEQRA decision was predicated on its belief that because the property owners intended to develop the property, a negative declaration was improper.

In its pleadings, the City argued that in the absence of a specific development plan, only the impact of the annexation itself may be considered in making a

SEQRA determination. The City argued that it complied with SEQRA by considering the annexation, evaluating a long form EAF and issuing a reasoned negative declaration, thus closing the SEQRA inquiry.

The Court's Analysis

The Second Department was persuaded by the City's "dehors the record" argument finding that to the extent the Town failed to object, or entertain objections from others as to the sufficiency of the petitions, it "conceded that the Petition for Annexation complied with the requirements of article 17 of the General Municipal Law."[12] Thus, the Town could not base its denial on objections presented for the first time in its own resolution.[13]

The Court also agreed with the City's interpretations of GML § 706(2) and 716(1). It concluded that owners of a majority of assessed value have standing under GML § 703(1) to annex the land of others, notwithstanding the alternative method provided by § 706(2). Nor did the presence of the county road destroy contiguity.[14]

Likewise, the Court interpreted § 716(1) as "merely act[ing] as a restriction on the effect of the annexation and not as an outright prohibition."[15] The Court contrasted the language of § 716(1) and § 716(3) through (6), which use clear prohibitive language, to § 716(2), which does not, showing legislative intent to limit, not prohibit, annexations.

Finally, the Court addressed the SEQRA issue, ruling that the Town erred in determining that an EIS was required because it was premised on speculation as to how the developer might use the property.[16] Relying on *City Council of City of Watervliet v. Town Bd. of Town of Colonie*,[17] the Court determined that "since no specific plan for the property had been officially submitted or a rezoning proposal made that would change the use of the property, the EAF was limited to the annexation itself and its effects."[18]

Conclusion

The decision addressed the issues of sufficiency of the petitions and compliance with the annexation law, and confirmed that speculative development is not a basis for a SEQRA positive declaration under New York State case law. However, the Court was not presented with and did not address the legal conflicts presented by SEQRA compliance in the annexation process. Neither SEQRA nor Article 17 addresses the 160-day procedural time line or the issue of lead agency determination in the context of land annexation.

First, it may be impossible for municipalities to make a decision within the Municipal Annexation Law's 160-day time frame if the lead agency determines that an environmental impact statement must be prepared.

Second, because co-lead agencies are neither authorized nor specifically prohibited under SEQRA, there is the potential for co-lead agencies to reach opposing determinations, as happened here. Therefore, a catch-22 situation is created where municipalities are bound by the law to close the SEQRA inquiry before making a final annexation determination and yet are constrained by the annexation statutory time line. These issues will be addressed in future litigation, or by the Legislature.

Endnotes

1. General Municipal Law § 716, specifically paragraphs (3) through (6), enumerates circumstances which prohibit annexation.
2. *City of Middletown v. Town Bd. of Wallkill*, 54 A.D.3d 333, 863 N.Y.S. 2d 52 (2d Dep't 2008).
3. GML § 703(2). Annexation may also be commenced upon a petition signed by at least 20% of the persons residing in the territory, if any, qualified to vote for local officials.
4. GML § 703.
5. GML § 704.
6. GML § 705(2).
7. GML § 711(1).
8. The determination of "public interest" entails the appointment of three referees by the appellate court to conduct a *de novo* hearing on the issue and report back to the court. The court considers the report, although it is not bound by it, and makes a decision as to whether the annexation is in the public interest.
9. Subsection (e) addresses public interest.
10. General Municipal Law § 705(2) states that "[o]bjections based on any of the grounds set forth in [705(1)(a) through (d)] shall, in addition to the presentation of any oral testimony thereon, be submitted in writing and placed on file with the boards holding such hearing and made part of the record thereof."
11. 6 N.Y.C.R.R. 617.12(b)(4). Although Type 1 actions are more likely to involve at least one significant environmental impact requiring analysis, this is not always the case.
12. *City of Middletown*, 54 A.D.3d 333, 336.
13. *Id., citing Wright v. Ranson*, 307 N.Y. 317, 321 (1954); *cf. City of Batavia v. Howland*, 43 A.D.2d 787, 788 (4th Dep't 1973) for the proposition that a municipality may not deny annexation where there is no basis in the record for determining that the petition failed to comply with the provisions of the statute.
14. *Citing Common Council of City of Gloversville v. Town Board of Town of Johnstown*, 32 N.Y.2d 1, 4 (1973).
15. *City of Middletown*, 54 A.D.3d at 337.
16. *Citing Cross Westchester Dev. Corp. v. Town Bd. of Town of Greenburgh*, 141 A.D.2d 796, 797, 529 N.Y.S.2d 870 (2d Dep't 1988).
17. 3 N.Y.3d 508 (2004).
18. *City of Middletown*, 54 A.D.3d at 337.

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