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Municipal Lawyer

A publication of the Municipal Law Section of the New York State Bar Association, produced in cooperation with the Government Law Center at Albany Law School

A Message from the Chair

Howard Protter

This is an exciting time to be involved in government law and practice whether you represent local government or private clients interacting with local governments. Today we are all learning to live with a state mandated Tax Cap, implications of municipal consolidation and dissolution, real property tax issues with rapidly falling market values, and ethical issues surrounding communications with public officials. Economic redevelopment of our aging cities and infrastructure presents challenging opportunities for public private partnerships to experiment with new technologies and design concepts which advance energy conservation and establish safer and healthier communities. The prospect of gas drilling in the Marcellus Shale area of our state presents unique hopes of economic expansion and energy independence, as well as significant environmental concerns. The urgency for communities to have an array of affordable housing available is magnified in this economy where unemployment and underemployment are at levels not seen by many in this generation. Municipal employers and labor unions are struggling to reach collective bargaining agreements which reflect very real budgetary constraints, maintain jobs and address the rising cost of health care. Attorneys who understand the broad legal framework in which all of these issues and opportunities arise in are imperative for the future of our state.

Inside

NYSBA

As this new, expansive issue of our *Municipal Lawyer* demonstrates, the New York State Bar Association's Municipal Law Section provides the premier statewide forum for analysis and discussion of the latest developments in municipal law. I am pleased to recount the success of the Section's Annual Meeting held in New York at the Hilton New York. Program Co-Chairs Darren Derosia and Michael Kenneally created a timely program which addressed the most current and significant municipal law issues affecting our profession. The programs were all very well attended, and the speakers were engaging, informed and informative. The printed materials provided to us will long serve as practical reference guides to these complex and changing areas of the law.

I am happy to report that your Executive Committee has been continuing its work to increase the diversity of our Section and has authorized the creation of a Young Lawyers subcommittee to reach a broader audience. Our future CLE events will include more programs tailored to the needs of young lawyers as well as the seasoned practitioners.

I encourage you to make the most of your Section membership by becoming involved in the great work of our committees: Bylaws, Employment Relations, Ethics and Professionalism, Government Operations, Green Development, Land Use and Environmental Law, Legislation, Membership, Municipal Finance & Economic Development, and Technology. This issue of the *Municipal Lawyer* contains names and contact information for members of the Executive Committee and committee leadership. **Section members can conveniently join one or more of our committees online at ww.nysba.org/municipal**. Contact NYSBA Membership Services if you need your Web site sign-in information: **518.487.5577 / 800.582.2452**, or **membership@nysba.org**.

I encourage you to make the time to get involved with our Section. Not only do Section programs keep you up to date on the latest developments in municipal law, they provide great professional development opportunities—you'll meet leading colleagues in the field of municipal law and share with them common problems and solutions you face in your daily practice. The networking, the intellectual stimulation and the ability to make a difference in the practice of municipal law are all invaluable rewards.

As always, please contact me at hp@jacobowitz.com with your suggestions or ideas for improving our Section. I look forward to seeing you at an upcoming program.

Howard Protter

From the Editor

The team at the Government Law Center of Albany Law School is honored to have assumed editorial responsibilities of the *Municipal Lawyer* beginning with this issue. We are grateful to Lester Steinman and the more than three decades of stewardship he has put into every page of each issue of the Section's flagship publication. Joining me in the production of this issue are associate editors Daniel Gross, Esq., Charles Gottlieb, Esq. and Amy Lavine, Esq. Student editors are Zachary Kansler '12 and Laura Bomyea '13.

In this issue of the *Municipal Lawyer*, we introduce readers to two blogs of interest for municipal lawyers by reprinting a recent posting from each. The first is from the Fireplace, a blog maintained by the students at the Albany Government Law Review (see, http://aglr.wordpress.com). The Fireplace is the first student written and edited law blog in the country to engage in substantive law review-like legal analysis and academic speculation. It publishes short comments on recent developments in government law and policy, especially as they relate to New York state government. In this issue we reprint student Benjamin Fox's posting on refusing chemical tests by conduct and the N.Y. Vehicle and Traffic Law. The second blog entry is by Amy Lavine, Esq. from the Public Authorities Blog (www.publicauthorities.wordpress.com). This short article discusses the recent Court of Appeals case addressing the sale of swipes on MTA cards.

There is a series of articles addressing environmental and land use issues, including a piece by Dominic Cordisco, Esq. discussing a recent court challenge to the 2010 Endangered Species regulations adopted by NYSDEC. Charles Gottlieb, Esq. authored a short article explaining the recently enacted "complete streets" law in New York, and Joel Russell, Esq. examines the use of mandated conservation easements to protect open space in cluster developments.

Four articles deal with the subject of municipal liability. The first article, by Alyse Terhune, Esq., provides a case law overview of liability issues for slips and falls on ice in municipally owned parking lots. Bradley Pinsky, Esq. offers much needed information on municipal contract issues involving emergency medical services—a topic where there is scant case law. Karen Richards, Esq. examines the use of collateral estoppel in the civil rights context when dealing with a parole revocation claim. Lastly, Daniel Gross, Esq. provides a discussion of a case recently argued at the U.S. Supreme Court on the subject of qualified immunity as it pertains to private practice attorneys retained by local governments for particular matters.

This issue is rounded out with an ethics article by Steven Leventhal, Esq., who discusses the "no contact rule" as applied to government lawyers. Sharon Berlin, Esq. and Richard Zuckerman, Esq. provide an update on the recent Court of Appeals decision regarding contractual no-layoff provisions. Lastly, Darrin Derosia, Esq. compiled a summary of new legislation enacted in 2011 of interest to municipal attorneys, as well as few noteworthy vetoes.

Please consider writing an article for a future issue of the *Municipal Lawyer*. The interesting issues you are dealing with in your practice often make excellent educational reading for others. If you don't have time to write, but have ideas on topics you think ought to be covered, please send those suggestions along as well.

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Refusing a Chemical Test by Conduct: The Need for Expansion in Vehicle and Traffic Law § 1194

By Benjamin Fox

When a police officer is suspicious that someone is driving under the influence it is common knowledge that a field sobriety or breathalyzer test is soon to follow. It is also well known that the driver will be taken to the local jail for processing should he fail one or both of those tests. However, the administration of a second chemical test while in police custody seems to be less well known. These tests, typically in the form of another breath test (though blood tests are also possible), are significantly more sophisticated and important than field tests.[1] The results of the chemical test are admissible in a Vehicle and Traffic Law (VTL) § 1192 hearing–operation of a vehicle while under the influence of alcohol or drugs.[2]

The administration of a chemical test is governed by VTL § 1194, which requires that the officer have reasonable grounds to believe the person in custody has violated § 1192 prior to administration of the test.[3] The test must also be administered within two hours of the initial detainment. VTL § 1194 explains that there is no "right" to refuse the test and so consent to the test is not constitutionally required.[4] In the event that the detainee refuses to take the test she will have her license temporarily suspended, and potentially revoked.[5] Furthermore, evidence of refusal can be used against the driver during the VTL § 1192 hearing.[6] Because high stakes are involved it is important to understand exactly what "refusal" means. Unfortunately VTL § 1194 does not specifically define refusal, so the definition has been developed through various judicial decisions.

The clearest example of refusal is verbal, express refusal.[7] For instance, "I will not submit to the test." If the driver refuses, VTL § 1194 dictates that he be informed of the legal consequence of his refusal and given a second chance to take the test.[8] If that person persists in his refusal he will have his license temporarily suspended *regardless of* whether or not he is found guilty of a VTL § 1192 violation.[9]

The second form of refusal is less clear—refusal by conduct. *People v. Davis* explains that, "where a defendant first verbally consents to take the breathalyzer test, but then *deliberately* acts in such a way as to prevent the breathalyzer machine from working, the defendant will be deemed to have refused by his conduct to take the test."[10] Examples of this behavior include refusal to take the test a second time after the initial attempt proved inadequate, refusal to take the test at a particular hospital, avoiding the test by "feigning unconsciousness," and others.[11] Refusal has even been found where a motorist agrees to take the test *and* delivers a sample. This conduct is the primary issue for the remainder of the article.

Van Sickle v. Melton explained that where a driver blows into the machine but "deliberately diverts his breath in order to prevent the machine from registering a reading," the defendant has refused.[12] In this case, the officer's testimony that he heard air coming out the side of the defendant's mouth was enough to suggest that the defendant's actions were deliberate.[13]

In another case, *Beaver v. Board of Appeals,* a driver submitted to a breathalyzer test and after several failed attempts was deemed to have refused.[14] The driver's doctor subsequently testified to the driver's pulmonary function, stating that the driver could only exhale 190-204 cc's or 9-12% of air for a person her age.[15] However, the Court of Appeals affirmed the finding of refusal upon information that the breathalyzer machine could take a sample with as little as 55-56 cc's of air.[16] Inferentially, since the machine could take a sample with a smaller amount of air than the driver was capable of producing, she must have *deliberately* diverted her breath or acted in a way that resulted in failure to take a sample.[17]

Unfortunately, the connection between hearing air escape from the corner of one's mouth and deliberately diverting air in order to fool a breathalyzer machine, as it occurred in *Van Sickle*, seems tenuous. Air escaping from the sides of one's mouth does not necessarily mean that there was a deliberate attempt to circumvent a breath test.

The inferential connections made in *Beaver* seem equally tenuous. The driver's ability to exhale 190-204 cc's of air coupled with the machine's ability to take a reading with as little as 55 cc's of air does not ultimately mean that the machine's inability to produce a sample resulted from the driver's deliberate diversion. In the case of *Beaver*, the administering officers only testified that the defendant was given three opportunities

to blow into the machine but each time no air was produced.[18] Thus, she was found to have refused despite the driver's explanation that she was trying her best to comply.[19] That the driver was trying her best could have been a crucial turning point in other cases such as *People v. Davis*.[20]

In *Davis* the court stated that where a defendant acts in "good faith" by genuinely attempting to produce a breath sample by "breathing directly into the machine," it couldn't be said that such a person actually "refused the test."[21] VTL § 1194 does not currently spell out what it takes to refuse a test by conduct. Perhaps if this test was considered in cases like *Beaver* and *Van Sickle* other evidence would have been more carefully reviewed and the outcome would have been different.

In light of this information the legislature has a responsibility to do two things. First, the definition of refusal should be fully realized in statute, for ease if for no other reason. Second, and more importantly, it would be helpful for the legislature to articulate a test that can more accurately identify refusal by conduct, especially for those who have willingly submitted to a breathalyzer test. The "deliberate diversion" test should be used *in conjunction* with the "good faith test" set forth in *Davis.* The deliberate diversion is an important tool for determining whether someone has genuinely submitted to a breath test. At the same time a good faith test can counteract the potentially harsh effects of the deliberate diversion test in times when some other potential error in the process, of no fault to the defendant, is capable of explaining what appears to be deliberate.

Endnotes

1. N.Y. VEH. & TRAF. LAW § 1194 (McKinney 2011).
2. § 1192.
3. § 1194.
4. People v. Anderson, 568 N.Y.S.2d 306, 308 (Nassau D.C. 1991).
5. VEH. & TRAF. § 1194.
6. *Id.*; *Anderson*, 568 N.Y.S.2d at 307–08.
7. 8 N.Y. JUR. 2D *Automobiles* § 568 (West 2011).
8. VEH. & TRAF. § 1194.
9. *Id*.
10. 797 N.Y.S.2d 258, 263 (Sup. Ct. Bronx Co. 2005) (emphasis added).
11. 8 N.Y. JUR. 2D at § 568.
12. *Davis,* 797 N.Y.S. at 263 (*citing* Van Sickle v. Melton, 407 N.Y.S.2d 334 (App. Div., 4th Dep't 1978)).
13. *Melton*, 407 N.Y.S.2d at 335.
14. 499 N.Y.S.2d 248, 249 (App. Div., 3d Dep't 1986)).
15. *Id.* at 251.
16. Beaver v. Appeals Bd. of Admin. Adjudication Bureau, State Dep't of Motor Vehicles, 502 N.E.2d 994, 994 (N.Y. 1986) (citing *Beaver*, 499 N.Y.S.2d at 251 (Kane & Levine, JJ., dissenting) (The Court of Appeals decision directly references factual information from the Appellate Division decision without stating particular facts of the case in its opinion)).
17. *Beaver,* 499 N.Y.S.2d at 251 (Kane & Levine, JJ., dissenting).
18. *Id*. at 249.
19. *Id.*
20. 797 N.Y.S.2d 258, 265 (Sup. Ct. Bronx Co. 2005).
21. *Id.* at 262, 265.

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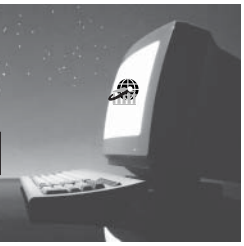

From the Public Authorities Blog: The MTA Doesn't "Own" Possible Future Fares, So Selling Metrocard Swipes Isn't "Larceny" (It's Still Illegal Though)[1]

By Amy Lavine

The Court of Appeals decided recently that selling swipes of an unlimited MetroCard, "although decidedly criminal in nature," isn't larceny.[2] For those of you who've never witnessed this "classic subterranean swindle," *The New York Times* explains[3] how it works: "The scam is simple. An enterprising scofflaw invests in an unlimited pass and charges passengers less than the standard fare. After recouping the investment, the rest is pure profit—and the Metropolitan Transportation Authority loses out on legitimate fares."[4]

The defendant in this case was charged with petit larceny, a class A misdemeanor that's routinely applied in similar cases, and he was also charged with a class B misdemeanor under the specific statute that prohibits the unauthorized sale of transportation services. He pled guilty to petit larceny in satisfaction of all the charges, but then challenged the validity of the accusatory instrument (a misdemeanor information in this case) on jurisdictional grounds, claiming that it violated the reasonable cause requirement.

The court agreed that the misdemeanor information in this case was defective. Although it provided reasonable cause for the unauthorized sale of transportation services, the court explained, it didn't support the charge of petit larceny, which is what the defendant was actually convicted of.

Larceny—which is legalese for stealing—requires proof that the stolen property belonged to someone else, and this element simply wasn't met in this case:

> The Authority was not deprived of the unknown amount of money that defendant accepted from the subway rider because it never owned those funds. In *People v. Nappo* (94 NY2d 564 [2000]), we held that the State was not the "owner" of uncollected taxes within the meaning of the statutory definition of the term because "taxes due were not the property of the State prior to their remittance." Here, the unknown amount of money paid to the defendant could have been due and owing to the [New York City Transit Authority], but as was the case in *Nappo*, the NYCTA never acquired a sufficient interest in the money to become an "owner" within the meaning of the [larceny statute].[5]

The court also rejected the prosecution's argument that the defendant had committed larceny by depriving the authority of its business:

> We have held that taking away a portion of a person or entity's business through extortion constitutes larceny (see *People v. Spatarella*, 34 NY2d 157 [1974]). However, we decline to extend that reasoning to these facts because here we must assume that the NYCTA voluntarily transferred this valid MetroCard in a manner consistent with its ordinary course of business by selling the card and receiving the price set. By contrast, in *Spatarella*, the victim was compelled to give up a business customer (who, unlike the uncollected taxes in *Nappo*, was already within his "control" and "possession") to one of the defendants when that defendant threatened the victim with physical injury.
>
> Accordingly, in this case, there was no basis for the petit larceny charge in the misdemeanor information, and as a violation of the reasonable cause requirement, there was no jurisdiction to prosecute the defendant.[6]

People v. Hightower, 18 N.Y.3d 249 (2011).[7]

Endnotes

1. This post appeared on December 14, 2011 on the Public Authorities Blog maintained by the Government Law Center of Albany Law School. The blog is a free resource and is available at: www.publicauthorities.wordpress.com.
2. People v. Hightower, 18 N.Y.3d 249, 251 (2011)
3. Michael M. Grynbaum, *Selling Swipes May Be a Swindle, But Don't Call it Larceny*, N.Y. TIMES, Dec. 14, 2011 at A28, *available at* http://www.nytimes.com/2011/12/14/nyregion/selling-metrocard-swipes-isnt-larceny-new-york-court-of-appeals-rules.html?_r=2.
4. *Id*.
5. People v. Hightower, 18 N.Y.3d 249 (2011).
6. *Id*.
7. Decision also available at: http://www.courts.state.ny.us/CTAPPS/Decisions/2011/Dec11/223opn11.pdf.

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Court Dismisses Lawsuit Challenging NYSDEC's 2010 Endangered Species Regulations

By Dominic Cordisco

On December 1, 2011 the New York State Supreme Court, Albany County, dismissed the lawsuit brought by the Town of Riverhead and other interested parties that challenged the new Part 182 Endangered Species regulations adopted by the New York State Department of Environmental Conservation (NYSDEC) in November 2010.[1]

Riverhead, through its local Community Development Agency, is the owner of the Enterprise Park at Calverton (EPCAL). EPCAL is a planned redevelopment of a 2,900-acre property formerly known as the Naval Weapons Industrial Reserve Plant at Calverton, assembled by the Navy in the 1950s and leased to the Grumman Corporation for final assembly and flight-testing of military aircraft. In 1996, defense downsizing resulted in closure of the Grumman facility. In September 1998, the U.S. Government transferred the site to the Town of Riverhead Community Development Agency on the condition it be used for economic development to replace thousands of well-paid jobs and tax base lost by the Grumman closure. NYSDEC identified the EPCAL site as habitat for tiger salamanders and the short-eared owl, both protected species in New York; NYSDEC informed Riverhead that any reuse of the property would require an incidental take permit.

The thrust of Riverhead's challenge related to the new "net conservation benefit" standard for permit issuance. By adopting the 2010 regulations, NYSDEC significantly changed the regulatory oversight of endangered and threatened species in New York State. The 2010 regulations require an applicant to provide a "net conservation benefit" in order to obtain a permit to "take" a protected species.[2] Taking is broadly defined, and includes any disturbance of a protected species habitat.[3] The 2010 regulations require an applicant to not only mitigate a project's potential impacts on a protected species, but to enhance the species' habitat above and beyond what it would be even if the project were not built.

The 2010 regulations define net conservation benefit as:

> …[A] successful enhancement of the species' overall population or contribution to the recovery of the species within New York. To be classified as a net conservation benefit, the enhancement or contribution must benefit the affected species listed as endangered or threatened in this Part or its habitat *to a greater degree than if the applicant's proposed activity were not undertaken*.[4]

Prior to the adoption of the 2010 regulations, a project's potential impact on protected species had been largely evaluated and mitigated through the State Environmental Quality Review (SEQR) process; the NYSDEC has seldom issued endangered species permits (known as Article 11 permits) when a project's impacts have been addressed through SEQR. Nonetheless, the conservation of endangered species has long been a legislative policy of New York, and ever since the enactment of the State Endangered Species Act in 1972, NYSDEC has had the authority to require a permit for a taking of protected species. However, both the enabling legislation and the prior regulations did not provide NYSDEC with a standard to use in deciding whether to issue such a permit. The prior regulations merely provided NYSDEC with the discretion to issue such a permit, on conditions that it "may deem appropriate."[5] The State Endangered Species Act simply provides that "the taking… of any endangered or threatened species...is prohibited, except under license or permit from the [NYSDEC]."[6] The 2010 regulations create a new category of permit, called an "incidental take permit," which requires that an applicant provide not only a mitigation plan, but also a net conservation benefit for the species in order to obtain a permit.[7]

In its lawsuit, Riverhead claimed, among other things, that the NYSDEC's adoption of the 2010 regulations was beyond the power delegated to it by the state legislature.[8] In its response, NYSDEC argued that the lawsuit must be dismissed because Riverhead's issues were not yet ripe for review given that Riverhead had not yet been denied an incidental take permit. The Court agreed, stating that "the mere fact that [Riverhead] may have to endure the [NYSDEC] review process is not sufficient, without more, to constitute injury."[9]

Riverhead argued, unsuccessfully, that by requiring an applicant to enhance the habitat of a protected species beyond the status quo ante, NYSDEC has shifted the public goal of protecting endangered and threatened species onto individual applicants.[10] Prior to the 2010 regulations, individual applicants have had to address their own projects' impacts—not enhance a species' wider viability. This issue was not addressed by the Supreme Court, as the Court did not reach the merits of the issue.

Unless the Supreme Court's decision is reversed on appeal, any challenge to the 2010 regulations would have to occur after NYSDEC completes its permit review and either issues or denies an incidental take permit.

Endnotes

1. Ass'n for a Better Long Island v. New York State Dep't of Env. Cons., 935 N.Y.S.2d 488 (Sup. Ct. Albany County, 2011), *available at* http://www.nycourts.gov/reporter/3dseries/2011/2011_21431.htm.
2. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.12(a)(3) (2012).
3. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.2(x).
4. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.2(o) (emphasis added).
5. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.4 (Repealed).
6. N.Y. ENVTL. CONSERV. LAW § 11-0535(2) (McKinney 2012).
7. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.11(a).
8. Ass'n for a Better Long Island v. New York State Dep't of Env. Cons., 935 N.Y.S.2d 488 (Sup. Ct. Albany County, 2011).
9. *Id.* at 494.
10. *Id.* at 492.

Dominic Cordisco is a partner with the New Windsor law firm of Drake, Loeb, Heller, Kennedy, Gogerty, Gaba & Rodd PLLC. His practice includes land use permitting and environmental law for both municipal and private clients. He is a past Regional Attorney for Region Three of the New York State Department of Environmental Conservation. Mr. Cordisco has been a lecturer for various programs including SEQRA, wetlands regulation, mining, underground storage, and oil spills, and appears regularly before the New York Association of Towns, the New York Planning Federation, and the Orange County Municipal Planning Federation. Mr. Cordisco is director of the Orange County Partnership, a co-chair of the Alliance for Balanced Growth, and he serves as co-chair of the New York State Bar Association Environmental Law Section's Committee on Mining, Oil and Gas Regulation. He earned his B.A. from the State University of New York at Plattsburgh and his J.D. from Fordham University School of Law, where he received the Murray Award for Outstanding Public Service. Mr. Cordisco can be reached at cordisco@gmail.com.

Complete Streets: New York Legislation and Policy Overview

By Charles Gottlieb

Municipal streets are the channels of transportation for all users including motorists, bikers, pedestrians, and those using public transportation. In the growing age of environmentalism, local grassroots initiatives, and extended life expectancies, it is important to reexamine the impact that the methods of transportation have on our lives and community. Redesigning streets and sidewalks to accommodate health, safety, and environmental concerns is part of this mix. To meet these ends, in 2011, the New York State legislature amended the New York Highway Law incorporating a "complete streets" policy.

The complete streets movement has its roots with federal legislation in 2009. The federal bill, enacted into law, sought to ensure that each state's department of transportation and metropolitan planning organizations consider complete streets during their transportation projects.[1] Accordingly, states and municipalities are busy implementing complete streets policies that will provide for the safety, health, and welfare of their community.[2]

After an unsuccessful effort to bring a complete streets program to New York in 2009,[3] a more comprehensive law was enacted last year mandating that all state, county, and local transportation projects, undertaken by the Department of Transportation (DOT) or those that receive federal or state funding, "consider the convenient access and mobility on the road network by all users of all ages, including motorists, pedestrians, bicyclists, and public transportation users through the use of complete street design features…."[4] These complete streets design features must be considered in the planning, design, construction, reconstruction, and rehabilitation of transportation. However, they do not need to be considered during resurfacing, maintenance, or pavement recycling transportation projects.[5]

The bill requires the use of many complete streets design features, including: "sidewalks, paved shoulders suitable for use by bicyclists, lane striping, bicycle lanes, share the road signage, crosswalks, road diets, pedestrian control signalization, bus pull outs, curb cuts, raised crosswalk and ramps and traffic calming measures."[6]

Overall, the new law emphasizes the need for flexibility when implementing complete street features, allowing for a more tailored approach for both rural and urban settings. To accomplish this, the law includes many exceptions for municipalities and the DOT. For example, there are exceptions for projects where: the use of the road by bicyclists or pedestrians is prohibited by law; the cost for implementing the complete street principles would be disproportionate (considering the land use context, volume of non-automobile users, population density, etc.); there is a lack of need for the complete street principles (considering population, land use context, traffic volume, etc.); or the design features considered during the project would have an adverse impact or are contrary to public safety.[7]

The law also includes various reporting/transparency requirements. For instance, DOT must report its compliance with the complete streets legislation two years after the passing of the bill.[8] In the report, DOT must show how it has complied with the law, specifically in the planning, scoping, and construction of projects.[9] The report must also include an identification of best practices used by DOT when implementing complete streets principles in new projects.[10] These best practices require DOT to consult with land use, environmental, and transportation representatives from various municipalities, metropolitan organizations, public transit operators, relevant state agencies, and other stakeholders (disability rights groups, aging groups, bike and pedestrian groups, etc.).[11]

The new law does not require the state to spend additional funds to comply. Also, failure to comply with the new law is not admissible as evidence against the state, any municipality or public authority in any claim for money damages. The law becomes effective 180 days after the bill was signed (signed August 15, 2011), and projects previously undertaken or approved prior to the effective date are exempt.[12]

Municipal Complete Streets Plans

Municipalities should consider adopting a complete streets plan for a number of policy reasons. First, complete streets designs emphasize pedestrian safety. Statistics show that many pedestrian deaths

and accidents occur on streets without crosswalks or safety mechanisms for non-automobile travelers.[13] Second, complete streets promote a healthy lifestyle, encouraging exercise through more accessible walkways and bike paths.[14] Third, complete streets, with its emphasis on improved public transportation, will allow the aging, disabled, and other populations that rely on public transportation to re-engage themselves in their community.[15] Fourth, complete streets is environmentally conscious, promoting carpooling, walking, or biking to lower carbon emissions, reduce air and noise pollution, traffic congestion, and climate change.[16] Lastly, and most important in a time of local economic stress, complete streets will bring people to the community center with slower traffic, by lowering automobile speeds and promoting walking or biking, allowing them to spend time shopping in local businesses, which will increase downtown economic development.[17]

Implementation Tactics for Municipalities

A major challenge for complete streets programs is the implementation of the policy into the actual construction of complete streets due to cost and uncoordinated planning at the local level. However, these added costs can be curtailed by thoughtful and comprehensive planning, and utilizing opportunities to make small but impactful changes to street designs. Early consultation with all stakeholders and developing a planning process before construction will avoid costly mistakes in the early stages of implementation and will more effectively integrate all design features.[18] Additionally, even small, inexpensive changes can help employ complete streets principles. For example, the American Planning Association notes that even simple solutions such as changing the paint on a road can be inexpensive and make large impact.[19] To this end, repaving opportunities, replacing signal detectors, narrowing travel lines, and adding sidewalks are all projects that would easily lend themselves to affordable complete streets changes.

Complete Streets Implementation and Comprehensive Plans

To ensure that complete streets policies are put into action, municipalities should create an implementation plan and add complete streets language into their comprehensive plan. An implementation plan simply identifies the tasks that must be completed to jump start the initiative. It examines what needs to be changed, delegates who should make those changes, and lays out a process for design standards to be set in place.[20] Even more important is the addition of policy language to a municipality's comprehensive land use plan, ensuring that complete streets will be a priority of the municipality in every development project.

Conclusion

With the safety and welfare of the community in mind, New York has taken the necessary steps to incorporating complete streets design principles into transportation projects. Once implemented, the complete streets legislation will make the streets a safer place for all roadway users through requirements that must be followed when certain transportation projects are undertaken. Complete streets projects have the ability to reform the way New York's roads impact the community, its residents, and the environment. Municipal officials should use their local comprehensive land use plans to outline the community's complete streets policy to make certain that it is not overlooked.

Endnotes

1. Sebastian Przybyla, *Finding the Right Way: Implementing Complete Streets Programs*, 33 ZONING AND PLANNING LAW REPORT No. 10, 5 (2010).
2. AMERICAN PLANNING ASS'N, COMPLETE STREETS: BEST POLICY AND IMPLEMENTATION PRACTICES 3 (2010) (herein after "COMPLETE STREETS").
3. S.B. 5711; A.B. 8587 (N.Y. 2009). This bill would have recognized bicycle, pedestrian and transit modes of travel as integral to the transportation system and also would have required additions to the roads to include paved shoulders suitable for bicyclists, lane stripping, share the road signage, crosswalks, pedestrian control signals, bus shelters, curb cuts, and ramps.
4. 2011 N.Y. LAWS Ch. 398.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. COMPLETE STREETS, *supra note* 2 at 4.
14. *Id.*
15. *Id.* at 6.
16. *Id.* at 5.
17. *Id.* at 5–6.
18. *Id.* at 66–67.
19. *Id.* at 69.
20. *Id.* at 46.

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Mandating Conservation Easements to Protect Open Space in Cluster Developments

By Joel Russell

Introduction

It is becoming increasingly common for municipalities to require conservation easements in connection with cluster development (also called "conservation development" or "open space development"), multi-family development, and other types of development projects in which there are open space set-aside requirements to provide buffers or protect resources of conservation value. The need to require conservation easements originally arose to ensure that open space set aside in a cluster development will remain undeveloped and will not subsequently be developed as a result of a zoning change or a request by a developer to amend an approved subdivision plat. Less permanent techniques, such as notes on plats and restrictive covenants, have proven ineffective at accomplishing this on a permanent basis. This article will establish the legal authority for requiring conservation easements, discuss the differences between donated, purchased, and mandated conservation easements, and suggest some guidelines for the drafting of zoning and subdivision law provisions to ensure that this technique is used properly, under proper legal authority, and without allowing a board to exercise excessive discretion.

Legal Authority

The statutory authority for the existence and enforceability of perpetual conservation easements is found in both Section 247 of the General Municipal Law, which relates to the powers of towns, villages, cities, and counties to obtain and hold conservation easements, and Article 49, Title 3, of the Environmental Conservation Law, which enables municipalities as well as state agencies and private not-for-profit conservation organizations to acquire conservation easements. Historically, most conservation easements have either been donated, primarily to conservation organizations such as land trusts, or purchased by government or land trusts. Such purchase programs are usually referred to as "Purchase of Development Rights" (PDR) programs, and New York has many successful examples of this approach at the local, county, and state level. However, the requirement of conservation easements as a condition of subdivision approval is a relatively recent development, stemming from the increasing popularity of cluster/conservation development and the growing awareness that plat notes and restrictive covenants are inadequate forms of protection.

There have been numerous examples, and a handful of reported judicial decisions, in which land was thought to be protected through a cluster subdivision process,[1] but such protection turned out to be ineffective and impermanent because the mechanism used was usually a plat note or restrictive covenant. For example, in *O'Mara v. Town of Wappinger*,[2] a recorded map note was found by the Court of Appeals to be insufficient to create a perpetual restriction on open space land because it is not a conveyance of a real property interest and is not in the chain of title, leaving the Town free to amend the map note and permit development of land that was understood at the time of subdivision approval to be protected as open space.[3] Even a duly recorded declaration of covenants and restrictions can be dissolved by agreement of the parties to it and through other legal tools beyond the scope of this article. Only a conservation easement has the possibility of being enforceable "in perpetuity," or at least for an indefinitely long time. The statutory framework for conservation easements provides the most secure legal protection available.

It is now well established under New York law that municipalities have the authority to require a conservation easement to protect land that has been set aside as a condition of a planning board approval. The leading case on this issue is *Smith v. Town of Mendon*,[4] in which the Court of Appeals held that the requirement of a conservation easement as a condition of a site plan approval, pursuant to a municipality's established conservation policy, is constitutional. In *Smith,* the Town required both a note on a site plan and a conservation easement to protect land in perpetuity that had been identified in the Town's planning documents and covered by special conservation overlay zones in its zoning law. The *Smith* case addressed primarily the takings issue and left many issues unresolved, but it did establish that such a requirement is legally permissible, especially if it is imposed pursuant to clear town planning policies and local laws. The reasoning in *Smith,* although it was a site plan approval case, would

apply equally or perhaps more compellingly to a subdivision situation in which state law authorizes a town to cluster development with a *quid pro quo* that open space must be preserved.

The authority for New York municipalities to require conservation easements was also upheld in federal court in *Ruston v. Town Board of the Town of Skaneateles*,[5] in which a challenge to the Town's "conservation analysis" and "conservation value" approach to determining which land should be preserved as open space[6] was upheld against a "void for vagueness" constitutional challenge.[7] The federal district court found that the zoning law "does not imbue the Planning Board with unlimited discretion. Rather, it provides an information-gathering mechanism to determine whether to seek a conservation easement pursuant to New York law. Therefore, the Court dismisses the Plaintiffs' void for vagueness claim."[8]

Differences Between Mandated, Purchased, and Donated Conservation Easements

Since most experience with conservation easements has been in the context of donated or purchased easements, it is important to note the differences between these more common situations and the newer and more challenging issues involving mandated conservation easements. Some of the differences between mandated conservation easements and donated or purchased ones include the following:

Motivation: In most cases of mandated easements, the motivation for granting the conservation easement is that it is required by law. This is very different from a donated easement, where there is usually significant conservation motivation, or PDR, where there is a combination of conservation motivation and financial need involved. Some developers understand that protected open space adds value to their development and therefore they see a financial benefit to doing this, but the motivation is rarely that they are devoted to land conservation. This means that the easement negotiation is more likely to have an adversarial quality because the motivations of the developer, municipality, and land trust may be different.

Parties: The parties to this type of easement typically include the municipality, as a holder, co-holder, or third-party enforcer, as well as the landowner and frequently a land trust as well. This has advantages and disadvantages. Involving the municipality is generally a good thing, but the municipality's lack of knowledge, commitment, and experience with conservation easements, and its budgetary constraints and changing political climate can also result in inferior easements and poor easement administration.

Authorization: Although some municipalities require conservation easements without authorizing language in their land use regulations, this is risky and it is much better to have such provisions in zoning and/or subdivision laws. Of course, donated and PDR easements do not require this.

Role of the Land Trust: It is advisable, but often difficult as a practical matter, to involve a land trust as early as possible in the development approval process. Many developers resist this and want to eliminate or marginalize the land trust's role. Because the municipality can be the holder of the easement, the land trust is seen by some developers as a threat and an interloper in the process. Experience shows that land trusts are beneficial to the process, and the earlier they are involved, the better, because they usually have far more expertise than the municipality in the use of conservation easements.

Potentially Conflicting Conservation Criteria: Land trusts have criteria for the acceptance of conservation easements. Municipal land use regulations should have criteria for the selection and protection of open space wherever a conservation easement is mandated. These criteria are rarely the same, and sometimes are quite different. This can create a problem when the municipality requires an easement that meets its criteria, but the land trust will not accept it unless it also meets the land trust's different and usually more stringent criteria. This is all the more reason to involve the land trust early, so that the developer is aware that there are two sets of criteria to be satisfied and they can be reconciled at the outset.

Tax Deductibility: Because conservation easements are required for a development approval, they are almost never tax-deductible. Granting a conservation easement in this context lacks donative intent and also involves a "*quid pro quo*" in the form of a development approval. Also, the land is usually considered property used in a trade or business in the hands of a developer and does not qualify for the charitable tax benefits for appreciated property in the Internal Revenue Code. The rare exception may be where a landowner is not a developer by trade and grants a conservation easement that is far more restrictive than would otherwise be required by the municipality.

Administration and Enforcement: A conservation easement mandated in connection with development is administered the same way as any other kind, but the process can be complicated by the proximity of many homeowners in a development to the protected land, the lack of expertise or willingness to enforce if the easement is held by a municipality, and the reluctance of developers to put up money for stewardship endow-

ments when they feel they have already been required to "give away" the land. In addition, enforcement is often complicated by the fact that both a land trust and a municipality have enforcement rights. The rights and duties of these different entities can complicate both administration and enforcement.

Mandated Easements with No Willing Holder: A zoning code may require that a developer grant an easement to a land trust. What happens if no land trust wants to hold the easement? There has to be a back-up solution, such as municipal acceptance of the easement.

Drafting Zoning and Subdivision Laws That Mandate Conservation Easements

Local laws should provide specific authorization for the requirement of a conservation easement under Article 49 of the Environmental Conservation Law and/or section 247 of the General Municipal Law. The purpose of such authorization is to give the municipality clear legal authority under local legislation to require the easement as a tool for the permanent protection of open space. Generally, the substantive provisions relating to conservation easements belong in the zoning law, while the procedural steps for securing conservation easements should be part of the subdivision law. The submission requirements for the aspects of conservation subdivisions that relate to conservation easements may be in either document.

Conservation easements may be required in connection with conservation subdivisions. It is less common, but also permissible, to require conservation easements in connection with site plan approvals[9] or special use permits for multi-family developments, and commercial, mixed-use, and industrial developments, particularly for the open space buffers that are designed to protect neighboring properties. In any of these cases, the zoning law should specifically authorize the use of conservation easements for these purposes or it may be subject to a successful challenge by a developer.

The "default" source of authority for conservation development itself is Town Law section 278, and parallel sections of the Village Law and General City Law,[10] which specifically authorizes "cluster development" through the subdivision review process. However, many municipalities also do this through zoning, using home rule powers under the Municipal Home Rule Law (MHRL). This approach has certain advantages in enabling the municipality to customize the local laws to better fit the community's needs and avoid some of the rigidities, procedural hurdles, and ambiguities in section 278. Although there are no reported cases on this issue, it is advisable to include a supersession provision under MHRL Article 2, section 10 *et seq.* (for towns and villages) if the conservation development law is adopted under the MHRL rather than Town Law section 278 or Village Law section 7-738.

Purpose Section. The zoning or subdivision law should contain a purpose section making it clear that the purpose of the conservation easement requirement is to ensure that the Town's open space preservation goals are achieved. In this connection, it is helpful to have language in the Comprehensive Plan identifying the importance of protecting open space generally and in conjunction with the development approval process, as well as recommending the use of conservation easements for this purpose. An open space plan and/or a section of the Comprehensive Plan should identify the specific conservation values the municipality wishes to protect and may also include an inventory of specific properties where conservation easements are especially desirable. Where this inventory has been officially adopted as part of the municipality's "Open Space Index"[11] this should also be referenced in the zoning and/or subdivision laws.

Conservation Analysis. It is critically important to deal with the conservation and environmental issues as early as possible in the development planning and approval process. The best way to do this is through an informal pre-application "conservation analysis" process in which an applicant presents a conservation analysis of the property prior to drawing up any plans for subdivision or development. This is the process that was upheld in the *Town of Skaneateles* case referenced above.[12] The conservation analysis identifies both "constrained land" (land unsuitable for development due to wetlands, steep slopes, floodplains, utility easements, etc.) and "land of conservation value," which is land that is developable but that has special importance to the community for its resource value.[13] Land of conservation value will vary from one community to another, but often includes prime farmland, land that is scenic and visually prominent (such as ridgelines), historic areas, large trees, wellhead protection zones, land with important recreational potential, and land that has been mapped as a link in a town-wide trail system. A municipality may not constitutionally require the dedication of land to public use, but may require such land to be reserved and protected from development so that it is available in the future for acquisition by gift or purchase. Requiring a conservation easement is the best tool for doing this, as it ensures the preservation of the land but cannot be construed to be a "taking" of it.

The conservation analysis stage is also the best time to involve the local land trust in the process. A professionally staffed land trust may be able to per-

form the conservation analysis, or it may be done by a qualified professional such as a landscape architect, ecologist, or forester, depending upon the type of land. The earlier the environmental and conservation issues come to light, the easier it is to incorporate them into the project planning process. All too often, a developer or a town will wait until a plan has already been under review for some time (often during or at the end of the SEQR process) before doing this kind of analysis. By that time, the developer has invested considerable sums of money in a plan that may not be environmentally acceptable, and the proposed conservation easement required by local regulations will not be acceptable to any qualified conservation organization. One cannot overemphasize the importance of consultation with a land trust early in process, including consideration of the land trust's criteria for acceptance of conservation easements. This should be part of the conservation analysis process.

Procedurally, the conservation analysis should occur prior to the filing of a formal application for preliminary plat approval. In most communities this can be done through "sketch plan" review or in the course of a pre-application meeting or meetings and site visits with the planning board. Such meetings are advisable because they help to clarify expectations about the needs and desires of both the developer and the community. There is no formal or legally binding output from such meetings. However, the planning board should make clear recommendations, in the form of "conservation findings," which are intended to guide the applicant in formulating a development plan that takes into account the community's conservation objectives and likely parameters of an acceptable conservation easement. The conservation findings also show which areas of the property are most appropriate for development and provide guidance as to how to access these development areas. In analyzing conservation values, the conservation analysis should also consider appropriate ownership of the open space land, based upon its conservation value. While the conservation findings are not "final determinations" in a legal sense, they are designed to give all parties a common understanding of the development's design parameters so that the development plan and resulting conservation easement reflect the community's conservation goals.

The conservation analysis will often involve weighing competing conservation interests, such as the value of protecting scenic road frontage versus the value of preserving intact ecosystems or ridgelines on the "back land." This is where the expertise of both a land trust and land planning professionals can be helpful in assessing the relative value of these conservation interests. In the end, however, there are value judgments to be made and the Planning Board must make these and provide a clear and sensible rationale in writing (the "conservation findings"). These judgments must be based upon the facts about the land, the community's values as expressed in its planning documents, the landowner's goals, and the economic reality that the developer must be allowed to develop a portion of the property that is actually developable and that will contribute to meeting the community's housing needs.

The main value of doing a conservation analysis and findings as early as possible in the process is to ensure that the open space preserved in a conservation development is land that has real conservation value and is not just the land that the developer does not want to develop because it is unattractive, inaccessible, or physically constrained. This approach puts the community in the driver's seat to ensure that conservation subdivisions fulfill their intended purposes.

Implementing the Conservation Analysis Through the Planning, Approval, and SEQR Process. Once the conservation findings have been made, the developer can prepare a formal application for preliminary—or final, if there is no requirement of a preliminary plat—plat approval. The application should reflect the conservation findings and, if it does, the Planning Board should be prepared to accept the open space shown on the plat as the area to be protected in the subdivision.

The preliminary plat stage is the best time to nail down the specifics of what the restrictions will be in the conservation easement, what uses will be allowed on the conservation land, how that land will be managed, and what form(s) of ownership would be appropriate. Since most of the SEQR process occurs during the preliminary plat process, SEQR is a good vehicle for ironing out these details, which can then be implemented prior to stamping the plat as approved in the final approval stage.

It is a common mistake to wait until preliminary plat and SEQR review to do the conservation analysis. This puts matters in the wrong order, because the project has already been designed before sufficient attention is paid to environmental issues. At that point, the best one can usually hope for is mitigation of negative impacts. The true spirit of SEQR is avoidance of impacts, not the creation and subsequent mitigation of them. An early conservation analysis is designed to avoid impacts by identifying environmentally significant land before project design occurs. If that is done, there is much less impact to mitigate.

Selecting and Working with the Conservation Easement Grantee. As mentioned above, the sooner a conservation easement grantee can be identified, the better. Ideally this happens before the project is designed, and the prospective easement grantee is involved in the conservation analysis and project design process. In this way, the project can be designed in a way that satisfies both the municipality's conservation criteria and the conservation easement criteria of the land trust. In some cases, the easement grantee will be the municipality itself or another governmental entity. Most municipalities are ill-equipped to administer conservation easements, so this choice should normally be a last resort, unless the municipality has developed the capacity to administer and oversee conservation easements.

The Planning Board should be careful to avoid putting the applicant in a position where the Board requires a conservation easement but no organization will accept it. This may entail telling the applicant up front that working out the conservation easement with a potential grantee is his/her responsibility and should be done as early as possible in the process to ensure a smooth approval. In cases where this simply does not work, the municipality must be prepared to accept the easement. Otherwise, it risks a legal challenge that it is requiring an applicant to do the impossible, which amounts to depriving the applicant of the right to develop the land. Alternatively, such a situation could force the applicant to do a conventional subdivision that does not preserve any land.

The Conservation Easement Requirements. The zoning law should also specify the parameters of what the conservation easement should contain in terms of restrictions and use provisions.[14] In addition, the local law should specify a minimum percentage of the total land area to be preserved as open space and how it should be configured to ensure that the conservation values are preserved. It is a mistake to allow the open space to be highly fragmented or to have too many small lots abutting it because this creates the likelihood that lot owners will encroach into the protected open space areas, creating a potential monitoring and enforcement nightmare for the land trust.

It is a good idea to provide a buffer or other separation between individual small lots and the protected open space, in order to minimize the risk of encroachment. The buffer can be in the form of land owned in common by a homeowners association, if there is one, but not protected by the conservation easement. It may also take the form of major natural or man-made features that block access, such as a stream, steep hillside, cliff, or road. On a very large estate lot (over 30 acres), the eased land may actually be part of the lot and a buffer may be less necessary, but there should still be a clearly marked boundary of the easement area so that both the landowner and the land trust can readily identify it in the field.

The Conservation Analysis and Ownership of the Open Space. Many zoning laws arbitrarily limit ownership options for open space, typically to a homeowners association, a non-profit conservation organization, or the municipality. A homeowners association is often not the best vehicle for ownership of protected open space (often called "common open space" even though it does not need to be owned in common). Where the protected land is to be used for recreational purpose by residents of the development, a homeowners association may be appropriate. Where the land will be used for public recreation, a municipal or other government entity may be appropriate. However, if the resource value of the land is as farmland or harvestable forest, the best owner may be a private farmer or timber company who is free to use the land for farming or forestry. If the land is ecologically sensitive, appropriate ownership may be a non-profit organization that specializes in habitat conservation or one large private estate landowner who will leave the land untouched.

Another common misconception is that the open space in a conservation subdivision must be accessible to the public and/or to residents of the subdivision. This is simply not the case. A developer is free to offer the land for this purpose, but is not obligated to do so, and the municipality is not obligated to accept it if offered. Again, this all comes back to the conservation values and conservation analysis, i.e., what the reasons are for preserving the land as open space. The developer may want to establish a private trail system on the property for the benefit of homeowners in the development, and the conservation analysis may show this to be a good use of the land. Such an approach adds value to all of the lots. But there is no legal obligation to do this unless the zoning requires it.

Non-Subdivision Contexts (Site Plan Review, Special Permits, Non-Residential Uses). Conservation easements may be required for the protection of open space land reserved in connection with other kinds of developments, such as industrial parks, commercial developments, multi-family condominiums, and mixed-use town centers or shopping mall makeovers. All of the same principles discussed above in connection with subdivision approvals apply. There should be an early conservation analysis done, and pre-application consultations with Planning Boards and land trusts are also essential. It is also important that these requirements, if they are to be implemented, be spelled

out in the relevant sections of a zoning code. Typically, these sections are those that relate to site plan review and sometimes special use permits as well.

Drafting the Conservation Easement (Differences from Donated or PDR Situations)

Tax Deductibility Issues. Because there will normally be no tax deduction involved, the IRS requirements for tax deductibility do not need to be included in the easement, although some or all of them may be required by the land trust as "good practice."

Third-Party Enforcement, Notifications, and Approvals. Typically, if a land trust is the holder of the easement, the municipality will want to have third-party enforcement rights as authorized under Article 49 of the ECL. Similarly, if the easement requires notification or prior approval for activities within the easement area, such notification should be sent to the municipality as well. The municipality's independent authority to review proposed uses and structures under zoning remains separate and any approvals required by the easement should not be confused with approvals required by zoning or building codes.

Mapping. The easement area should be surveyed and shown on the subdivision plat or site plan, which should be referenced in the easement. However, if the easement involves a more complex land management plan or other details, it may be appropriate to attach a separate map as an exhibit or to file such a map in the County Clerk's office. As mentioned above, the area should be mapped in a way that protects land of conservation value and minimizes fragmentation and enforcement problems.

Treatment of Eased Land for Density Purposes. Land already protected by a conservation easement, such as a previously donated or purchased conservation easement, can be counted toward the density calculation for a cluster or conservation subdivision, unless a conservation easement or a municipal regulation provides otherwise. In *Friends of the Shawangunks, Inc. v. Knowlton*,[15] the Court of Appeals held that land restricted by a conservation easement purchased by the Palisades Interstate Park Commission could be counted for purposes of a density calculation for a development on adjoining unrestricted land. While this point mainly affects the drafting of conservation easements that are not required in connection with a conservation subdivision, it is included here because careful consideration is needed in the drafting of all conservation easements in view of the fact that a conservation easement does not automatically extinguish development rights on a parcel. As a result of the *Friends* decision, it has become common practice to include an "extinguishment of development rights" clause in all conservation easements, whether donated, purchased, or mandated in connection with a development. This, in effect, makes the *Friends* rule inapplicable by explicitly stating that the land protected by a specific conservation easement cannot be used to calculate density on other land. It is also possible to draft language in a zoning or subdivision law that either explicitly excludes or includes land under easement from a density calculation. This can help avoid future disputes over this issue. For a refinement of this idea that seeks a middle ground, see the Town of Gardiner Zoning, section 220-21F, which allows previously eased land to be counted for density purposes, but under limited circumstances. This provision is designed to make sure that landowners who donate easements are not punished for doing so if they want to later develop portions of their unrestricted land in an environmentally appropriate way.

Conclusions and Open Issues

The use of conservation easements to protect open space as a condition of municipal approval is still a cutting edge legal issue, with numerous unresolved problems associated with it. There are many examples of ineffective attempts to protect land from development in connection with development approvals. Therefore, this issue must be approached with great care and local land use laws should be revised to clarify and specify how such land protection is to be accomplished.

Some have questioned the desirability of requiring perpetual protection of open land in this context. What if the protected land is needed for development someday? Should some kind of shorter term restriction be considered? But what happens after it expires? The experience with term restrictions to keep housing affordable is sobering, as much affordable housing stock has been lost after the term restriction expires and it reverts to market rate housing.

It is important to understand the panoply of issues that surround this important subject and to foresee and avoid potential future problems. Conservation easements, properly used, can be the most effective tool for protecting open land that the community values and that would otherwise be developed in a manner detrimental to the long-term welfare of the community and its natural environment. When conservation easements are imposed as a condition of development approval, the financial engine of real estate development can be harnessed to the environmental and open space protection goals of the community at little or no cost to the taxpayer.

Endnotes

1. Typically under N.Y. Town Law § 278; N.Y. Village Law § 7-738; N.Y. Gen. City Law § 37.
2. 9 N.Y.3d 303 (2007).
3. The author has even observed examples where this process was done in such an informal manner that the recorded plat showed only that an area was marked "open space" or "conservation land," with no accompanying recorded document or even an explanatory note on the plat.
4. 4 N.Y.3d 1 (2004).
5. 2009 WL 3199194 (N.D.N.Y. 2009), *aff'd*, 610 F. 3d 55 (2010).
6. *See*, *infra*, section on Drafting Zoning and Subdivision Laws that Mandate Conservation Easements, subsection on Conservation Analysis.
7. Disclosure: The author drafted the challenged provision of the zoning law that established the Town's conservation analysis process and that the court upheld.
8. *Rustin*, 2009 WL 3199194, at *8.
9. Smith v. Town of Mendon, 4 N.Y.3d 1 (2004).
10. *See* note 1.
11. *See* N.Y. GEN. MUN. LAW § 239-y (McKinney 2012).
12. *Ruston*, 2009 WL 3199194.
13. The eminent land planner Randall Arendt calls constrained land "primary conservation areas" and land of conservation value "secondary conservation areas" and some land use laws use this terminology.
14. *See, e.g.*, TOWN OF GARDINER, N.Y., ZONING LAW § 220-21.
15. 64 N.Y.2d 387 (1985).

Municipalities—Be Careful Where You Put the Snow!

By Alyse D. Terhune

Municipal attorneys may be called upon to address the potential liability of municipalities for injuries sustained by pedestrians who slip and fall on ice in municipally owned parking lots. Below is a review of the current case law to guide good counsel.

San Marco v. Village of Mount Kisco

It is dark and cold at 4:45 a.m. on Friday, February 4, 2005 when the Village of Mt. Kisco inspects and salts a municipally owned parking lot.[1] Twenty-seven and-one-half hours later, on Saturday, February 5, at 8:15 a.m., Dale San Marco slips on a patch of black ice and falls in the same parking lot. She suffers multiple injuries. During the twenty-seven-and-one-half hours between the salting and San Marco's fall, the temperature rises above freezing for nineteen hours and then drops again. Is the Village liable for San Marco's injuries?

San Marco argues that she fell on black ice caused by the melting and refreezing of a pile of snow that the Village had plowed next to a row of meters adjacent to parking spaces—an affirmative act by the Village that created the hazard. She claims that the Village failed to inspect the parking lot for unsafe conditions after it plowed and salted, even though the Village should have known that the temperature fluctuation would create an icy condition—negligent maintenance.

The Village makes a motion in county Supreme Court to dismiss the case, asserting protection under the "prior written notice" statute. The statute exempts a municipality from liability for injuries on public property unless it is aware of the problem.[2] The motion is denied and the Village appeals to the Second Department.

The Second Department reverses the lower court's decision and dismisses the case, finding that icy conditions in municipally owned parking lots are analogous to potholes in streets and uneven manhole covers.[3] In other words, just like work done in streets or sidewalks, a municipality is not liable for a dangerous condition without prior notice unless the plaintiff can show that the dangerous condition was immediately caused by the municipality.

San Marco appeals to the New York Court of Appeals, which brings the case full circle by reversing the Second Department and reinstating the case.

The Court of Appeals agreed with the Supreme Court, finding that the prior written notice statue does not protect a municipality where "a municipality's [affirmative] negligence in the maintenance of a municipally owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts."[4] As for liability, only a jury can determine "whether the Village exercised its duty of care to maintain the parking lot in a reasonably safe condition by plowing the snow high alongside active parking spaces, and failing to salt or sand the lot on weekends, despite the fact that it remained open seven days a week."[5]

The General Rule Prior to *San Marco*

The general rule is that "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice, a municipality is excused from liability absent proof of prior written notice or an exception thereto."[6]

However, prior written notice statutes will not protect a municipality from inquiry into, and possible liability for, ice-related accidents where an issue of fact is presented as to whether the municipality created the dangerous condition through negligent snow and ice maintenance,[7] had a reasonable amount of time after the snow event to remove ice and snow but did not,[8] or knew of a defect that created the icy condition.[9]

In addition, the municipal action must be an *affirmative* action[10] that "*immediately* results in the existence of a dangerous condition," for example, where by digging an unmarked ditch in a road or when a special use confers a special benefit upon the locality.[11] If the hazard develops over time, the municipality enjoys immunity from liability.

In *San Marco*, the Court departed from the general rule when it concluded that "the immediacy requirement for 'pothole cases' should not be extended to

cases involving hazards related to negligent snow removal."[12] Even if the hazard was not immediate, common sense should have told municipal officials that melting and refreezing snow piles can create hazardous conditions. Thus, a municipality cannot avail itself of prior notice protection if hazardous icy conditions are reasonably foreseeable, as they were in *San Marco*.

How much is the "immediacy" requirement weakened by the decision in *San Marco*? How does a municipality protect itself from slip and fall liability short of not plowing (not possible since municipalities are required to maintain streets and sidewalks in a safe condition) or hauling away all the plowed snow?

To answer those questions, we must analyze post-*San Marco* cases to determine how the courts have incorporated the ruling in other prior-notice decisions. Although lower state courts must follow precedent set by the Court of Appeals, no two cases are exactly alike. The facts and circumstances of one case can often be distinguished from all other cases. In other words, judges usually have some "wiggle room" when it comes to following precedent. So, before you retire your snow plows, let's review some of the cases that preceded the December 2010 *San Marco* case, and some that followed, to determine if a precedent was really set.

Post-*San Marco* Decisions

In *Groninger v. Village of Mamaroneck*,[13] the Court of Appeals found reason not to follow the *San Marco* decision.

Like Dale San Marco, Margaret Groninger slipped and fell on ice in a parking lot owned by the Village of Mamaroneck. She sued, claiming that the general icy condition of the lot caused her fall. Unlike *San Marco*, the Supreme Court found that the Village was not liable for Groninger's fall because it had no prior notice of the ice. Groninger's complaint was dismissed. The decision was upheld by the Appellate Division, Second Department, and by the Court of Appeals. Why? What was different?

As a threshold matter, the courts determined that there was no merit in Groninger's argument that no prior notice of the icy condition was required because parking lots are not listed among the six enumerated locations in the prior notice statute.[14] The Court of Appeals cited thirty years of New York case law that consistently found that publicly owned parking lots fell within the definition of "highway" enumerated in the statute. Thus, the Village was entitled to prior notice.

Nor did the circumstances fall within the "affirmative action" exception found in *San Marco*. San Marco alleged that plowing snow near active parking spaces—an affirmative act—and failure to check for hazardous conditions after the melting and refreezing of the snow piles—negligence —created a foreseeable, if not immediate, hazard. In contrast, Groninger was unable to show that an affirmative act of the Village created the general icy condition of the parking lot. The Second Department noted that "[t]he failure to remove all the snow or ice from a parking lot is not an affirmative act of negligence."[15]

Another difference between the two cases was the credibility of the evidence offered in support of the plaintiff's contentions. In *San Marco*, incontrovertible weather records were deemed credible evidence that the Village of Mt. Kisco should have known that snow piles would thaw and re-freeze, essentially providing notice of the hazardous icy condition existing near the active parking spaces. In contrast, Groninger offered the expert opinion of an engineer premised on his inspection of the parking lot conducted over two years after she fell. The Court of Appeals viewed this testimony as "mere speculation," not evidence.[16]

In a decision reached just twelve days after *Groninger*, the Second Department, reversed a jury determination in favor of the plaintiff in another black ice slip and fall case, *Urquhart v. Town of Oyster Bay*.[17] Urquhart fell in a municipal parking lot while issuing citations to illegally parked vehicles. The Town was not afforded protection by the Supreme Court under Town Law § 65-a (the equivalent prior notice statute).

At trial, the *Urquhart* jury heard testimony that it snowed on March 8, 2005 between 12 a.m. and 9:45 p.m. Although the Town salted and sanded the parking lot between 1 p.m. and 3 p.m. the same day, it did not plow the lot because snow accumulation was only about one inch. Urquhart fell at 9:30 the next morning, March 9.

The Town Commissioner of Highways testified that he decided not to sand and salt on March 9 because he saw asphalt on the parking lot that day. However, his testimony was essentially impeached by the fact that the Town salted and sanded the lot on March 10, even though it had not snowed since March 8.

It is possible that the questionable veracity of the Commissioner's testimony contributed to the jury's finding that "the ice on which plaintiff slipped was the result of the Town's March 8, 2005 salt and sand operations and that, had the Town performed its duties

with due care, the ice condition would not have been present."[18] The jury found that the Town's negligence was the proximate cause of the Urquhart's fall and apportioned liability between the Town (65%) and Urquhart (35%).

The Town appealed the judgment. In a brief opinion, the Second Department reversed the jury's determination finding that "no valid line of reasoning and permissible inferences could possibly have led rational jurors to conclude…that [the Town's] salting and sanding operation resulted in a dangerous condition, or exacerbated a previously dangerous condition.…"[19]

The Second Department did not offer a recitation of the facts it relied upon to decide that the jury decision was irrational. Rather, it determined that the Town was protected under the prior written notice law and that the plaintiff had not proved either of the two exceptions to that law: affirmative negligence or special use.

Decisions reached in *Groninger* and *Urquhart* support the pre-*San Marco* general rule that unless a plaintiff can provide credible evidence that a municipality caused the dangerous condition that led to an injury or, in the alternative, special use of the area at issue, a municipality is protected from tort liability by the prior written notice statute.

Conclusion and Recommendations

The decision in *San Marco* represents a departure from the immediacy standard required to find municipal negligence expressed in earlier decisions. Theoretically, *San Marco* broadened the instances whereby a municipal actor could be found liable, at least in snow and ice cases. However, few New York courts, even the Court of Appeals, have found reason to broaden the immediacy exceptions in post-*San Marco* decisions.

But they could. Although no one can predict the weather with one hundred percent accuracy, and while the courts have expressed some leniency where extraordinary snow events occur, it appears that the *San Marco* decision opens municipalities to the charge of foreseeable and thus constructive notice of a dangerous condition. In cases prior to and after *San Marco*, the courts have denied a municipality's motion for summary judgment founded on prior notice where the injured party successfully raised triable issues of fact as to municipal negligence.[20]

Therefore, to avoid costly litigation, even litigation which may ultimately fail, a municipality should review its snow plowing and sanding procedures to determine whether those procedures may open it to future litigation. For example, is snow piled near active parking places or is snow piled into a designated area that is closed to pedestrian traffic, at least during and after snow events? Are municipal parking lots, streets and sidewalks monitored after freezing and thawing weather to determine if additional treatment is necessary? How contemporaneous and complete are the snow plowing and sanding records? These and other questions should be asked of the Superintendent of Highways or his or her equivalent when determining to what extent your town, village, or city may, or may not, be protected by the prior written notice statute.

Endnotes

1. San Marco v. Village/Town of Mount Kisco, 16 N.Y.3d 111, 114 (2010).
2. N.Y. VILLAGE LAW § 6-628 (McKinney 2012): No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe. *See also*, N.Y. TOWN LAW § 65-a; N.Y.GEN. MUN. LAW §§ 50-e(4), 50-g; N.Y. C.P.L.R. § 9804.
3. The Second Department relies on the New York Court of Appeals' decisions in Yarborough v. City of New York, 10 N.Y.3d 726, 728 (2008) ("the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition") and Oboler v. City of New York, 8 N.Y.3d 888 (2007) (motion to dismiss affirmed where plaintiff failed to present evidence of affirmative negligence or special use exception to prior written notice requirement).
4. *San Marco*, 16 N.Y.3d at 117.
5. *Id*. at 118.
6. Poirier v. City of Schenectady, 85 N.Y.2d 310, 313 (1995).
7. *See* Dauria v. New York, 178 A.D.2d 289 (1st Dep't 2000) (City liable where testimony of a City supervisor stated that the subject area had been plowed by the City in a manner near the curb which did not meet City standards); Siddon v. Village of Massena, 65 A.D.2d 832 (3d Dep't 1978) (Village liable where it was foreseeable that pedestrians would be compelled to walk up and over snowbanks Village concededly created between the parking meters and failed to remove the snowbanks in conformity with prior practice).
8. *See* Mandel v. City of New York, 44 N.Y.2d 1004 (1978) (City not liable where extraordinary snowfall had occurred only two days prior to plaintiff's slip on a mound of snow located partly on the sidewalk). *Compare* Candelier v. New York, 129 A.D.2d 145 (1st Dep't 1987) (City liable where evidence was offered

that the dangerous ice condition had existed for a period of at least seven days).

9. Morales v. City of New York, 270 A.D.2d 239 (2d Dep't 2000) (City liable where expert testimony established that the City had prior written notice of the raised sidewalk where pooling water resulted in dangerous ice formation).
10. Grant v. Village of Lloyd Harbor, 180 A.D.2d 716, 717 (2d Dep't 1992) ("[F]ailure to remove ice from the road or to salt and sand it, as well as failure to warn of a dangerous condition, are acts of omission, not acts of affirmative negligence such as would exempt the plaintiff's claim from the prior written notice requirement.").
11. Oboler v. City of New York, 8 N.Y.3d 888, 889–90 (2007) (emphasis added).
12. *San Marco*, 16 N.Y.3d at 116.
13. 17 N.Y.3d 125 (2011).
14. The statute lists defects to a "street, highway, bridge, culvert, sidewalk or crosswalk" as requiring prior notice. N.Y. VILLAGE LAW § 6-628.
15. Groninger v. Village of Mamaroneck, 67 A.D.3d 733, 734 (2d Dep't 2009).
16. *Id.* at 129.
17. 85 A.D.3d 899 (2d Dep't 2011).
18. Urquhart v. Town of Oyster Bay, 2010 N.Y. Misc. LEXIS 6425, 8-9 (N.Y. Sup. Ct., Dec. 10, 2010).
19. Urquhart v. Town of Oyster Bay, 85 A.D.3d,899, 900 (2d Dep't 2011).
20. Gennaro v. Locascio, 18 A.D.3d 811 (2d Dep't 2005) (judgment as a matter of law upheld where there was a rational process by which the court could find in the plaintiffs' favor after considering evidence viewed in the light most favorable to the plaintiffs, and affording plaintiffs all favorable inference which may properly be drawn from the facts presented); Pennamen v. Town of Babylon, 86 A.D.3d 599 (2d Dep't 2011) (plaintiff raised a triable issue of fact as to whether the Town created the defective condition within the meaning of the exception, based on the affirmative negligence of the Town which immediately resulted in the existence of the dangerous condition).

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Municipal Contract Issues Involving Emergency Medical Services

By Bradley M. Pinsky

The phone rings at the 911 dispatch center. A call taker answers the phone and hears a cry for help from a babysitter of a 9-month-old child. The child is not breathing. The dispatcher looks at the dispatch protocols in order to determine which ambulance will be dispatched to the emergency. Which service should be dispatched? Should it be the volunteer service which has proven only partially reliable? Can the dispatcher afford to wait ten minutes to determine if enough volunteers respond to the station or scene? Should the dispatcher ignore choices made by a municipality to dispatch its contracted service, rather than dispatching another service with an ambulance which is closer to the emergency? These questions plague dispatcher entities every day.

In order to understand the issues involved in arranging and contracting for ambulance services, municipalities must understand the basic legal framework of ambulance services, the rights of dispatch entities, the limitations of the present system, and the available solutions.

Certificates of Need

Municipalities have limited choices when determining which ambulance service(s) should provide care to their residents. Article 30 of the Public Health Law restricts the territories in which ambulance companies may receive patients. With few exceptions, an ambulance company may only receive patients in a territory for which it has been provided a "Certificate of Need."[1] Certificates of Need ("CONs") are not easily obtained. Among other factors, an ambulance company must prove to the state that a need exists for its additional services in addition to the other existing ambulance companies. Thus, only those ambulance companies which hold a CON may provide ambulance services to a municipality.

This CON requirement was created in the mid-nineteen seventies. When the CONs were distributed to existing ambulance companies, such companies were provided CONs for the territories they served at that time. Although new companies have obtained CONs in areas of the state, and some companies have expanded their operating territory to permit them to legally serve additional areas, the ambulance company CONs were not originally distributed in an attempt to equalize the availability of services or to ensure the most prompt response times. Thus, companies hold CONs but may not be located in or near the entities to best serve their patients.

The Public Health Law does permit a municipality to obtain its own CON for two years, and then grants a presumption of need to the municipality when it applies for a permanent CON.[2] Thus, a municipality may not be restricted to existing ambulance services when considering potential solutions.

Municipal Involvement

Municipalities have no legal duty to provide or arrange for ambulance services, unless the municipality has established one or more ambulance districts. Understandably, many municipal boards feel compelled to arrange for services in order to provide for the health, safety and welfare of their residents. State law provides municipalities with the authority to contract for ambulance services, to provide their own ambulance services or to engage a variety of options to arrange for ambulance services.[3]

Municipalities vs. Dispatchers

It should be argued that the municipality's selection of an ambulance provider under the General Municipal Law was designed to instruct the dispatcher which company to select to respond to an emergency. While municipalities are statutorily authorized to provide and/or arrange for ambulance services,[4] dispatch entities have no statutory authority to disregard the instructions of a municipality or to choose their own service in place of that of the municipality. Despite this fact, several dispatch entities make their own decisions which run contrary to the instructions of a municipality, possibly in an effort to reduce response times and increase the reliability of the ambulance service being provided for any given request for help. However, these actions, while maybe based on good intent, frustrate the efforts of the municipality.

Volunteer Organizations on the Decline

Many ambulance corps became successful from the efforts of volunteers. However, as volunteers become less available to provide their time, the reliability of some volunteer ambulance corps has declined. As a result, although the 911 service may dispatch the volunteer ambulance corps, the 911 center frequently has no idea whether any volunteers have left their homes or work to respond to the emergency. It is common in New York to wait five or ten minutes before the dispatch center seeks another ambulance company to respond to the emergency.

Even though the "closest available ambulance" may be the best choice to provide ambulance services, only holders of a CON for such territory may legally be dispatched. An exception exists only if there are no other holders of CONs available or willing to respond. Thus, the CON system may actually result in increased response times, forcing 911 services to dispatch ambulance companies that have no vehicles in a reasonable vicinity of the emergency and to overlook other services that could respond in a timely manner.

For-Profit Companies

For-Profit companies frequently have a CON for entire counties. These companies staff their ambulances with paid employees. In many areas, For-Profit companies are the best choice to be the provider, as no other reliable options are available. These services frequently provide non-emergency transfers to or from hospitals or other health care facilities and may not be available to respond to emergencies. Volunteer services generally do not participate in non-emergency transfers and remain available for emergency responses only. Moreover, For-Profit companies cannot afford to locate ambulances in areas with low call volumes, such as rural areas. Thus, the response times of For-Profit companies may be extended due to the distance that they must travel to arrive at the emergency.

Fire Department Rescue Squads

Fire Departments have traditionally provided ambulance services in addition to providing fire protection. General Municipal Law 209-b deems these services "Rescue Squads." Rescue squads are much like any other ambulance company, except that the law strictly prohibits them from billing for services. Rescue squads also commonly suffer from lack of volunteers to staff their ambulances. Unfortunately, the squads cannot afford to hire staff to fill the gaps without increasing the public tax burden.

Private Services vs. Volunteer Services

Many For-Profit companies respect the volunteer corps' missions to respond to emergencies in their territories and do not act in a predatory nature by attempting to take over the service contracts. Some For-Profit companies are willing to supplement the Not-For-Profits while others actively attempt to put Not-For-Profits out of business.

While a municipality may contract with a For-Profit company in lieu of a Not-For-Profits ambulance corps, it may also create a long-term issue for the residents. First, removing the volunteer corps from the response plan may lead to the end of the volunteer corps. This in turn destroys competition and limits a municipality's options and negotiating power in the future. Some For-Profit companies have offered significant contractual concessions to a municipality during contract negotiations against a Not-For–Profit ambulance corps, but one must question the For-Profit company's willingness to provide the same level of service, under the same conditions, when the competition has disappeared. The existence of the volunteer corps creates competition which can be better for the municipality and its residents.

Solutions

Reliability and predictability. These are the keys to ambulance protection. Volunteer ambulance and fire services offer the best bargain but reliability may be questionable. For-Profit companies may not be available, may demand too a high contract fee, or may not guarantee a response rate. So what are some solutions being tried today?

Paid employees. Paid employees are one good answer to the problem. Staffing an ambulance service creates reliability and ensures at least the first ambulance can respond, but staffing takes money. Where does the money come from? Taxes alone cannot be the answer. The solution lies in the ability of an ambulance company to bill for its services. Billing can generate revenues averaging about $325 per call, for Basic Life Support level calls. The revenue generated by Advanced Life Support level calls is higher. Thus, an ambulance company which transports even 300 patients can collect enough revenue to afford a daytime staff five days a week.

Can the patients afford to be billed? Persons over 65 receive Medicare. The extremely poor receive Medicaid. Persons involved in car accidents receive no fault coverage and persons injured at work are covered by

workers compensation. Veterans have coverage, and persons with insurance are certainly covered. Billing can be the answer. Moreover, not billing patients can actually be costly to a patient. Medicare will deny payment to an advanced life support ("ALS") company if the company provided ALS care while assisting a basic life support ambulance company which does not bill for services. However, Medicare permits the ALS company to bill the patient directly. Thus, elderly residents will receive a bill for services from the ALS-only provider up to almost $1,000 for advanced life support services, even if the transporting ambulance does not impose charges for its service.

Fire Department billing. As mentioned, General Municipal Law 122-b prohibits fire departments from billing. However, nothing prevents the members of the fire department from forming a truly separate not-for-profit corporation with its purpose to provide ambulance services. So long as this new ambulance service is legally and ethically structured to act as a separate organization, it can bill for its services. The fees can be utilized to hire employees. As a bonus to the municipality, if the new organization hires persons who are also qualified volunteer firefighters, the employees can leave work to staff a fire engine in the event of a fire call, thus ensuring enhanced fire services!

Crew confirmation. What about volunteer responses? The system works when volunteers respond to emergencies. The system does not work efficiently when dispatchers are required to wait to see if volunteers arrive at the station or respond to the scene. Waiting can take 15 minutes or more! However, if a dispatcher could know in a minute that a crew was in route to the station or scene, the system improves dramatically. Numerous New York State counties have turned to a patent pending system called IamResponding.com. This system permits responders to immediately notify dispatch that they are responding to the station or scene, simply by pressing a button on their phone. Dispatchers and persons at the station can view the list of responders and know within seconds following the dispatch whether a crew will arrive or whether mutual aid services are required. Putman County's dispatchers, for example, monitor the IamResponding.com display and announce each responder or lack of responder. If insufficient manpower is available, the call is quickly turned over to another agency. The patient is not forced to wait. This saves time and, potentially, lives.

Conclusion

Ambulance service issues are complicated, but response reliability can be obtained. Billing revenue can permit the Not-For-Profit to employ staff, and utilizing a crew confirmation system will decrease response times. By preserving the not-for-profit services, the For-Profit services can be utilized as backup services or to provide advanced life support services, without being overtaxed. There are answers, but the municipality needs to be creative. Dispatch entities are part of the solution, but must be given the tools to help solve the problem. Dispatchers cannot be forced to hope that an ambulance responds, and patients cannot keep waiting for a response that may not be quickly forthcoming. The solutions are out there.

Endnotes

1. N.Y. PUB. HEALTH LAW § 3006 (McKinney 2012).
2. N.Y. PUB. HEALTH LAW § 3005(4).
3. N.Y. GEN. MUN. LAW § 122-B.
4. N.Y. PUB. HEALTH LAW § 3003.

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The Collateral Estoppel Effect of a Parole Revocation Hearing in a Civil Rights Claim

By Karen M. Richards

The doctrine of collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue decided against that party in a prior adjudication.[1] This doctrine protects parties from multiple lawsuits, conserves the resources of the court and the litigants, and "'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'"[2] The party seeking to invoke collateral estoppel has the burden of showing the identity and decisiveness of issues, while the party against whom preclusion is sought bears the burden of showing that he did not have a full and fair opportunity to litigate the issues.[3]

It is an affirmative defense that can be waived if it is not pled in a timely manner.[4] However, a district court may consider this defense, even if it was raised for the first time during summary judgment proceedings, provided that the plaintiff was given notice of the defense and had an opportunity to respond to it.[5] A district court may also *sua sponte* consider the issue of collateral estoppel because it furthers the strong public policy of economizing the use of judicial resources by avoiding relitigation.[6]

> Because the doctrine of collateral estoppel places termination of litigation ahead of the correct result, its application "has been narrowly tailored to ensure that it applies only where the circumstances indicate the issue estopped from further consideration was thoroughly explored in the prior proceeding, and that the resulting judgment thus has some indicia of correctness."[7]

It has been applied in circumstances where the issue was litigated and decided by an administrative agency; however, when the doctrine is applied to the determination of an administrative agency, New York courts additionally require the agency's determination to have been "quasi-judicial" in character rather than legislative.[8] Parole revocation hearings satisfy this requirement because they "have safeguards comparable to those found in judicial trials."[9]

> Parole revocation hearings are administrative in nature but they have many of the indicia of judicial proceedings. Minimum due process requirements such as written notice of claimed violations; disclosure to the parolee of evidence against him; an opportunity to confront and cross examine adverse witnesses; a neutral and detached hearing officer; and a written statement by fact finders of evidence relied upon and reasons for revoking parole, serve as a buffer against constitutional infringements.[10]

Additionally, in a parole revocation hearing, the parole authorities have the burden of proving a parole violation by a preponderance of the evidence, which is the same burden of proof in a 42 U.S.C. § 1983 cause of action.[11] Thus, a determination made by an administrative law judge in a parole revocation hearing may preclude a parolee from relitigating an issue in a civil rights lawsuit brought pursuant to § 1983.[12]

In *Banks v. Person*, the doctrine of collateral estoppel was successfully invoked in a civil rights lawsuit where the plaintiff alleged excessive force.[13] In *Banks*, upon arriving at his parole officer's office, Banks was immediately handcuffed and told he was wanted for questioning in connection with attempted murder. The parole officers claimed that Banks became agitated and began kicking and jumping, and as a result of his actions, it took many officers to subdue him. Banks did not admit to any conduct that provoked the exercise of force by the parole officers.

The district court, in determining whether collateral estoppel applied, examined whether there was an identity of issue between the parole revocation hearing and the § 1983 claim. At the parole revocation hearing, the issue decided was whether Banks had violated the terms of his parole by allegedly resisting arrest, failing to follow instructions, and posing a danger to himself and other individuals. The administrative

law judge sustained the parole violation, finding that Banks acted violently to the attempt to detain him for questioning.[14] The district court found that there was an identity of issue because the issue litigated at the parole revocation hearing—Banks' conduct in his parole officer's office—was the same issue the defendants sought to bar Banks from relitigating in the civil rights case.

Next, the court examined whether the factual findings concerning Banks' conduct in his parole officer's office were necessary to the judgment sustaining Banks' parole revocation. The court found that "[g]iven the nature of the charge, a finding that Banks had acted dangerously [in his parole officer's office] was clearly necessary to the ultimate determination that Banks violated a term of his parole."[15]

The court also considered whether Banks had a full and fair opportunity at the parole revocation hearing to litigate the issue of his conduct. At the hearing, Banks was represented by competent counsel, who had the opportunity to call, cross-examine, and subpoena witnesses. Further, "Banks' incentive to vigorously litigate the propriety of his parole revocation was high. If the violation was sustained, Banks' liberty was at stake."[16] These factors demonstrated to the court that Banks had a full and fair opportunity at the parole revocation hearing to litigate the issue of his conduct in his parole officer's office.

Since the issue in question was actually and necessarily decided at the parole revocation hearing, and since Banks had a full and fair opportunity to litigate the issue, the district court found that collateral estoppel was applicable. Therefore, Banks could not relitigate the issue of his conduct in his parole officer's office in the § 1983 action.

Collateral estoppel was raised as a defense, unsuccessfully, in *Curry v. City of Syracuse*, where a parolee sued the city and one of its police officers, both individually and as a police officer.[17] In *Curry*, Officer Lynch responded to a call of shots fired in a high crime area and saw a man coming out of a yard in the area where the shots had been fired. Lynch chased after the man, later identified as Curry, while continually ordering him to stop. Lynch eventually tackled Curry and attempted to handcuff him while the two were struggling. During the struggle, Curry hit Lynch in the head and also reached for and pulled an object out of his sock, which he then threw away.[18] Lynch hit Curry with his police radio numerous times and called for help.[19] Another officer responded to Lynch's call for help, and the two officers handcuffed Curry. Curry told the officers he ran from them because he was on parole and was out past his curfew.

A Violation of Release Report charged Curry with threatening the safety and well-being of a police officer by resisting arrest, possessing a controlled substance, violating his curfew, and threatening the safety and well-being of a police officer by striking Lynch. The administrative law judge presiding over the parole revocation hearing found that Curry violated his parole by being out past his curfew and by threatening his safety and that of the officers.

Curry brought claims of excessive force and false arrest against the city and Lynch pursuant to 42 U.S.C. § 1983. In determining the collateral estoppel effect of the parole revocation hearing to the civil rights action, the Second Circuit considered four factors.

The first factor considered was whether there was an issue of identity. Curry's actions in threatening and striking Lynch were the primary subject of testimony at the parole revocation hearing, and his actions were an issue in the federal court action. Thus, the Second Circuit found "the issue being raised in the present case is identical to an issue that has already been decided in a previous adjudication."[20]

The second factor examined was whether Curry was represented by competent and experienced counsel at the parole revocation hearing. Curry's attorney in the § 1983 action did not dispute the city's contention that Curry's attorney at the parole revocation hearing was experienced and competent. Instead, he argued that he would have taken a different defense tactic at the hearing. The Second Circuit found that:

> Curry was represented by competent counsel at the parole revocation hearing. He had a strong "incentive and initiative to litigate" this issue at the parole revocation hearing, because he knew that a finding by the ALJ that he had struck Lynch would almost certainly result in his incarceration. Curry had the opportunity to call witnesses, to testify himself, to present evidence, and to cross-examine Lynch and Officer Yarema; the fact that he chose not to testify, and that his counsel conducted only a limited cross-examination [of the officers], is beside the point. The opportunity was clearly there. Accordingly, we find that Curry had a full and fair opportunity to litigate this issue before the ALJ.[21]

The third factor considered by the Second Circuit was whether new evidence was available. Curry claimed that he did not have a full and fair opportunity to litigate the issue of whether he struck Lynch because there was new evidence that was not available at the parole revocation hearing. The new evidence was the officers' deposition testimony, which Curry contended, contradicted the testimony given by the officers at the parole revocation hearing. However, the Second Circuit found that this new evidence related to the issue of the force used by Lynch, not to the issue of Curry striking Lynch. Therefore, the new evidence did "not prevent application of collateral estoppel on the question of whether Curry struck Lynch."[22]

The last factor examined was whether the issue that was decided at the parole revocation hearing was decisive of the § 1983 action. The Second Circuit was unable to find any New York precedent construing the term "decisive" in this context; however, it defined it as "an issue is 'decisive in the present action' if it would prove or disprove, without more, an essential element of any of the claims set forth in the complaint."[23] Applying this definition, the Second Circuit found that the issue of whether Curry struck Lynch was not decisive of whether Lynch used excessive force because "[e]ven if Curry struck Lynch, it is possible for Curry to prevail on his excessive force claim if he is able to show that Lynch used more force than was necessary to subdue him."[24]

Although Curry was represented by competent and experienced counsel, and had the incentive and initiative to litigate the propriety of his parole revocation, and there was no relevant new evidence, the issue of whether Curry struck Lynch was not decisive to Curry's claim of excessive force. Therefore, collateral estoppel could not be applied in the § 1983 action.

The defense of collateral estoppel was also rejected in *Hernandez v. Wells*.[25] In *Hernandez*, the plaintiff, a parolee, went to a correctional facility to leave a package of clothing for a friend. An altercation ensued when Wells, a corrections officer, refused to allow him inside the facility. When Hernandez demanded to speak to a captain, Wells responded by handcuffing Hernandez and advising him that he was under arrest. Wells claimed he handcuffed Hernandez because Hernandez punched him in the face, a claim that Hernandez denied. Hernandez was charged with assault, obstructing governmental administration, and harassment.

A few weeks later, the New York State Division of Parole issued a violation of parole warrant on Hernandez, charging him with eight violations of his conditions of release, six of which were connected to the events at the correctional facility. At the final parole revocation hearing before an administrative law judge, both Hernandez and Wells testified at the proceeding. Notably, the administrative law judge found Wells' testimony credible, but not Hernandez's testimony. The administrative law judge found that Hernandez punched Wells and concluded that the charges of physically assaulting an officer and causing injury and assaulting a peace officer and preventing that officer from performing his duties had been proven by a preponderance of the evidence.

Hernandez filed an action pursuant to 42 U.S.C. § 1983, alleging deprivation of federal rights, malicious prosecution, and malicious abuse of process, and naming the city of New York, the city's Department of Corrections, and a number of corrections officers, including Wells, as defendants. During discovery, the defendants, for the first time, provided Hernandez with portions of Wells' disciplinary history. The disciplinary history revealed that Wells had filed a Use of Force Report in which he stated that, when an inmate attacked him and other corrections officers first, they had to use force in self-defense. The report was false—a video tape from a monitor revealed that the officers, not the inmate, were the aggressors. In addition to filing a false report, Wells also provided false information about the incident at a hearing. He was disciplined as a result of his actions. The closing memorandum for the assault case stated, "[s]hould Officer Wells violate any of the Department's Rules or Regulations at any time in the future, his expeditious termination is virtually assured."[26]

Hernandez argued that collateral estoppel was inappropriate in the civil rights lawsuit because he did not know at or before the parole revocation hearing that Wells had been disciplined for falsely claiming that an inmate assaulted him. The district court found Hernandez's argument "powerful," for "[i]f significant new evidence has been uncovered since the parole revocation hearing, [the court] cannot find that Hernandez had a full and fair opportunity to present his case at the hearing without that evidence."[27]

The defendants argued that Wells' disciplinary history was available during the parole revocation hearing because Hernandez's attorney could have discovered it by cross-examining Wells. The district court rejected this argument, finding that Hernandez's attorney had no "good-faith basis" for asking Wells about his disciplinary history at the parole revocation hearing.[28]

The defendants also argued that Wells' disciplinary history was not significant evidence that could have helped Hernandez's case and changed the decision rendered by the administrative law judge. The district court disagreed, stating:

> The ALJ did not learn that Wells had made a false claim in the past about being assaulted on the job, and it is at least likely that such evidence would have affected her evaluation of Wells' credibility. Furthermore, Wells' disciplinary history suggests a motive for him to lie about the [incident with Hernandez], as Wells was told in 1998, after he had filed a false report of an assault and then lied about it, that he would almost certainly be fired if he transgressed again. Because Wells' credibility was central to the ALJ's determination that an assault had occurred, Wells' disciplinary history amounts to significant evidence that certainly could have altered the ALJ's factual findings.[29]

The district court thus found that Hernandez did not have a full and fair opportunity to litigate the assault at the parole revocation hearing because he presented his case to the administrative law judge without the benefit of this important new information. Accordingly, collateral estoppel was inappropriate, and Hernandez could relitigate the administrative law judge's finding that Hernandez assaulted Wells.[30]

As case law demonstrates, in deciding whether to raise the affirmative defense of collateral estoppel in an action brought pursuant to 42 U.S.C. § 1983, a municipal attorney should evaluate the following:

(1) Whether there was an identity of issue between the parole revocation hearing and the civil rights lawsuit. The issue litigated at the parole revocation hearing must be the same issue the defendant seeks to bar the plaintiff from relitigating in the civil rights case.

(2) Whether the parolee was represented by competent and experienced counsel at the parole revocation hearing. Inexperience with parole revocation hearings may not weigh heavily against invoking collateral estoppel if the attorney has other trial experience. To deny collateral estoppel on this issue, the attorney's incompetence and inexperience must have had an identifiable effect on the outcome of the parole revocation hearing and denied the parolee a full and fair opportunity to litigate.

(3) Whether the parolee had an incentive to vigorously litigate his position at the hearing. Generally, this factor is present because failure to do so would likely result in the parolee's incarceration.

(4) Whether new evidence is available. A parolee's claim of new evidence is only successful if the new evidence is relevant to the issue at question, not merely because it is evidence that wasn't available at the parole revocation hearing. It must be shown that, without the new evidence, the parolee was denied a full and fair opportunity to present his case at the parole revocation hearing.

(5) Whether the issue would prove or disprove, without more, an essential element of any of the claims set forth in the complaint. This is clearly the most difficult factor to overcome in persuading a court that collateral estoppel is appropriate in the § 1983 action.

Collateral estoppel is a defense that is all too often overlooked in § 1983 actions, but if successfully raised, it serves to protect the resources of municipal defendants by avoiding relitigation of issues decided at a parole revocation hearing.

Endnotes

1. Banks v. Person, 49 F.Supp.2d 119, 126 (E.D.N.Y. 1999).
2. *Id*. (quotation omitted).
3. *Id*.
4. Curry v. City of Syracuse, 316 F.3d 324, 330–331 (2d Cir. 2003), *appeal after remand,* Curry v. Lynch, 323 F. App'x 63 (2d Cir. 2009).
5. *Curry*, 316 F.3d at 331.
6. Doe v. Pfrommer, 148 F.3d 73, 80 (2d Cir. 1998).
7. Hernandez v. Wells, 2003 WL 22771982, *5 (S.D.N.Y. 2003) (citation omitted).
8. *Doe*, 148 F.3d at 79 (citation omitted).
9. Johnson v. Kelsh, 664 F.Supp. 162, 165 (S.D.N.Y. 1987).
10. *Id*. (citations omitted).
11. Banks 49 F.Supp.2d at 128-129 (citation omitted).
12. *Id*. at 129.
13. *Id*. at 128–29.
14. *Id*. at 127.
15. *Id*. at 128.
16. *Id*. at 129.
17. 316 F.3d 324 (2d Cir. 2003).

18. Lynch later searched the area for the object thrown by Curry and found a plastic bag containing a substance consistent with crack cocaine.
19. Curry was a professionally trained boxer and was the 1995 Golden Gloves Lightweight Champion for Upstate New York.
20. *Curry*, 316 F.3d at 331–32.
21. *Id*. at 332 (citations omitted).
22. *Id*. at 332 n.5.
23. *Id*.
24. *Id*. At trial, the jury ruled in favor of Officer Lynch. *Curry v. Lynch*, 2009 WL 1054060 (2d Cir. 2009).
25. 2003 WL 22771982 (S.D.N.Y. 2003).
26. *Id*. at *3.
27. *Id*. at *6 (citations omitted).
28. *Id*.
29. *Id*.
30. *Id*. at *8. Hernandez also argued that the inexperience of his attorney at the parole revocation hearing weighed against the application of collateral estoppel. At the parole revocation hearing, his attorney admitted to the administrative law judge that he was not very familiar with parole, but he also stated that he had been a trial attorney for twelve years.

    The court stated that: "Although Hernandez suggested that his attorney's alleged inexperience deprived him of a full and fair opportunity to litigate, he does not identify any deficiencies in [his lawyer's] performance. Because Hernandez does not allege that his attorney's inexperience had any identifiable effect on the outcome of the parole revocation hearing, he does not demonstrate that [his lawyer's] supposed failings denied him a full and fair opportunity to litigate." *Id*.

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"A Distinction Without a Difference(?)": Supreme Court to Decide Whether Qualified Immunity Extends to Municipalities' Privately Retained Counsel

By Daniel Gross

Legal work done by municipalities and government agencies everywhere is commonly outsourced to private attorneys. Municipalities frequently retain private counsel to aid, assist, or even solely perform vital government functions for a variety of reasons, including cost and expertise. Outsourcing legal work to private attorneys can be found at all levels of the government; it is a regular practice in both small municipalities, where it may be fiscally impossible to employ in-house counsel, and large municipalities, who may find their in-house staff facing a conflict of interest or without the required expertise for particular legal issues.

However, this relationship of private attorneys performing legal work on behalf of municipal clients can, in some instances, create an uncomfortable strain on the doctrine of qualified immunity. The doctrine of qualified immunity shields government officials from civil liability for their professional conduct as long as they did not act in bad faith or unreasonably.[1] Qualified immunity balances "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[2] New York has long recognized the doctrine of qualified immunity for government officials performing municipal functions.[3]

Consequently, this leads to the question of whether private counsel, employed by a municipality to perform municipal functions, may qualify for immunity. After all, qualified immunity would be given to an in-house government attorney performing the same function as the privately retained attorney.[4]

The value of private counsel for the effective functioning of municipalities gives the recently certified (and argued) case of *Filarsky v. Delia*[5] even more importance. *Filarsky*, which originated from a 2010 Ninth Circuit decision, addresses: whether a private attorney, while representing a municipality in a municipal proceeding, is entitled to the same qualified immunity extended to government officials.[6]

Underlying Facts

The facts of the underlying case, *Delia v. City of Rialto*,[7] are straightforward. A firefighter for the City of Rialto, California, was on medical leave from work after receiving a doctor's note. The doctor's note, however, did not place any physical restrictions on the firefighter's activity. The firefighter maintained off-duty status through a number of follow-up visits with his doctor, with each subsequent doctor's note failing to place any physical restrictions on the firefighter.[8]

In time, and partly due to the firefighter's history of disciplinary infractions, the city became suspicious of the firefighter's extended work absence, and hired a private investigator to monitor the firefighter while he was out on medical leave. Soon enough, the firefighter was caught on videotape buying and loading building materials from a home improvement store.

Subsequently, the city launched a formal internal affairs investigation to determine whether the firefighter fabricated his injury, and retained Steve Filarsky "to provide legal analysis during the investigation, to propose disciplinary actions, and to participate in legal proceedings and hearings."[9] Filarsky, a private attorney who primarily practiced labor and employment law, had previous experience conducting internal affairs investigations, and had conducted a number of past investigations for the city.

As part of the investigation, the firefighter was ordered to appear for an interview to be conducted by Filarsky. The firefighter attended the interview with his attorney; two battalion chiefs, in addition to Filarsky, were also present. During the interview the firefighter was questioned about his current home construction projects, and shown the incriminating video of him purchasing home improvement materials. The firefighter conceded that although he did have home improvement projects in progress, the purchased building materials had not been used and were currently sitting in his home. Filarsky, after consulting with fire officials, offered to terminate the investigation if the firefighter could produce the materials. Filarsky was granted a written order to produce from the Fire Chief, who was not present for the interview.

Despite his initial protests, the firefighter was followed to his home by fire officials, who waited outside. Pursuant to the Fire Chief's order, the firefighter pro-

duced the building materials to the fire officials waiting outside of the house. The city thereafter terminated the internal investigation.

The firefighter subsequently filed a 42 U.S.C. § 1983 lawsuit against the city, fire officials, and Filarsky, alleging violations of his Fourth Amendment right to privacy and Fourth and Fourteenth Amendment right to be free from unreasonable searches. The district court granted summary judgment in favor of the city, finding that the municipal officials, including Filarsky, were entitled to qualified immunity.

The Appeal

On appeal, the Ninth Circuit upheld the district court's decision; however, the court reversed the finding that Filarsky was entitled to qualified immunity, albeit somewhat reluctantly.[10]

This apparent reluctance arose from a Sixth Circuit case, *Cullinan v. Abramson*, which extended qualified immunity to a private law firm that served as the city's outside counsel.[11] *Cullinan* involved a lawsuit brought by the investment manager for the Louisville, Kentucky police pension fund against the city, city officials, and the private law firm representing the city. The manager's complaint alleged that city officials, in retaliation for his opposition to the city's withdrawal of funds from the police pension fund, sought to have the manager fired from the fund. At the time, the city was facing severe financial problems and believed that placing more capital in the County Employee Retirement system (specifically from the "excess funds" of the police pension fund) would ease the burden. The manager brought suit under § 1983, citing a First Amendment violation of free speech, and a Fourteenth Amendment violation of deprivation of property without due process of law. The city officials and private counsel moved to dismiss on the grounds of qualified immunity.

Despite not being a "government employee" in the conventional sense, the Sixth Circuit extended qualified immunity to the private law firm. The court's rationale relied on language from a prior Supreme Court decision, *Richardson v. McKnight*, which had pointed out that the common law "*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign."[12] Satisfied with this language from *Richardson*, the *Cullinan* court pointed out that "[t]he city retained outside legal counsel for the defense of the lawsuit, entering into a professional services agreement with [private counsel,]"[13] and that there was "no good reason to hold the city's in-house counsel eligible for qualified immunity and the not the city's outside counsel."[14]

Despite the attractive rationale and symmetric fact-pattern of *Cullinan*, the *Delia* court, sitting as a panel, was bound by precedent under the "rule of interpanel accord," which holds that only courts of appeal which sit en banc, and not as panels, can overrule a previous panel decision. Therefore, subsequent panels must follow precedent "unless an en banc decision, Supreme Court decision, or subsequent legislation undermines [the previous panel] decision."[15] Unfortunately for Filarsky, no such exception existed, and a Ninth Circuit panel had previously denied qualified immunity to a private attorney who was representing a municipality in *Gonzalez v. Spencer*.[16]

In *Gonzalez*, a private attorney was hired to defend a civil rights lawsuit against Los Angeles County. While researching for material to cross-examine the plaintiff at an upcoming deposition, the attorney accessed the plaintiff's juvenile court file without first obtaining the requisite court permission. The court noted that although the attorney was acting "under color of state law[,]" and that "[h]er role was analogous to that of a state prosecutor,"[17] she was not entitled to qualified immunity because "[s]he is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position."[18]

With *Gonzalez* already decided, and without any intervening Supreme Court, en banc, or legislation to override the precedent, the *Delia* court did not (and could not) extend qualified immunity to Filarsky.

The Supreme Court

On September 27, 2011, the U.S. Supreme Court granted certiorari to *Filarsky*.[19] The petitioner's brief presented two basic arguments in favor of granting immunity. First, Filarsky argues that both Supreme Court precedent (including *Richardson*, mentioned above) and basic history support the notion that private individuals, engaged in essential government functions, are entitled to immunity.[20] Second, that the purpose and policy of the qualified immunity doctrine supports the expansion of immunity.[21] Further, Filarsky argues that the proper test for "whether [an] attorney is the functional equivalent of a government employee" is based on four factors: "(i) the nature of the advisory or representative role the attorney performs, (ii) the control exercised by a close coordination with government employees or officials, (iii) the role that the attorney's legal counsel places in the execution of 'an essential governmental activity,' and (iv) the immunity accorded to the government employees performing the same role."[22]

The respondent's brief, on the other hand, made three arguments against the extension of qualified immunity. First, immunity should not be extended because Filarsky does not present "evidence showing a firmly rooted tradition of immunity applicable to private

actors" and that the public policy reasons laid out in *Richardson* do not support the extension of immunity.[23] Second, that the underlying decision does not create a circuit split because "the facts in [the Sixth Circuit case] *Cullinan* bear almost no resemblance to those of this case."[24] Third and finally, the respondent argues that this case is a "poor vehicle for deciding the question presented" because Filarsky was working as a private investigator, and not a private attorney, at the time of the conduct complained of.[25]

The case, argued January 17, 2011, attracted a significant amount of interest from amici including: the United States, the American Bar Association, the State of Kansas (along with twenty-seven other States who signed on—New York did not sign), the American Association for Justice, DRI (an organization for defense and in-house counsel), the National School Boards Association, National Association of Counties, National League of Cities, United States Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, and National Conference of State Legislatures, and the League of California Cities and the California State Association of Counties. Notably, all of the amici were in support of Filarsky.

Conclusion

Municipal attorneys should be cognizant of how the Supreme Court ultimately decides *Filarsky.* Qualified immunity remains an important attribute of the American political system and influences how government officials carry out their duties. The doctrine is supported by well-recognized policy considerations, as it spares officials "from the costs associated with the defense of damage actions…[including] the expense of litigation, the diversion of official energy from pressing public issues, and…the danger that fear of being sued will 'dampen the ardor or all but the most resolute, or the most irresponsible [officials], in the unflinching discharge of their duties'"[26] These policy considerations remain just as true "where a governmental body has invoked the expertise of qualified employees."[27]

Endnotes

1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Arteaga v. State, 72 N.Y.2d 212, 216 (1988).
2. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
3. Urguhard v. City of Ogdensburg, 91 N.Y. 67 (1883). *See also* Weiss v. Forte, 7 N.Y.2d 579, 585 (1960)("The [progeny of *Urguhard*] rests immunity on the policy of maintaining the administration of municipal affairs in the hands of state or municipal executive officers as against the incursion of courts and juries…").
4. Cahill v. O'Donnell, 7 F.Supp.2d 341, 350 (S.D.N.Y. 1998).
5. Filarsky v. Delia, 132 S.Ct. 70 (2011).
6. Federal courts in New York have generally found an attorney retained by a municipalities to be a "consultant" rather than a state actor, effectively dismissing § 1983 actions against them. *See* Stepien v. Schaubert, 2010 WL 1875763 (W.D.N.Y. 2010), *aff'd,* 424 Fed.Appx. 46 (2d Cir. 2011) ("An attorney providing legal counsel to a municipal entity is not subject to § 1983 claims based upon the conduct of the municipality."); Goetz v. Windsor Central School District, 593 F.Supp. 526, 528–29 (N.D.N.Y. 1984) (school attorney acting in his professional capacity while representing a municipal client is not actionable under § 1983); R-Goshen LLC v. Village of Goshen, 289 F.Supp.2d 441 (S.D.N.Y. 2003) (consultant who drafted a town ordinance only provided advice and was not subject to a claim under § 1983).
7. Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010).
8. The firefighter was eventually found to be suffering from esophagitis, the ulceration of his esophagus. *See*, Brief of Respondent at 4, Filarsky v. Delia, 132 S.Ct. 70 (2011) (No. 10-1018).
9. Brief of Petitioner at 3, Filarsky v. Delia, 132 S.Ct. 70 (2011) (No. 10-1018).
10. *Delia*, 621 F.3d at 1080.
11. Cullinan v. Abramson, 128 F.3d 301 (6th Cir. 1997).
12. Richardson v. McKnight, 521 U.S. 399, 407 (1997) (citations omitted). The Richardson decision provides additional insight that a *Filarsky* situation may be entitled to qualified immunity, as it found that qualified immunity may extend to "a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision." *Id*. at 413.
13. *Id*.at 305–06.
14. *Id*. at 310 ("As attorneys for the city, [the private lawyers] were clearly acting as the city's agents. The rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's sometimes law director.").
15. In re Findley, 593 F.3d 1048, 1050 (9th Cir. 2010) (quoting Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994)). Filarsky's Petition for Rehearing En Banc was denied. *See* Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010).
16. Gonzalez v. Spencer, 336 F.3d 832 (9th Cir. 2003).
17. *Id*. at 834.
18. *Id*. at 835 (*quoting* Richardson v. McKnight, 521 U.S. 399, 412 (1997)).
19. Filarsky v. Delia, 132 S.Ct. 70 (2011).
20. Brief of Petitioner at 12–40, Filarsky v. Delia, 132 S.Ct. 70 (2011) (No. 10-1018).
21. *Id*. at 40–55.
22. *Id*. at 34 (*citing* Richarson, 521 U.S. at 413).
23. Brief of Respondent at 9–16, Filarsky v. Delia, 132 S.Ct. 70 (2011) (No. 10-1018).
24. *Id*. at 18.
25. *Id*. at 22.
26. Crawford-El v. Britton, 523 U.S. 574, 588, n.12 (1998) (*quoting* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
27. Friedman v. State, 67 N.Y.2d 271 (1986) (*citing* Weiss v. Forte, 7 N.Y.2d 579 (1960)).

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Communication with Represented Public Officials: The "No Contact Rule" as Applied to the Government Client

By Steven G. Leventhal

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States…. In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The Declaration of Independence

Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, First Amendment

No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof…and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. Constitution, Article I, § 9(1)

Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues.

Minnesota St. Bd. for Comm. Colleges v. Knight[1]

The venerable notion that a lawyer should not directly communicate with the client of his or her adversary is deeply rooted in the American legal tradition. The current rule applicable in New York, Rule 4.2 of the New York Rules of Professional Conduct,[2] echoes earlier, similar prohibitions found in the Nation's first professional code of ethics for attorneys, the Alabama Code of Ethics of 1887, and in other state codes of ethics that followed Alabama's lead, and in the Canons of Professional Ethics adopted by the American Bar Association in 1908 and by the New York State Bar Association in 1909.

The purpose of the "No Contact Rule" is "to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches."[3] To accomplish this end, Rule 4.2 (Communication with Person Represented by Counsel)[4] provides that:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Rule 4.2 does not prohibit communication with a represented party concerning matters outside the representation.[5] Unlike the analogous ABA Rule, the New York Rule prohibits communications with a represented "party." ABA Model Rule 4.2 was clarified in 1995 when the word "person" was substituted for "party." Report-

edly, this change was made at the request of prosecutors who were concerned that the broader rule might impede their investigative activities. New York did not make the same substitution in adopting Rule 4.2, possibly indicating that the New York Rule is limited to adversary proceedings. In 2007, the New York Court of Appeals affirmed that former employees are not parties for purposes of DR 7-104(A)(1).[6]

A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so. Communications authorized by law may include communications made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, or the investigative activities of lawyers representing government entities prior to the commencement of criminal or civil enforcement proceedings.[7]

The No Contact Rule applies only where the lawyer knows that the person is represented in the matter to be discussed, but the lawyer may not ignore the obvious; this knowledge may be inferred from the circumstances.[8] If the lawyer does not know that the person is represented in the matter to be discussed, the lawyer's communications with the person are subject to Rule 4.3 (Communicating with Unrepresented Persons).

Since a primary purpose of the No Contact Rule is to preserve the proper functioning of the attorney-client relationship, then, in the government context, we are once again faced with the familiar and sometimes vexing question, who is the client of a government lawyer? In her informative article on the erosion of the government attorney-client confidentiality, Professor Salkin noted that there are five possible clients of the government lawyer: the responsible official; the government agency; the branch of government (executive or legislative); the government as a whole; or the public.[9]

Rule 1.13 (Organization as Client) provides, in pertinent part, that:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents….
>
> (d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 Comment [9] indicates that the duties defined in that rule apply to governmental organizations, but that:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules.… Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified….

As difficult as it may sometimes be to identify the client of a government lawyer, that identification may determine whether the communications between the attorney and the government officer or employee are confidential. Legal advice is privileged only when given to a client. Recent cases have eroded the government attorney-client privilege in federal grand jury investigations. The Federal Circuit Courts of Appeal have split, with the majority view being that:

> When an executive branch attorney is called before a…grand jury to give

> evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence.…
>
> …[T]he proper allegiance of the government lawyer is contemplated by the public's interest in uncovering illegality among its elected and appointed officials.[10]

For now, the government attorney-client privilege is alive and well in the Second Circuit, which adopted the minority view that:

> [I]f anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.[11]

Having thus identified the client, and irrespective of whether particular communications with a government client are protected by the attorney-client privilege, a municipal attorney must still determine which of the government officers and employees are considered "parties" under Rule 4.2 and whether, on the facts presented, direct contact by adversary counsel with a represented party is "authorized by law."

In New York, the rights and responsibilities of corporations and corporate employees have served as a template for those of government entities, officers, and employees.[12] In 1990, the New York Court of Appeals held in *Niesig v. Team I*, a personal injury action, that plaintiff's counsel was permitted to conduct ex parte interviews of employees of the corporate defendant who were merely witnesses to the underlying accident.[13]

In an opinion written by Chief Judge Kaye, the *Niesig* Court traced DR 7-104(A)(1) of the Code of Professional Responsibility (the predecessor to Rule 4.2)[14] to the American Bar Association Canons of 1908, and noted that the rule fundamentally embodied principles of fairness. The general aim of the rule was to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralized the contact. By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguarded against clients making improvident settlements, ill-advised disclosures and unwarranted concessions. In a concurring opinion, Judge Bellacosa noted that DR 7-104(A)(1) was not intended to protect a corporate party from the revelation of prejudicial facts.

The *Niesig* Court observed that often in litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule. The issue therefore distilled to which corporate employees should be deemed parties for purposes of DR 7-104(A)(1), and that choice was one of policy.[15] The Court noted that a broader definition of "party," while furthering the interests of fairness to the corporation, would result in greater cost by foreclosing vital informal access to facts.

The *Niesig* Court rejected both a blanket ban and a "control group" test, and concluded that the test that best balanced the competing interests was one that defined "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. This definition of "party" as the term is used by DR 7-104(A)(1) served to negate the potential unfair advantage of extracting concessions and admissions from those who will bind the corporation. The Court concluded that all other employees could be interviewed informally.

Concern for the protection of the attorney-client privilege prompted the Court also to include in the definition of "party" the corporate employees responsible for actually effectuating the advice of counsel in the matter. However, in a concurring opinion, Judge Bellacosa noted that the confidentiality of attorney-client communications was unaffected by the case, and that the attorney-client privilege serves different purposes and policies.

In its practical application, the *Niesig* test would prohibit direct communication by adversary counsel "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." The test would permit direct access to all other employees, and specifically it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued. The Court noted that a similar test is the one overwhelmingly adopted

by courts and bar associations throughout the country. This long practical experience persuaded the Court that, in day-to-day operation, the test was workable.

In his concurrence, Judge Bellacosa noted that an attorney representing an adverse party seeking to interview any corporate employee who has individually retained counsel would be bound by the prohibition of DR 7-104(A)(1).

Some commentators have criticized *Niesig* either for diminishing the attorney-client privilege, notwithstanding Judge Bellacosa's concurring opinion,[16] or for applying an unhelpful test for determining which corporate employees are parties for purposes of the No Contact Rule.[17]

In the period before *Niesig* was decided, the New York State Bar Association twice considered how the No Contact Rule might apply in the government setting, and the New York City Bar Association considered the question once. So too, in the period after *Niesig* was decided, the New York State Bar Association has twice considered the question, and the New York City Bar Association has considered the question once.

In 1970, the Ethics Committee of the New York State Bar Association considered whether DR 7-104(A)(1) permitted a lawyer to communicate with an adverse party who is a public officer or board member.[18] The Committee concluded that a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual and that the attorney for a governmental unit and opposing counsel must abide by the provisions of DR 7-104. Therefore, once there is an indication that counsel has been designated by a party, whether a government unit or otherwise, with regard to a particular matter, all communication concerning that matter must thereafter be made with the designated counsel, except as provided by law.

In 1975, the Committee considered whether an attorney representing a petitioner reviewing a split decision of the Board of Education may contact the minority members of the board in connection with such proceedings without the consent of the board's attorney.[19] The Committee found that DR 7-104(A)(1) did not prohibit an attorney from interviewing employees or witnesses of an adverse party, as long as such witnesses were not, in fact, adverse parties in the action. It reasoned that the overriding public interest compels that an opportunity be afforded to the public and its authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. The Committee opined that minority members of a public body should not, for purposes of DR 7-104(A)(1), be considered adverse parties to their constituents whom they were selected to represent.

In 1988, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney representing a client who had a dispute with a government agency.[20] The agency had retained private counsel for the matter. The inquiring attorney requested the opportunity to submit comments to the head of the agency regarding the agency's exercise of its authority in the matter. The government's private counsel advised the inquiring attorney that a staff attorney for the government agency objected to the request, and took the position that such a communication would constitute an ethical violation by the inquiring attorney. The Committee balanced the competing interests of providing the government with the same protections that were afforded to other parties with the need to ensure relatively unrestricted public access to government. It opined that the inquiring attorney must first determine whether the head of the agency was acting in an official capacity. If so, then pursuant to the "authorized by law" exception DR 7-104, the attorney was permitted to submit comments to the head of the agency concerning the subject matter of the representation, provided that he notified the government's private counsel of the intended communication and that he provided counsel with copies of the submissions. However, if the inquiring attorney concluded that the head of the agency was acting in a private capacity, then he was not permitted to communicate with that person, unless he had the consent of opposing counsel or was authorized by law to do so.

In its first post-*Niesig* opinion addressing the application of the No Contact Rule in the government setting, the Ethics Committee of the New York State Bar Association considered whether an attorney may communicate directly with officials or employees of a government entity that is represented by counsel. The Committee noted that, in New York, the governing principle is set forth in the *Niesig* decision, which "define[d] 'party' to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." The Committee concluded that an attorney may communicate with officials or employees of a governmental entity that is represented by counsel in connection with a matter provided: (a) the officials or employees lack the power to bind the entity; (b) the communication is directed to an attorney representing the entity in connection with the subject matter of the communication; or (c) the attorney concludes that he or she is authorized by law to make the communication.

In 1991, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney that represented a former prison employee challenging

his discharge from the position of prison guard.[21] The inquirer wished to interview various government employees outside of the presence of, and without notice to, the agency's counsel. The Committee concluded that the inquirer was permitted to interview guards who were merely witness to the incident, outside the presence of and without notice to the agency's counsel, so long as the inquirer clearly identified himself and his interest to the persons being interviewed. As to agency supervisory officials whose acts or omissions may be imputed to the agency for purposes of liability, the Committee concluded that the inquirer was not permitted to interview such persons outside the presence of and without notice to the agency's counsel. As to those officials who had the authority to settle the dispute, the Committee concluded that the Rule, as construed in a manner consistent with the logic of *Niesig*, would generally prohibit the inquirer from communicating with such officials outside of the presence of the agency's counsel; however, certain communications with high-level agency officials relating to "the subject of the representation" may be ethically permitted as authorized by the legal and constitutional rights of the lawyer and his or her client to petition or otherwise have access to the government.

The Ethics Committee of the New York State Bar Association revisited the question in 2007.[22] The Committee was asked whether, over the objection of counsel representing a town planning board, the in-house counsel for a real estate development company may communicate privately, separately, and informally about the developer's pending application with the individual members of the board who support the developer's proposed project. The controversial project, construction of a shopping center, was supported by members of the Town Board but opposed by a majority of the members of the planning board.

The planning board was represented with respect to the shopping center project by outside counsel. The developer also retained outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who supported the project. The inquirer stated that these communications were not in the nature of legal advice or assistance and were not designed to supplant guidance provided to the board by their own legal counsel. Rather, the separate communications were confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices and were intended "to ensure that supportive members of the planning board had the information they needed to counter the opposition's efforts to derail the project, and were able to share facts and strategies with the developer." The developer thus sought to create an even playing field with members of the public who opposed the project and who "communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel." Counsel for the planning board objected to the separate, private communications regarding the project with individual members of the planning board, and directed that the developer's counsel limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

The Committee applied a two-step analysis to determine whether direct contact by the developer's counsel with minority members of the planning board was permitted under DR 7-104(A)(1). The Committee first analyzed whether the minority planning board members were "parties" within the meaning of the *Niesig* decision and, upon concluding that they were (because the planning board was invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it), the Committee next determined whether the proposed communications were "authorized by law."

The Committee noted that most authorities share the sentiment that "the literal application of the 'no-contact' rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated." The Committee adopted the approach of the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408 that allowed, without consent, contacts with government officials that would otherwise have been prohibited by the model No Contact Rule, subject to three conditions: (a) the official to be contacted must have authority to take or recommend action in the controversy, (b) the sole purpose of the communication must be to address a policy issue, and (c) advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.

The Committee concluded that the communications fell within the protection of the First Amendment right to petition and were therefore not prohibited by DR 7-104(A)(1), provided that counsel for the planning board was given reasonable advance notice that such communications will occur. Noting that the precise parameters of the constitutional right to petition were beyond its jurisdiction, the Committee noted that communications directed to government officials who do

not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (such as interviews with witnesses to government misconduct), should be fully subject to the No Contact Rule as, in each of these situations, there are no First Amendment considerations at play. Of course the communications, even if not protected by the First Amendment right to petition, would be permissible under the No Contact Rule if the respective government officials are not "parties" as the term was defined in *Niesig*.

The Committee concluded its analysis with several important caveats. First, it did not opine on whether additional "private," "separate" or "informal" communications with board members might violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, it did not address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations. Third, the Committee cautioned that the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product. Fourth, the Committee stated that the inquirer should cease contact with a planning board member if the member so requests.

Effective April 1, 2009 the New York Appellate Divisions jointly adopted the New York Rules of Professional Conduct (22 NYCRR Part 1200) making New York the last state to adopt the Model Rules of Professional Conduct; this now allows us to look to judicial decisions and ethics opinions rendered in other jurisdictions for guidance in interpreting the New York Rules of Professional Conduct. As noted by the Ethics Committee of the New York State Bar Association, the majority view is that the No Contact Rule is limited in the government setting by application of the right to petition government guaranteed by the Constitutions of the United States and the State of New York.

In his comprehensive treatise on New York Rules of Professional Conduct, Professor Simon gives the following advice to New York lawyers interpreting the No Contact Rule:[23]

> First, the interpretation of the no-contact rule remains very much a state by state affair. Even though the text of the rule is likely to be almost identical from one state to the next, the interpretation of the rule differs greatly. For litigators in particular, it is crucial to research the meaning of the no-contact rule in each jurisdiction where litigation is pending.
>
> Second, the meaning and operation of the no-contact rule varies from context to context. An interpretation that works in the context of a class action may not work in the context of a suit against a state agency or a visit to a web site.
>
> Third, the meaning of the no-contact rule is evolving over time. Courts and ethics committees are producing a steady stream of opinions interpreting the rule, and it is important to check the latest offerings before engaging in ex parte communications with those who may be within the sweep of the no-contact rule.
>
> Fourth, opposing attorneys are eager to seek sanctions for violations of the no-contact rule, including suppression of evidence, disqualification, and monetary sanctions-and courts are often willing to oblige if they find a violation.
>
> In sum, it pays to pay attention to the nuances and frequent developments in the scope and meaning of the no-contact rule. Lawyers who fail to do so are taking great professional risks.

There are very few cases construing the "right to petition" clause of the First Amendment. However, while the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances, and while the government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy or by imposing sanctions for the expression of particular views it opposes, the First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective…[Nor does it] impose any affirmative obligation on the government to listen…[or] to respond…."[24]

It is not uncommon for litigation adversaries or their counsel to confront government officials at their public meetings. The Open Meetings Law[25] is silent on the issue of public participation. Thus, a government body is not required to permit members of the public to speak or participate at meetings; if a body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, it is not obligated to do so. But, if a government body chooses to permit public participation, it must do so in a reasonable manner, based on reasonable rules that treat all members of the public equally.[26]

If the public is generally permitted to speak at meetings, a public body cannot validly prohibit a person from speaking because of the possibility that he or she might at some point initiate litigation, as that person's comments would divulge nothing about the public body's strategy in the potential or eventual litigation.[27]

In summary, under Rule 4.2 (Communication with Person Represented by Counsel), an attorney may communicate directly with officers or employees of a government entity provided that either: (a) they are not "parties" as defined by the Court of Appeals in *Niesig*; (b) the contacted officer or employee is an attorney representing the entity in connection with the subject matter of the communication; or (c) the contacting attorney is authorized by law to make the communication, such as a communication on a policy issue made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, upon reasonable advance notice to counsel. Municipal attorneys should fully inform their clients of the dangers that attend unguarded conversations with litigation adversaries, and should urge them to exercise caution and restraint in responding to direct communications from adversary counsel.

Endnotes

1. 465 U.S. 271, 272 (1984).
2. N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200.0 (2012).
3. N.Y. State 652 (1993); N.Y. State 650 (1993); N.Y. State 607 (1990).
4. Unless otherwise stated, all "Rules" cited in this outline are found in the New York Rules of Professional Conduct, N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200., effective April 1, 2009.
5. Rule 4.2 Comment [4]. The Appellate Divisions have not adopted the Comments, which are published by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.
6. Muriel Siebert Co. v. Intuit, Inc., 8 N.Y.3d 506 (2007).
7. Rule 4.2 Comment [5].
8. Rule 4.2 Comment [8].
9. Patricia Salkin, *Beware: What You Say to Your [Government] Lawyer May be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 URB. LAW 283 (2003). *See also,* Fed. Ethical Consideration 5-1 of Canon 5 of the ABA Code of Prof. Resp. (1973) (the immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency).
10. In re Lindsay, 158 F.3d 1263 (D.C. Cir. 1998).
11. In re Grand Jury Investigation v. John Doe, 399 F.3d 527 (2d Cir. 2005).
12. *See* New York State Bar Association, Opinion 160 (October 9, 1970).
13. Niesig v. Team I et al., 76 N.Y.2d 363 (1990).
14. DR 7-104(A)(1) provided that "[d]uring the course of representation of a client a lawyer shall not…[c]ommunicate or cause another to communicate with a party [the lawyer] knows to be represented by a lawyer in that matter unless [the lawyer] has the prior consent of the lawyer representing such other party or is authorized to do so."
15. "In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, [the Court is] of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules of professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law. That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances…[the Court is] not constrained to read the rules literally or effectuate the intent of the drafters, but to look to the rules as guidelines to be applied with due regard for the broad range of interests at stake. When [the Court agrees] that the Code applies in an equitable manner to a matter before [it, the Court] should not hesitate to enforce it with vigor. When [the Court] find[s] an area of uncertainty, however, [it] must use [its] judicial process to make [its] own decision in the interests of justice to all concerned." Niesig, 76 N.Y.2d at 369-70 (citations omitted).
16. *See* C. Evan Stewart, *How One Bad Ruling Can Spoil a Whole Bunch of Cases,* N.Y. L.J., Jan. 8, 2009, at 5, col. 2.
17. *Id. See also,* Brian C. Noonan, *The Niesig and NLRA Union: A Revised Standard for Identifying High-level Employees for Ex Parte Interviews,* 54 N.Y. L. Sch. L. Rev. 261 (2009/2010).
18. New York State Bar Association, Opinion #160 (1970).
19. New York State Bar Association, Opinion #404 (1975).
20. NYC Bar Association, Formal Opinion 1988-8 (1988).
21. NYC Bar Association, Formal Opinion 1991-4 (1991).
22. New York State Bar Association, Opinion #812 (2007).
23. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 833 (2012 Ed.).
24. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464-65 (1979) (internal citations omitted).
25. N.Y. PUB. OFFICERS LAW Art. 7.
26. *See* Comm. on Open Gov't OML-AO-4810, 4691, 4644, 4573, 4044, 4024, 3845, 3518, 3405, 3364, 3295, 3171, 2896, 2894, 2798, 2794, 2696, 2585, 2199 (Opinions of the Committee on Open Government are available at http://www.dos.ny.gov/coog/index.html.).
27. Comm. on Open Gov't OML-AO-2696.

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Court of Appeals Update: Contractual No-Layoff Provisions

By Sharon N. Berlin and Richard K. Zuckerman

A recent New York Court of Appeals decision has important implications for public employers and unions whose collective bargaining agreements (CBAs) contain a no-layoff provision, or which are considering agreeing to one. At a time when many public employers are considering reductions in force, the decision appears to signal a judicial shift away from deferring to arbitrators to decide questions involving the scope of a CBA's no-layoff provision, and towards a requirement that a job security clause be explicit in its scope in order to be enforceable through the arbitration process.

In *Matter of the Arbitration Between Johnson City Professional Firefighters and Village of Johnson City*, the Court of Appeals granted a stay of arbitration precluding a union from arbitrating a CBA's no-layoff clause that stated, "[t]he Village shall not lay-off any member of the bargaining unit during the term of this contract." 18 N.Y.3d 32, 36 (2011). The union sought to enforce this provision through a grievance arbitration following the layoff of several of its members due to budgetary constraints.

In considering the Village's objection to arbitrability, the Court explained that it "has long held that a purported job security provision does not violate public policy, and therefore is valid and enforceable, only if the provision is 'explicit,' the CBA extends for a 'reasonable period of time,' and the CBA 'was not negotiated in a period of a legislatively declared financial emergency between parties of unequal bargaining power'… A purported 'job security' clause that is not explicit in its terms is violative of public policy, rendering it invalid and unenforceable." *Id.* at 37.

The Court held that the contract did not define the term "layoff," did not expressly prohibit the abolition of positions due to budgetary necessity, was not "explicit, unambiguous and comprehensive" in its restriction on the Village's right to eliminate positions for "budgetary, economic or other reasons" and did not "explicitly protect the firefighters from the abolition of their positions due to economic and budgetary stringencies." *Id.* In finding the provision to be unclear, the Court noted that "[t]he term 'layoff' is undefined in the CBA, and is open to different and reasonable interpretations. Indeed, the parties' disagreement over whether the term 'layoff' constitutes a permanent or non-permanent job loss, and whether the Village's abolition of the firefighter positions constituted a layoff, underscores its ambiguity." *Id.* at 38. The Court concluded, therefore, that "[s]imply put, because the clause is not explicit, unambiguous and comprehensive, there is nothing for the Union to grieve or for an arbitrator to decide." *Id.*

The Court further explained that "[f]rom a public policy standpoint, our requirement that 'job security' clauses meet this stringent test derives from the notion that before a municipality bargains away its right to eliminate positions or terminate or lay off workers for budgetary, economic or other reasons, the parties must explicitly agree that the municipality is doing so and the scope of the provision must evidence that intent. Absent compliance with these requirements, a municipality's budgetary decisions will be routinely challenged by employees, and its ability to abolish positions or terminate workers will be subject to the whim of arbitrators." *Id.* at 37-38.

The Court provided examples of the wording for no-layoff clauses that would meet its "stringent test" for arbitrability. One was a clause providing that "[d]uring the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance and provided for under Tenure Law." *Id.* at 37. This, the Court explained, explicitly restricted the public employer's right to eliminate positions and terminate workers for economic reasons.

Now that the Court has provided updated guidance with regard to this issue, a CBA's no-layoff provision, or one to which an employer or union may be considering agreeing, should be examined to determine whether it meets the test for being enforceable through arbitration; *i.e.*, that it is sufficiently comprehensive,

unambiguous and explicit in limiting the employer's right to eliminate positions for economic or budgetary reasons. This review should also include whether the provision was negotiated at a time when the parties had equal power at the bargaining table and whether the provision restricts layoffs for only a reasonable period of time. Depending upon the answers to these questions, a reduction in force might be implemented without having a concern about an arbitrator interpreting and perhaps enforcing the provision against the employer.

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2011 New York State Legislative Update

By Darrin B. Derosia

Chapter 3

Village Elections

Permits villages to temporarily use lever voting machines in village elections. Beginning in 2013, villages will have to use electronic ballot scanners or paper ballots in village elections.

Chapter 16

Notification of Veteran Events

Authorizes municipalities to adopt a local law to provide a bulletin board at the municipal office building for displaying information specific to veterans such as upcoming events.

Chapter 41

Installment Loans Bond Extender

Extends the provisions of Local Finance Law until 2014 that authorize municipalities to issue grid bonds or notes evidencing installment loans to the New York State Environmental Facilities Corporation in order to obtain financial assistance from the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund.

Budget Bills

Chapters 50, 55, and 56

Regional Economic Development Councils

This year's Budget established 10 Regional Economic Development Councils. Members of each of the Councils were comprised of local business, community, academic, municipal, state government, labor and other key regional stakeholders. These councils, chaired by Lt. Governor Robert Duffy, are responsible for developing a long-term economic strategy for their respective regions, as well as assisting in the coordination and distribution of state economic development resources, and reviewing previous economic development commitments to ensure the appropriate projects are receiving aid. Funding for the regional councils will come from $200 million in existing resources that will be awarded competitively—$130 million in capital funds and $70 million in tax credits.

State Aid

AIM funding for New York City was eliminated in this year's Budget, and there was a 2% reduction from last year's levels for other municipalities. CHIPS and Marchiselli aid funding stayed at last year's levels. There are 16 municipalities that receive state aid for being a host community with respect to Video Lottery Terminals (VLTs), and this year's Budget reduced the amount of that aid for each community to about 45% of the original amounts in 2008, except for the City of Yonkers, which continues at current levels.

Local Government Efficiency Program

Provides technical assistance and grants to local governments for the development of projects that will achieve savings and improve municipal efficiency through shared services, cooperative agreements, mergers, consolidations, and dissolutions. The 2011-12 Budget provided $79 million for this program, divided into three categories: $35 million for Citizen Empowerment Tax Credits and Citizens Reorganization Empowerment Grants; $4 million for Local Government Efficiency Grants; and $40 million for Local Government Performance and Efficiency awards. More information about the program is available from the NYS Department of State.

Chapter 68

Renewable Energy Credit Program

Extends the authority of NYS Office of General Services to purchase and deliver renewable energy and renewable energy credits, along with electricity, from the New York Power Authority and other suppliers until 2015.

Chapter 69

Statutory Installment Bonds

Extends the authority to issue and sell statutory installment bonds to the Environmental Facilities Corporation, as provided in the Local Finance Law, until 2014.

Chapter 71

Private Bond Allocation Act of 2011

Provides an allocation mechanism for the private activity bond ceiling on issuance of certain tax-exempt private activity bonds and notes, in order to qualify for federal tax exemption.

Chapter 72

Refunding Bonds

Extends the authority for certain refunding bonds, as provided in the Local Finance Law, until 2014.

Chapters 95 and 96

Marriage Equality Act

Amends the Domestic Relations Law to authorize marriage of persons of the same gender and prohibits the denial of a marriage license for same-sex couples. Chapter 96 was an amendment enacted to provide protections for the clergy and religious organizations that refuse to perform same-sex wedding ceremonies.

Chapter 97

Omnibus Reform Bill

Property Tax Cap

The property tax cap imposes a 2% (or the increase in the CPI if less than 2%) limit on increases in the local property tax levy with exclusions for a portion of rising pension costs, lawsuits and adjustments for economic growth in a community. The cap also applies to special ad valorem levies and special assessments, but not to fees or fines.

A municipality may adopt a local law to override the tax cap, but it requires an affirmative vote by 60% of the governing body. For school districts to override the cap, at least 60% of the votes cast in a referendum would have to be in favor of the override. Both the NYS Department of Taxation and Finance and the NYS Office of the Comptroller play significant roles in the new process.

Mandate Relief Council

Authorizes creation of an 11-member Mandate Relief Council with the power to review and recommend amendment/repeal of regulatory and statutory mandates presented by local governments and school districts.

Petition Process for Alternatives to Regulatory Mandates

Provides the process for local governments to seek approval from state agencies for an alternative method of implementing a regulatory mandate.

Procurement Reform

Permits municipalities to piggyback onto federal contracts for information technology and telecommunications hardware, software, and professional services, as well as law enforcement equipment contracts. The law also extends the ability for municipalities to piggyback onto county contracts, now including public works contracts (in addition to purchasing contracts) that have been competitively bid.

Contracts for Fuel and Electricity

Permits the NYS Office of General Services to provide centralized contracts for the purchase of fuel and electricity by municipalities and school districts.

CHIPS Cap

Increases the cap, from $100,000 to $250,000, on local street or highway projects funded by CHIPS aid where the work is performed by the municipality's own employees.

Tax Exemption for Multiple Dwellings

Authorizes municipalities to designate benefit areas in which newly constructed or substantially rehabilitated multiple dwellings that meet certain conditions regarding affordable housing will be exempt from increased taxation resulting from such new construction or rehabilitation.

Repeal of Police Chief Compensation Mandate

Repealed General Municipal Law section 207-m, which related to mandatory salary increases for heads of police departments of municipalities, districts, or authorities.

Reimbursement for Police Officer Training

Allows all municipalities (eliminating the under 10,000 population requirement) to recover municipal expenses associated with police officer training when an officer transfers to another municipal police department within three years of completing training.

Attorney Certification of Local Laws

Removes the requirement that the municipal attorney certify that a local law filed with the Department of State contains the correct text and was properly adopted.

Chapter 109

Texting and Driving

Makes the use of an electronic device while operating a motor vehicle a traffic infraction without the requirement that the driver had violated a separate section of the Vehicle and Traffic Law.

Chapter 170

Special District Elections

Permits fire districts and special improvement districts that have commissioners to temporarily use lever voting machines in their elections. Beginning in 2013, these districts will have to use electronic ballot scanners or paper ballots in their elections.

Chapter 257

Land Banks Act

Creates a new article 16 in the NYS Not-For-Profit Corporations Law to provide for the creation of up to 10 municipal land banks for the purpose of redeveloping vacant, abandoned, and tax-delinquent properties. The new law gives tax foreclosing governmental units authority to create a "land bank" with the approval of the Empire State Development Corporation (ESDC). ESDC has issued guidelines for the land bank program including applications. Land Banks have the ability to clear titles and forgive back taxes, removing many of the legal impediments to turning properties that blight communities into ones that can help revive private real estate markets, while giving more control to local governments to tailor development to local needs and conditions.

Chapter 388

Power NY Act of 2011

Reauthorizes the expired Article X of the Public Service Law to give a new streamlined permitting process for siting a "major electric generating facility," with a generating capacity of at least 25,000 KW; requires a multi-agency board to hold hearings and make determinations regarding environmental impact.

Chapter 390

Surplus Municipal Computers

Expands the authority of municipalities to donate computers and software to non-profit organizations for use by senior citizens or low-income persons.

Chapter 398

Complete Streets Program

Requires that future state and local transportation projects consider various access and mobility factors by users, including public transportation users, pedestrians, and bicyclists, with the goal of improving safe access to public roads for all users, not just cars. The requirements apply to any transportation project receiving state or federal funding or undertaking by NYS DOT. The goals are to be met through the use of complete street design features, unless the cost of doing so is disproportionate to the need or there is a demonstrated lack of need for such features.

Chapter 399

Public Integrity Reform Act of 2011

This ethics reform Act requires greater financial disclosure for State officials, additional disclosures for registered lobbyists, forfeiture of pensions for public officials convicted of a felony related to their public office, and provides for the creation of a Joint Commission on Public Ethics with increased penalties for violations.

Chapter 401

Water Withdrawal Permitting

Authorizes the Department of Environmental Conservation to implement a water withdrawal permitting program to regulate the use of the State's water resources. The law empowers the Public Service Commission to set rates for supplying water by a public water supply system to another public system, and prescribes penalties for violations.

Chapter 471

Joint Municipal Ambulance Services

Clarifies authority for municipalities to provide joint emergency and ambulance service, or for one municipality to provide the service for another municipality pursuant to an inter-municipal agreement.

Chapter 524

"Cure Period" for Rules and Regulations

Directs state agencies when adopting rules involving assessment of penalties on local governments or small businesses for violation to include a "cure period," or explain why such a cure period is not included, that will allow time for the local government to correct the situation before the penalty is imposed.

Chapter 527

Funeral Demonstration Permits

Authorizes a local government (and other entities having jurisdiction over territory) to adopt by local law or regulation a permit requirement for a demonstration within 1,000 feet of a funeral event.

Chapter 528

Funeral Demonstration Buffer Zones

Increases to 300 feet the buffer zone for demonstrations at religious services or funerals under the Penal Law.

Chapter 557

Stormwater Management Design Modification

Requires that the NYS Stormwater Management Design Manual be modified to promote safety in and around stormwater retention ponds by requiring new safety features to be implemented such as warning signs around the pond, defining reasonable slope, establishing aquatic vegetation prior to rendering the pond as "in-service," and ensuring examination of the status of pond safety features as part of a routine maintenance schedule.

Chapter 561

Conditional Approval of Final Plats

Authorizes local planning boards to extend the duration of the conditional approval of a final plat at 90-day intervals. Removes the limitation of a maximum of two 90-day extensions.

Chapter 603

Open Meetings Law and Public Records

Requires that records that are subject to the Freedom of Information Law (FOIL), as well as any resolution, law, regulation or policy, which are scheduled to be discussed at an open meeting, be made available upon request, to the extent practicable, prior to or at the meeting. Additionally, where the public body's agency maintains a website, such records shall be posted on the website, to the extent practicable, prior to the meeting.

Chapter 608

Best Value Standard for Purchase Contracts

Provides that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract) must be awarded on the basis of best value, as defined in State Finance Law—"awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers." Best value awards must be based upon objective and quantifiable analysis wherever possible. The best value standard does not apply to public works contracts, which must still be awarded to the lowest responsible bidder.

Some Vetoes Worth Noting

Veto No. 59

Modifications to Fireworks Statute

The bill would have amended provisions of the Penal Law pertaining to the unlawful possession and sale of fireworks by clarifying definitions. However, by altering the definition of "firework" and "dangerous fireworks" it would have made certain harmful devices legal to sell and use in New York.

Veto No. 60

Health Coverage to Spouses and Dependents

The bill would have provided continuous health insurance coverage to the spouse and dependents of public employees who are injured or taken ill while on the job, at the expense of the employer.

Veto No. 70

Office of Taxpayer Advocate

The bill would have created the Office of Taxpayer Advocate to assist New York State taxpayers in their dealings with the New York State Department of Taxation and Finance.

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