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Municipal Lawyer

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

A Message from the Chair

Patricia Salkin

Home run! It is the baseball playoffs as I write this column, and it is the best phrase to describe the fall 2010 Section meeting in Washington, D.C. Kudos to Program Co-Chairs Sharon Berlin and Steve Leventhal for putting together a spectacular program.

Judge Richard Dollinger of the New York Court of Claims, and former member of the New York State Senate, started the CLE program with a riveting presentation on the federal honest services statute, public corruption and municipal officials. Observing the room, everyone was captivated by the information and the group was engaged in an active question and answer session with the Judge. We look forward to reading an article by the Judge on this topic in an upcoming issue of the *Municipal Lawyer*.

Kevin Crawford and Lisa Weber then delivered an informative Section 1983 update. There were a lot of great practice pointers sprinkled throughout the presentation. Two Washington, D.C.–based lawyers then discussed recent developments in the siting of wireless communications equipment, which focused significant attention on the FCC's new shot clock regulations. Chuck Thompson, Executive Director of the International Municipal Lawyers Association, walked the group through a case law update of recent U.S. Supreme Court cases of interest to municipal lawyers. He shared wonderful insights into the cases and the courts. Michael Fox and Douglas Briggs closed the program with a wonderful presentation on the use of technology for litigation.

Special thanks to our program sponsors, whose support generously contributed to keeping costs manageable for the program: Leventhal and Slinely, LLP; New York Municipal Insurance Reciprocal; RBC Capital Markets Corp.; Squire Sanders; and Lamb and Barnosky. We were also pleased to be joined by Mark Gorgos, who is not just our new NYSBA Executive Committee liaison, but a local government lawyer in Binghamton, NY.

On Monday following the program, I had the honor of moving the admission of 23 Section members to the U.S. Supreme Court. It was an exciting time for everyone to be in the courtroom with a guest and to stand before Chief Justice Roberts, as well as six other members of the Court including Justice So-

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tomayor from New York and new Justice Elana Kagan. State Bar President Stephen P. Younger joined the Section for this memorable event and was admitted with us. Congratulations to the following Section members now admitted to practice before the Supreme Court: William Anderson, Michele Babcock, Sharon Berlin, Kenneth Bond, Philip Dixon, Stephen Dorsey, Brian Egan, Robert Feller, Josephine Greco, E. Tom Jones, Michael Kenneally, Jr., Steven Leventhal, Richard O'Rourke, Richard Olson, John Matthew Plunkett, Christopher Quinlan, Amy Reichhart, Jeremy Scileppi, Benedict Sliney, Chris Trapp, Mindy Zoghlin and Richard Zuckerman.

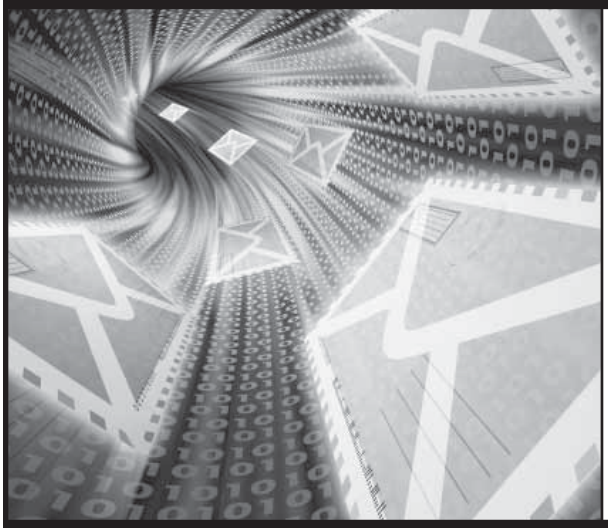
Plans are under way for our Annual Meeting program in New York City on Thursday, January 27, 2011. Co-Chairs Dan Spitzer and Bernis Nelson are putting together what promises to be an information-filled CLE program. Topics will include an examination of the use of social networking sites by local governments and local government officials—covering issues including labor law, ethics, open meetings, records retention, the First Amendment, and ex parte communications. Affordable housing, raising revenue at the local level in tough economic times and case law updates will also be presented.

Also at our fall Executive Committee meeting we discussed strategies for launching our new Municipal Law Section blog. This should be up and running by the time you are reading this column. Lisa Cobb has volunteered to assist with this initiative. There was also discussion of planning a two-day transitional CLE program on the nuts and bolts of municipal law practice. We are looking for volunteers to assist in further developing this effort. Lastly, a number of Section members have been participating in the State Bar's Task Force on Government Ethics. Mark Davies is chairing the task force committee looking at proposed reforms in the area of municipal ethics. He will also be a featured speaker at the Presidential Summit scheduled for Wednesday afternoon, January 26, 2011 during the Annual Meeting. This is going to be a provocative and insightful program, and worth attending the afternoon before our scheduled meeting/program.

Please consider making the time to get involved in the Section. The more people who volunteer to write for the *Municipal Lawyer*, participate in our blog and list serve, write a book, plan a CLE, organize a new committee and join an existing committee, the better able we will be to serve all of our members, attract new members, and continue to provide high value to all. If you are ready to step up to the plate, please send me an email at psalk@albanylaw.edu and we will happily draft you to the active team.

Patricia Salkin

Request for Articles



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

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

www.nysba.org/MunicipalLawyer

From the Editor

To avoid violating ethics laws and common law conflict of interest principles, municipal board members' financial interests and business and personal relationships may require their recusal from deciding certain applications for land use, contractual or other government approvals. What happens if a majority of municipal board members recuse themselves from a particular application and no other board or official is authorized to act on that application?

Under limited circumstances, board members who would otherwise be disqualified from voting on a matter may nonetheless act under a doctrine known as the Rule of Necessity. The Court of Appeals has articulated the basis for the Rule of Necessity as follows:

> The participation of an independent, unbiased, adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions…the Rule of Necessity provides a narrow exception to this principle requiring a biased adjudicator to decide cases if and only if the dispute can not otherwise be heard… Thus, where all members of an adjudicating body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law.[1]

Although its genesis can be traced to the obligation of a judge to decide a case in which he or she has a personal interest if the case cannot be heard otherwise,[2] the Rule of Necessity has been applied to conflicts of interest involving administrative and legislative bodies.[3]

Under these cases, for example, if three members of a five member town board were to recuse themselves, the Rule of Necessity would be applicable since, under General Construction Law § 41, the two remaining town board members would have no power to take any action. Conversely, the Rule of Necessity would not apply in the event of two recusals and a 2-1 vote by the remaining three town board members since the board, through the votes of those three members, would be capable of acting even though it would be unable to muster the number of affirmative votes required to act.[4]

Assuming that there are only two recusals, a related question concerns whether the Rule of Necessity could be applied where a county planning board disapproves of a proposed zoning amendment and the town board, because of two recusals, is mathematically incapable of obtaining the supermajority vote required under General Municipal Law § 239-m(5) to override that disapproval. Nor is it clear, assuming that the Rule of Necessity can be properly invoked, whether a previously recused board member can be compelled to vote should that person choose not to.

In this issue of the *Municipal Lawyer*, Patricia Salkin's Message from the Chair describes the Section's spectacularly successful Fall Meeting in Washington, D.C., highlighted by the grandeur of the proceedings to admit twenty-two members of our Section to the United States Supreme Court. Chair Salkin's Message also previews topics to be addressed at the Annual Meeting in January, 2011, including the use of social networking sites, affordable housing and case law updates.

Model ethics legislation proposed by the New York State Comptroller is critiqued in an article entitled, "How Not to Draft an Ethics Law" by Mark Davies, Executive Director of the New York City Conflicts of Interest Board. While acknowledging the need for an overhaul of Article 18 of the General Municipal Law and applauding the Comptroller's goals in proposing the legislation, the article discusses the problems raised by the Comptroller's bill and proposes a different approach to revising Article 18.

Enacting a model green building ordinance is the subject of an article by Michael B. Gerrard, Andrew B. Sabin Professor of Professional Practice and Director of the Center for Climate Change at Columbia Law School, and Jason James, a Post-Doctoral Research Fellow at the Center. Mr. Gerrard and Mr. James review the essential provisions to be incorporated into a green building ordinance, discuss the legal issues raised in connection with such ordinances and explain how the model ordinance would avoid these vulnerabilities.

Finally, the various types of employments and appointment procedures available to the state and political subdivisions as public employers are reviewed by Harvey Randall, former principal attorney for the New York State Department of Civil Service. Topics

addressed include employment in the classified and unclassified service, employment by public benefit corporations and employment of retired public employees.

Endnotes

1. *Matter of General Motors Corporation-Delco Products Division v. Rose*, 82 N.Y.2d 183, 188 (1993).
2. *See Morganthau v. Cooke*, 56 N.Y.2d 24, 29 (1982).
3. *Matter of General Motors Corp. supra* note 1, [Rule of Necessity may not be employed to enable otherwise disqualified Commissioner of the Division of Human Rights to act where she had the authority to appoint a subordinate to act in her place.]; *Duquette v. Town of Peru Town Board*, 18 Misc.3d 1129 (A) (Sup. Ct. Clinton Co. 2008) [Rule of Necessity applies to allow the interested town board members to vote on a resolution to confer themselves with municipal defense and indemnification protection from a pending lawsuit where otherwise the town board would be disabled from acting.]; *Malone v. City of Poway*, 746 F.2d 1375 (9th Circuit 1984) [City council was the only body authorized to consider an application for land use approval and therefore cannot be subject to a civil rights damage action for failure to disqualify themselves.].
4. *See Vesely v. Town of New Windsor*, 90 A.D.2d 770 (2d Dept. 1982) [Town board deadlock does not permit resort to the Rule of Necessity to allow board member with conflict of interest to vote to break the deadlock.].

Lester D. Steinman

NEW YORK STATE BAR ASSOCIATION

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January 24-29, 2011

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Municipal Law Section Program
Thursday, January 27, 2011

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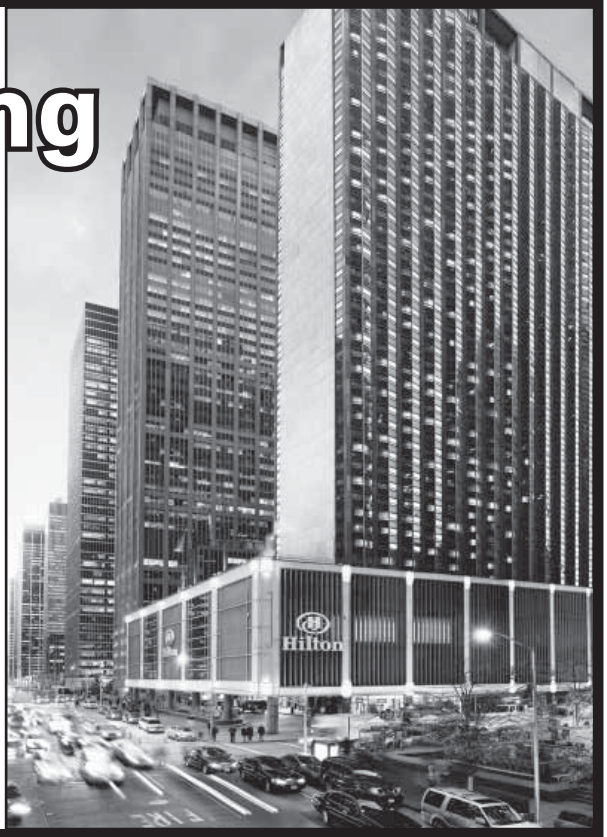

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Appointment to Positions in New York State's Civil Service

By Harvey Randall

With apologies to Elizabeth Barrett Browning,[1] *How may I appoint you; let me count the ways!* As this article will attempt to illustrate, there are many types of employments and appointment procedures available to the State as an employer, to a political subdivision of the State or to a New York State public benefit corporation with respect to appointing or employing an individual.

Essentially the workforce in New York State consists of those employed and those unemployed but seeking employment. If employed, the individual is either working in the private sector or the public sector.[2] Excluding the federal government and interstate compact commissions and authorities, if serving in the public sector in New York State the individual is either in the State's military service[3] or its civil service.

The State's "civil service" has two components: the classified service[4] and the unclassified service.[5]

The Classified Service

Let us first consider employment in the classified service, as the majority of the employees of New York State as an employer and the employees of its political subdivisions serve in positions in the classified service.

Appointments to positions in the classified service are subject to the approval of the New York State Civil Service Department or a local Civil Service Commission or Personnel Officer, depending on the appointing authority involved.[6]

A position in the classified service is typically a position in the competitive class or, as provided by law, it may be "jurisdictionally classified" as a noncompetitive class position, an exempt class position or a labor class position.[7] All classified service positions are automatically in the competitive class unless placed in a different jurisdictional class by the action of a civil service commission or by a statute.[8]

An individual's statutory rights[9] with respect to his or her employment, including his or her right to administrative due process in a disciplinary situation, depend on the nature of his or her appointment by the responsible appointing authority of the State or a political subdivision of the State[10] and his or her status flowing therefrom.

The statutory rights of employees in the civil service of the State and its political subdivisions, however, are not universal. A simple example: an individual appointed as a provisional or temporary employee in a position in the competitive class does not have the same employee statutory rights as those enjoyed by an individual holding a permanent appointment in the same competitive class title.[11]

An individual's statutory right to many benefits of employment such as eligibility to compete in a promotion examination for a higher grade position, his or her seniority in a layoff situation, and the right to administrative due process for the purpose of discipline all flow from the individual's initial date of permanent appointment, his or her tenure status and the jurisdictional classification of the position in which he or she serves as a matter of law.

In contrast, employees in a collective bargaining unit within the meaning of the Taylor Law,[12] regardless of their holding "permanent appointment" or otherwise, are typically entitled to many, if not all, the rights and benefits established through collective bargaining and set out in a collective bargaining agreement. Such rights and benefits could include determining seniority for the purpose of "shift selection," eligibility for, or avoiding, working "overtime," preference in selecting "vacation" time or "job bidding," or, indeed, administrative due process in a disciplinary setting, without regard to the individual's "civil service status."

Determining an individual's appointment or employment rights and status involves an inquiry as to whether one holds a permanent appointment,[13] a contingent permanent appointment,[14] a temporary appointment,[15] or a provisional appointment,[16] and in some instances, the individual's minimum period of probation if he or she has not yet satisfactorily completed his or her maximum period of probation.[17]

A critical element in considering an individual's rights as an employee in the public service is "tenure." An individual permanently appointed to a position attains tenure in his or her position upon the satisfactory completion of his or her probationary period.[18] Further, tenure is vested in the individual, regardless of the budgeted or funding status of the item from which he or she is paid. In other words, a person may be permanently appointed to a position established or budgeted as a "temporary position" while, in contrast, an individual may be serving in a "permanent position" yet not enjoy a "permanent appointment" because he or she has been appointed to the position as a provisional employee or as a temporary employee.[19] Indeed, an

individual may be permanently appointed to a nonexistent position and thereupon granted an immediate leave of absence in anticipation of the availability of an appropriate vacancy in the near future.[20]

An individual's appointment status and the jurisdictional classification of the position in which he or she serves is often critical to correctly resolving questions involving the individual's employment in the public service. Anyone involved in the disciplinary process or making a seniority determination in a layoff situation must consider these elements, as an employee's rights to administrative due process and layoff rights, if any, depend on his or her actual, i.e., statutory, appointment status and the actual jurisdictional classification of the position to which he or she has been appointed.

On this point it is well to remember that regardless of what an appointing authority believes to be the case, or intended in appointing the individual to, or continuing the individual in, the position, the status of the individual as recorded in the personnel records of the responsible civil service department or commission controls.

The failure of an appointing authority to correctly identify an individual's statutory appointment status or the statutory jurisdictional classification of the individual's position neither enhances nor diminishes the employee's legal rights but could prove costly to the employer.

For example, if, in a layoff situation, the clerk having greater seniority than a co-worker employed as a clerk in the same layoff unit is excessed, the typical redress awarded to the individual incorrectly laid off is reinstatement to his or her former position with full back salary and benefits. This means that the employer not only has paid the less senior individual that it retained in the position in violation of the "seniority in layoff rules," it typically must also reinstate the more senior individual to his or her former position with back salary and benefits. In effect, the appointing authority has to pay twice for, presumably, the same services because the "wrong person" was laid off. Clearly this is counter productive, especially in a layoff situation where the abolishment of positions usually is undertaken to reduce the employer's personnel service costs.[21]

The selection of individuals for appointment to positions in the several jurisdictional classes of positions in the classified service—the competitive class, the non-competitive class, the exempt class and the labor class—reflect the requirements of Article V, § 6 of the New York State Constitution. Article V, § 6, in pertinent part, requires that "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…."

As earlier noted, all positions in the classified service are in the competitive class unless placed in a different jurisdictional class by statute or by the civil service commission having jurisdiction [*see* §§ 41, 42 and 43 of the Civil Service Law].[22] Consistent with Article V, § 6, competitive examinations are used to establish eligibility for permanent appointment to positions in the competitive class. Selection of an eligible individual from a list resulting from a competitive examination is typically based on the so-called "rule of three" currently set out in § 61.1 of the Civil Service Law.

Such has not always been the case. The Civil Service Law of 1883[23] was amended to provide for "the appointment of the candidate standing highest on the eligible list certified by the responsible civil service commission." In 1900 this "rule of one" as then set out in then Civil Service Law § 14 was struck down by the Court of Appeals as unconstitutional.

In *People v. Mosher*,[24] the Court of Appeals held that "if the civil service commissioners have power to certify to the appointing officer only one applicant of several who are eligible and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final…then the civil service commission becomes and is the actual appointing power."

Following the *Mosher* decision, then § 14 of the Civil Service Law was further amended to provide that "appointments shall be made from among those graded highest," thus restoring the language initially set out in the Civil Service Law of 1883.

Ultimately the so-called "rule of three" as currently set out in § 61.1 of the Civil Service Law was enacted in concert with the recodification of the Civil Service Law in 1959 [Chapter 790 of the Laws of 1958] and provides for the appointing authority's selecting from among the three candidates who stand highest on the eligible list and who are interested in the appointment.[25]

While the "rule of three" permits the appointing authority to select from among the highest scoring candidates for appointment to positions in the competitive class, there may be candidates having the same final test scores. In the event candidates have tied scores, essentially the appointing authority may select from among all those having the same "highest" final test scores and certified for appointment from the eligible list consistent with the "rule of three."

For example, under the "rule of three" if 2 candidates achieved a test score of 96 and 14 attained a test score of 95, all 16 candidates would be certified as eligible for appointment and the appointing authority

could select any one of the 16 for appointment to the vacancy. In contrast, were there 14 candidates attaining a test score of 96 and 2 attained a test score of 95, only the 14 "top ranked eligibles" would be certified as eligible for the appointment. The appointing authority, however, could select any one of the 14 names certified as eligible for appointment to the position being filled.

In some instances an appointing authority may elect to follow a "rule of one" by always selecting the individual in accordance with his or her rank or placement on the eligible list for the position. Sometimes this is done on the basis of tradition;[26] in other instances pursuant to the terms of a collective bargaining agreement.

Indeed, in a "rule of the list" case flowing from an alleged violation of a collective bargaining agreement,[27] the Court of Appeals concluded that no strong public policy prohibits an appointing authority from agreeing through collective negotiations to give promotional preference to certain individuals on an eligible list where a probationary period is required in order to attain tenure in the position to which they have been permanently appointed.[28]

In contrast to a "rule of the list" mandated by a civil service commission, an appointing authority may itself elect to establish or agree to such a rule in the course of collective bargaining and be bound thereby.

The *Buffalo* decision indicates that selection for appointment following the "rule of one" may be agreed to in a collective bargaining agreement for positions in the competitive class and for both interdepartmental and intradepartmental promotions in concert with providing for appointments subject to a probationary period as § 63 of the Civil Service Law provides that "every original appointment to a position in the competitive class and every interdepartmental promotion…shall be for a probationary term," while § 61 authorizes appointing authorities to require "probationary service upon intradepartmental promotion" by rule.[29]

One statutory "rule of the list" has thus far survived. § 81 of the Civil Service Law, providing for appointment from a preferred list, subject to certain exceptions,[30] requires that "the names of persons on a preferred list shall be certified therefrom for reinstatement to a vacancy in an appropriate position in the order of their original [uninterrupted permanent] appointments" in the classified service.

As to appointment to positions in the noncompetitive class, "noncompetitive examinations" are used to fill such positions. Typically a noncompetitive examination consists of a review of the nominee's "training and experience" and, in some cases, a performance test. Under certain circumstances an appointing authority may nominate an eligible competitive class employee for a noncompetitive promotion examination to fill a higher grade position in the competitive class that is "in the line of promotion."[31]

Persons appointed to labor class positions need only qualify by such examination for fitness for employment, if any, as the State Department of Civil Service or the responsible municipal commission may require of such applicants while those appointed to positions in the exempt class must simply satisfy the requirements of the appointing authority.

Each position in the exempt class must be specifically named to be in such class in the rules of the responsible civil service commission. Further, in the event the exempt position becomes vacant, the state or municipal civil service commission having jurisdiction must evaluate the position to determine whether the position, as then constituted, is properly jurisdictionally classified in the exempt class. Until the responsible commission makes its determination, § 41.2 of the Civil Service Law provides that the position can only be filled on a "temporary basis."

Another element to be considered in the event of the "jurisdictional reclassification" of a position is the status of the individual in the newly jurisdictionally reclassified position. If, for example, a position in the noncompetitive class is jurisdictionally reclassified to the competitive class and the then incumbent held tenure in the noncompetitive class position, he or she will be continued in service as a tenured permanent employee in the competitive class position without further examination.[32]

Further, an employee in the classified service may retain certain statutory rights upon the changing of the jurisdictional classification of his or her position from the classified service to the unclassified service. For example, § 355-a.10.a. of the Education Law, in relevant part, provides that "The incumbent of any position in the classified service which is determined to be in the unclassified service shall…retain the rights and privileges of the classified service jurisdictional classification with respect to discipline, dismissal and suspension for as long as such person remains in the redesignated position."

The Unclassified Service

Civil Service Law § 35 sets out the positions in the unclassified service, which essentially consists of all elective offices, positions in the State and local legislative bodies, incumbents of positions filled by appointment by the governor, the chief executive officer of a department having the authority to appoint and remove officers and employees of the department, and the members, officers and employees of boards of election.

In addition, the teaching and supervisory staff positions of a school district, a board of cooperative educational services or a county vocational education and extension board, as certified to the State Civil Service Commission by the Commissioner of Education, are in the unclassified service. The Commissioner of Education prescribes qualifications for appointment to all such positions and is responsible for establishing the specifications setting out the qualifications for appointment[33] to such positions and the nature and scope of the duties and responsibility of the incumbents of such positions.[34] Further, an individual is to be appointed to a position in the "appropriate tenure area" consistent with the provision of 8 NYCRR 30.4.[35]

For example, with respect to the probationary period to be served by an educator upon permanent appointment, Education Law § 3012(1)(a) provides that "Teachers…shall be appointed…for a probationary period of three years; provided, however, that in the case of a teacher who has been appointed on tenure in another school district within the state,…and who was not dismissed from such district or board…the probationary period shall not exceed two years."[36]

In contrast, the employees of an entity in the private sector providing services to a school district or BOCES pursuant to a contract with the school district or the BOCES are not employees of the school district or of the BOCES nor are they eligible for tenure with the school district or the BOCES by reason of their employment with the contracting private sector entity. Further, such individuals are not eligible for member service credit for the services they provide pursuant to the contract in a public retirement system of the State.[37]

In a probationary situation, tenure by estoppel or tenure by acquiescence "results when a school board [or BOCES] fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of [the] probationary term."[38]

In determining the duration of the probationary period, if a teacher is absent during his or her probationary period, the district may extend the probationary period for a period of time equal to the absence.[39]

Authority to designate positions as being in the unclassified service similar to that granted the Commission of Education is vested in the Chancellor of the State University with respect to positions in the State University's professional service as defined in § 355-a.3 of the Education Law. The Chancellor is required to report any position he or she places in the professional service to the State Civil Service Commission.

However, any existing State University position in the classified service that the Chancellor seeks to designate as being in the unclassified service must be approved by the State Civil Service Commission before the change may take effect.[40]

8 NYCRR 333 *et seq.* sets out the various types of employments in the professional service of the State University, which include the chief administrative officer, college administrative officers, the chairs of departments and divisions, and the college faculty.

8 NYCRR 335 provides for the various types of appointment of employees in the professional service, which appointments may be a continuing appointment, a permanent appointment, a term appointment, a probationary appointment, a temporary appointment or an appointment as a distinguished and university professor or as a distinguished librarian.

Employees at the State's "statutory contract colleges" at Alfred and Cornell Universities are employees of those universities, respectively, although they, by statute, are eligible for certain benefits available to employees of the State, such as participating in the New York Employees' Retirement System or the State University's Optional Retirement Program and in the State's Employees' Health Insurance Plan ("NYSHIP").

In addition, all positions in the State's community colleges and the Fashion Institute of Technology held by individuals whose principal functions are teaching or the supervision of teaching are in the professional service.

Public Benefit Corporations

Typically individuals employed by public benefit corporations in New York State are not public employees and thus have no civil service status or employee rights such as those set out in § 75 of the Civil Service Law. Such rights, however, may be specifically granted such individuals by law.[41] While the legislature may specifically provide that the Civil Service Law is to apply to employees of a particular public benefit corporation, where the law is silent on the point the courts have typically ruled that the Civil Service Law does not apply to the employees of the corporation.[42]

The dismissal of an employee by the New York City Health and Hospital Corporation, a public benefit corporation, required the courts to consider another form of a public benefit corporation's personnel structure—a situation where some of the corporation's employees are treated as though they were subject to the Civil Service Law and others are not. The decision in *Burns v. Quinones*[43] indicates it is possible for the Legislature to provide for something in between legislation giving employees of a public benefit corporation full "Civil Service Law rights" and the Legislature's not providing such rights by reason of the statute's remaining silent in this regard.

The legislation creating the New York City Health and Hospital Corporation ("NYCHHC") did not expressly make employees of NYCHHC subject to the provisions of the Civil Service Law. However, it did provide that NYCHHC was to "promulgate rules and regulations consistent with the Civil Service Law" regarding certain personnel practices. Such rules were mandated for employees who were not excluded from collective bargaining representation, presumably under the Taylor Law.[44]

This was permissible, said the Court, as there was nothing to prevent the State Legislature from providing that the Civil Service Law was to be made applicable to certain employees of a public benefit corporation but not other employees of the corporation. Accordingly, Burns, an employee excluded from representation within the meaning of the Taylor Law, was not covered by the rules "consistent with the Civil Service Law" promulgated by NYCHHC and his termination without a pretermination Civil Service Law § 75 disciplinary hearing was held lawful.[45]

Such a distinction in employee status is not all that unusual. In many public employment situations in the State and its political subdivisions, statutes may provide that certain positions in a department or agency shall be in the unclassified service. Placing the position in the unclassified service makes the provisions of the Civil Service Law inapplicable to the incumbent of the position. Probably the most common example of this is found in a school district or a BOCES where the majority of professional employees are in the unclassified service and the other employees of the school district or a BOCES are in the classified service and subject to the Civil Service Law.

In a case involving a similar question—"When is an employee a public employee?"—the Appellate Division considered whether or not an employee of a company that operated the County's public transit system (the County owned the bus operated by the company) was an employee of the County.[46]

Section 50-b of the General Municipal Law provided that such persons are County employees.[47] Carrion was injured on the job and sued the County. If a County employee, Carrion was only entitled to Workers' Compensation benefits; if not a County employee, he could sue the County for negligence. The County claimed that Carrion was a County employee and therefore could not sue his "employer" for his injuries.

According to the decision, the only indication of any relationship between the County and Carrion was that Carrion was "statutorily defined as a County employee." The Court said that as there was no evidence that Carrion was controlled or paid by the County, or that the County had a right to fire him, he was not barred by the Workers' Compensation Law from suing the County for damages for personal injury.

Section 45 of the Civil Service Law provides for the granting of the civil service status of employees of an employer in the private sector "upon the acquisition of a private institution or enterprise by government." The *Kern* case concerns the reverse: What is the civil service status of public employees continued in employment upon the privatization of their former governmental operation?[48]

Kenneth H. Kern and Mary Dickerson, former employees of the State Department of Health at the Roswell Park Cancer Institute, were transferred to the Roswell Park Cancer Institute Corporation together with all other employees of the Institute. The Corporation was created in 1997 as a public benefit corporation by the Roswell Park Cancer Institute Corporation Act.[49]

The Corporation and its employees are subject to the Civil Service Law and have the rights of State employees for purposes of the applicable provisions of the Civil Service Law, "[e]xcept as provided by [the Act] and rules issued pursuant thereto…pursuant to an internal merit system administered by a merit board."

Applications filed by Kern and by Dickerson to take a State promotion examination were disapproved by the New York State Department of Civil Service because they did "not have permanent competitive status as [State employees]." After their administrative appeals to the State Civil Service Commission were denied, Kern and Dickerson sued.

The Appellate Division said that Kern's and Dickerson's rights were a function of the Legislature's intent based on the "plain meaning" of Chapter 5 of the Laws of 1997:

> While it is true that the Act expressly provides in general terms for civil service coverage, collective bargaining rights and retirement rights for corporation employees…it is also apparent that the Legislature elected not to confer upon the employees of the corporation all the benefits of the Civil Service Law inasmuch as the Act provides a specific procedure whereby they are ranked, compensated and promoted pursuant to an internal merit system specifically laid out in the legislation.[50]

According to the decision, the Corporation's merit system operates independently of the State civil service system. As evidence of this independence, the Court stated, "corporation positions are classified separately and are not necessarily based upon the same criteria" as might be applied in the classification of positions in State service."[51]

As noted earlier, sometimes legislation may be enacted that provides for the retention of certain benefits when a State worker's employment status changes but he or she remains an employee of the State.[52]

Employment of Retired Public Employees

Except in cases involving the election to public office and employment in one of the specified capacities listed in Civil Service Law § 150, § 150 mandates the suspension of a retired public employee's retirement allowance from a public retirement system of this State if he or she returns to public service[53] and receives a "salary or emolument" as a result. Employees of a public retirement system of the State of New York, however, may be reemployed following retirement consistent with, and subject to, the limitations set out in Article 7 of the Retirement and Social Security Law, "Re-employment in Public Service of Retired Public Employees," with respect to their continuing to receive all or a portion of their retirement allowance.[54]

Section 211 of the Retirement and Social Security Law (RSSL) authorizes the State Civil Service Commission to grant waivers, under certain circumstances, permitting employees in the classified service of the State or a political subdivision of the State to earn compensation in excess of the statutory cap otherwise limiting the amount of such compensation without the suspension or reduction of their retirement benefits, consistent with the limitations set out in § 211.[55]

Only the appointing authority, rather than a designee of the appointing authority, is authorized to certify that the § 211 waiver application satisfies the requirements of § 211. Where the appointing authority is a board or commission, a current resolution of that body must be submitted with the application.[56] Further, the required § 211 approval must be secured prior to the effective date of employment. In the event the appointing authority expects to submit a subsequent waiver for a retiree, it must be submitted and approved prior to expiration of the waiver then in force.

The failure to obtain the required waiver in a timely fashion could result in financial difficulties for the reemployed retiree for which such prior approval had not been obtained. As an example, in *Freda v. Board of Educ. of City of New York*,[57] the court ruled that the NYC Police Retirement System could "recoup" over $100,000 of the retirement allowance that it had paid to Freda over the years because the required § 211 approval had not been obtained prior to his being reemployed by the New York City Board of Education following his retirement from the New York City Police Department.

In addition to the § 211 waivers issued by the New York State Civil Service Commission with respect to reemployment of retired members of a public retirement system of this State or a political subdivision of the State in a position in the classified service, such reemployments are subject to the approval of:

a. The Commissioner of Education with respect to employments in positions in the unclassified service of a school district [other than the city of New York], a BOCES or a county vocational education and extension board;

b. The New York City Civil Service Commission if the individual is to be employed in a classified position in the service of the city of New York or in the classified service in the board of education or board of higher education of such city;

c. The Chancellor of the New York City School District with respect to employments in the unclassified service under the board of education of the City of New York;

d. The Board of Higher Education of the City of New York if such person is to be employed in the unclassified service under the Board's jurisdiction;

e. The Chancellor of the State University of New York if such person is to be employed in the unclassified service of the State University, by a Statutory Contract College at Cornell and Alfred Universities or in the unclassified service of a community college other than those in the City of New York; or

f. The Chief Administrator of the Unified Court System if such person is to be employed in a judicial or nonjudicial position by the Unified Court System.

Endnotes

1. Sonnet 43, *Sonnets from the Portuguese*, Elizabeth Barrett Browning.
2. This article will limit itself to considering employment and appointment issues involving New York State, its political subdivisions and its public benefit corporations as an employer.
3. The term "military service of the state" with respect to military personnel means service in or with a force of the organized militia or in the Division of Military and Naval Affairs of the Executive Department of the State. As to "civilian personnel," the term applies to those in service in the Division of Military and Naval Affairs in other than those serving in a "military service" capacity. "Civilian personnel" are not in the civil service of the state. New York State's military service consists of four components: the organized militia, the state reserve list, the state retired list and the unorganized militia. The organized militia consists of the New York Army National Guard, the New York Air National Guard, the New York Naval Militia and the New York Guard. The unorganized militia consists of "all able-bodied male residents between the ages of 17 and 45 who are not members of the organized militia or on the state reserve list or the state retired list." See, generally, the State's Military Law.
4. Civil Service Law § 40.

5. Civil Service Law § 35.

6. In contrast to positions in the classified service, positions in the unclassified service, which includes judges, elected officials, commissioners and educators, are not under, or subject to, the jurisdiction of a State or municipal civil service commission or Personnel Officer.

7. Civil Service Law § 2.10.

8. In contrast to "jurisdiction classification," the term "position classification" is used to describe the classification of a position in terms of the minimum qualifications for appointment to the position and the duties to be performed by the incumbent and, with respect to the State as an employer, the allocation of the position to a salary grade (Civil Service Law § 2.11).

9. In some instances individuals not covered by a statute may be given an equivalent right pursuant to a collective bargaining agreement. One caveat: A right provided to an employee pursuant to a collective bargaining agreement may not trump a right provided to a co-worker by statute. *See, e.g., City of Plattsburgh v. Local 788 and New York Council 66, American Federation of State, County and Municipal Employees AFL-CIO*, 108 A.D.2d 1045, 485 N.Y.S.2d 618, (3d Dep't 1985) a case addressing a conflict between a Taylor Law contract provision and the Civil Service Law with regard to the layoff rights of employees.

10. Another category: Individuals in the civil service are either officers or employees. It has been noted that although not all public employees are "public officers," all such "public officers" are public employees.

11. There are other types of employment situations such as per diem employments, dual appointments, shared employments, joint appointments, extra service employments and war substitute appointments, among others, available to appointing authorities. In addition, one may be an "independent contractor" performing services for a public employer and not be an employee of the governmental entity within the meaning of the Civil Service Law.

12. *See generally*, Civil Service Law Article 14.

13. *See generally*, Civil Service Law § 61.

14. Civil Service Law § 64.4.

15. *See generally*, Civil Service Law § 64. Typically temporary appointments are authorized for not to exceed three months but may be approved for longer periods consistent with the limitations set out in the several subdivisions of § 64.

16. Civil Service Law § 65. Provisional appointments may be made only to "wholly vacant positions." In contrast, in instances where the position is encumbered as the result of the permanent incumbent being on a leave of absence from the position, a temporary appointment or a contingent permanent appointment to the resulting vacancy may be made in accordance with relevant provision set out in § 64 of the Civil Service Law.

17. "Probationary employees" in fact hold permanent appointments and may enjoy limited tenure rights. For example, courts have ruled that probationers are entitled to notice and hearing if the appointing authority seeks to dismiss the individual during his or her minimum period of probation. In contrast, a probationer may be dismissed without notice and hearing after completing his or her minimum period of probation and prior to the expiration of his or her maximum period of probation.

18. In some instances, an individual may hold a "term appointment." Most "term appointment" situations involve individuals serving in positions in the unclassified service such as a member of the faculty in an institution of higher education or as a member of the "professional service" of such an institution. Tenured status in higher education is frequently referred to a "a continuing appointment." However, term appointments, although rare, may be made to positions in the classified service as well. For example, Civil Service Law § 15.1(b) provides that "…The term of office of a personnel officer [having the powers and duties of a municipal civil service commission] shall be six years…." *See also*, Education Law §§ 3011, 3016 and 3019 with respect to "teacher contracts."

19. An individual may be appointed to a position "temporarily from an eligible list" but does not enjoy the same benefits accorded individuals "permanently appointed" to the same title from the same eligible list.

20. *Buffalo PBA v. City of Buffalo*, 79 A.D. 2d 186, 438 N.Y.S.2d 43 (4th Dep't 1981), *see also, Civil Service Employees Association v. Town of Harrison*, 48 N.Y.2d 66 (1979).

21. The same holds true with respect to complying with the controlling statute in situations involving reinstatements from a preferred list. *See Dickinson v. Board of Education of the Deer Park Union Free School District, et al.*, Decisions of the Commissioner of Education, Decision No. 16,082, Appeal I.

22. *See* Civil Service Law § 45, which provides for the status of employees of a private institution or enterprise upon the acquisition of such an entity by the State or a subdivision of the State.

23. Chapter 354, Laws of 1883.

24. 163 N.Y. 32 (1900).

25. The "rule of three" was held lawful by the Court of Appeals in *People ex rel. Qua v. Gaffney*, 201 N.Y. 535 (1911).

26. *See, e.g., Matter of Horowitz*, 70 A.D.2d 854, 417 N.Y.S.2d 700 (1st Dep't 1979).

27. *Matter of Professional, Clerical, Technical Employees Ass'n (Buffalo Bd. of Education)*, 90 N.Y.2d 364 (1997).

28. Note well that the Court of Appeals characterized the appointment as "permanent" in the first instance and that tenure is subsequently attained upon the successful completion of the required probationary period. In other words, an individual does not become "permanent" upon his or her satisfactorily completing the probationary period but rather when he or she is initially appointed "permanent from the list."

29. When, however, a permanent appointment or promotion to a position in the competitive class is conditioned upon the completion of a term of training service or of a period of service in a designated trainee title, such service and the probationary term for such competitive position shall run concurrently [Civil Service Law § 63.1].

30. *See, e.g.*, Military Law § 243.5, which provides for the establishment and certification of a "special military list" under certain circumstances.

31. The State Department of Civil Service and municipal commissions, as the case may be, may authorize a noncompetitive promotion examination where the "field for promotion" has three or fewer eligibles interested in the promotion. In such cases, the appointing authority may nominate one of the eligibles interested in the appointment for a "noncompetitive promotion examination."

32. *See Fornara v. Schroeder*, 261 N.Y. 363 (1933). In *Fornara* the court ruled that an individual lawfully appointed to a position that is jurisdictionally reclassified to the competitive class is continued in the competitive class position without further examination.

33. Article 61 of the Education Law establishes the qualifications required for employment of public school and BOCES personnel in the unclassified service. For example, Education Law § 3001 sets out qualifications for employment as public school teachers while § 3003 of the Education Law sets out qualifications for employment as a school superintendent.

34. In addition, the Commissioner determines all positions in the professional service in the New York State School for the Blind and the New York State School for the Deaf requiring

the performance of educational functions and certifies those positions to the State Civil Service Commission as being in the unclassified service.

35. *Abrantes v. Board of Educ. of Norwood-Norfolk Central School Dist.*, 233 A.D.2d 718, 649 N.Y.S.2d 957 (3d Dep't 1996).

36. Section 3012(1)(b) provides that: "Principals, administrators, supervisors and all other members of the supervising staff of school districts…shall be appointed by the board of education…upon the recommendation of the superintendent of schools for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education."

37. *Handley v. New York State Teachers' Retirement System*, 2010 NY Slip Op. 04667, decided on June 3, 2010, Appellate Division, Third Department [5 proceedings]. In contrast, employees of the Statutory Contract Colleges at Cornell and Alfred Universities are, by statute, eligible for member service credit in the New York State Employees' Retirement System should they elect that retirement option.

38. *Matter of Lindsey v. Board of Education of Mt. Morris Central School Dist*., 72 A.D.2d 185, 424 N.Y.S.2d 575 (4th Dep't 1980).

39. The same is true with respect to absence during the probationary service of employees in the classified service. However, appointing authorities may be accorded the authority to waive a limited period of such absence pursuant to the rules of the responsible civil service commission. Otherwise the minimum and maximum periods of the probationary term of the employee are extended by the number of workdays of such absences not counted as time served in the probationary term. *See, e.g.*, 4 NYCRR 4.5(g), "Absence during probationary term." Another element to consider is the extension of the probationary period in the event an employee is given a "light duty" or some other alternate assignment while serving his or her probationary period. *See Boyle v. Koch*, 68 N.Y.2d 601 (1986).

40. As noted in the text earlier, § 355-a.10.a. of the Education Law, in relevant part, provides that "The incumbent of any position in the classified service which is determined to be in the unclassified service shall…retain the rights and privileges of the classified service jurisdictional classification with respect to discipline, dismissal and suspension for as long as such person remains in the redesignated position."

41. Unless the law specifically makes the Civil Service Law applicable to the employees of a public benefit corporation, such persons are not subject to its provisions. As an example, see § 8087 of the Unconsolidated Law, which provides that the employees of the New York City Off-track Betting Corporation are subject to the Civil Service Law and "other laws applicable to civil service personnel." In contrast, statutes creating other OTBs do not have such a provision and the courts have ruled that such OTB employees are not in the public service for the purposes of the Civil Service Law.

42. *Collins v. MABSTOA*, 62 N.Y.2d 361(1984).

43. 68 N.Y.2d 719 (1986).

44. *See* § 7385[11] of the Unconsolidated Laws. The Taylor Law includes "public benefit corporations" within its definition of a public employer. See §§ 201.6(a) and 201.8. Managerial and confidential employees were, by implication, not to be subject to such rules. See § 7385(12) of the Unconsolidated Laws.

45. The Appellate Division also rejected Burns' claim that he was entitled to the § 75 protection extended to honorably discharged veterans in view of the provisions of § 7405 of the Unconsolidated Laws. § 7405 constituted the Act's "override provision" which made inapplicable any law inconsistent with the Act, including the Civil Service Law.

46. *Carrion v. County of Westchester*, 99 A.D.2d 793, *appeal dismissed*, 63 N.Y.2d 943 (1984).

47. The thrust of General Municipal Law § 50-b is to establish municipal liability for the negligent operation of certain vehicles or "other facility of transportation."

48. *Kern v. New York State Department of Civil Service*, 288 A.D.2d 674, 732 N.Y.S.2d 600 (3d Dep't 2001).

49. Public Authorities Law Section 3553, enacted by Chapter 5, Section 2, Laws of 1997.

50. Kern, *supra* note 48 at 675.

51. *Id.*

52. *See, e.g.*, Section 355-a(10)(a) of the Education Law.

53. The term "public service" means the service of the state or any political division thereof, including a special district, district corporation, school district, board of cooperative educational services or county vocational education and extension board, or the service of a public benefit corporation or public authority created by or pursuant to laws of the state of New York, or the service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its political subdivisions, a public benefit corporation or public authority created by or pursuant to laws of the state of New York, or the service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its political subdivisions. The several "optional retirement plans" available to certain officers and employees "in the public service" are not plans administered by the state or any of its political subdivisions.

54. Optional Retirement Plans, available to certain employees of the State University, the City University, the New York State Education Department, the Statutory Contract Colleges at Cornell and Alfred Universities and the community colleges, are not public retirement systems of New York State.

55. For additional information, see New York State Department of Civil Service—Division of Staffing Services General Information Bulletin No. 09-07.

56. Such waivers are not required with respect to such reemployments by an employer in the private sector, by the federal government, by a foreign government, by the United Nations or by state or a political subdivision of a state other than New York while § 212 of the Retirement and Social Security Law provides that there are no limitations on earnings with respect to retirees reemployed by the State or a political subdivision of the State, etc., age 65 or more as therein otherwise provided.

57. 224 A.D.2d 360, 638 N.Y.S.2d 83 (1st Dep't 1996).

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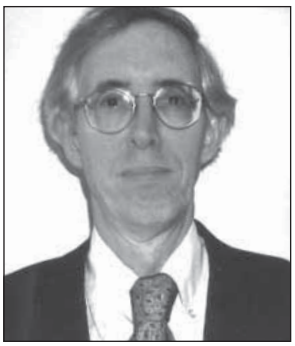
How Not to Draft an Ethics Law

By Mark Davies



In municipal ethics, as in baseball, failure often proves instructive. The recent failed attempt by the Comptroller and legislature to rush through a not-so-well thought out revision to the state ethics law for municipal officials (Article 18 of the General Municipal Law)[1] offers an opportunity to analyze what the process should be for amending Article 18 and to describe some of the shortcomings in this most recent legislative proposal—and thus forestall their recurrence.

At the outset one should highlight certain points. First, the much (and deservedly) maligned Article 18 desperately needs wholesale revision, and has needed it for decades.[2] Second, the Comptroller's goals in proposing the Bill are to be applauded—to address the issues of municipal officials acting in matters in which they have a personal interest, of the failure of ethics codes to regulate nepotism and misuse of municipal resources, of the need to inform municipal officials of the requirements of the relevant ethics laws, and, in particular, of the absence of authoritative interpretation and enforcement of those laws. Third, the comments by some critics of the Bill that no one's life, liberty, or property is safe while the legislature is in session[3] prove not only mean-spirited but also unhelpful, for only the legislature can fix the mess that constitutes Article 18. This article will thus first discuss the problems raised by the Bill—in the hope that they will not be repeated—and then second, and briefly, propose a better approach to revising Article 18.

Analysis of the Bill

Enacted in 1964, Article 18 of the General Municipal Law, the primary state law regulating municipal ethics, has been described by the Temporary State Commission on Local Government Ethics as "disgracefully inadequate." Among its many flaws, this law provides no guidance to municipal officials in the form of a simple and comprehensive code of ethics, establishes no ethics enforcement mechanism, offers no assistance to municipalities struggling with ethics matters, inflicts upon municipalities a criminal prohibited interests provision that is virtually opaque, and contains financial disclosure requirements that are nonsensical and onerous.[4] But as bad as Article 18 is, the Bill would have made it worse in the three substantive areas the Bill addresses: prohibited interests in contracts, codes of ethics, and especially boards of ethics. The Bill also provides no relief from the excessively burdensome financial disclosure requirements of Article 18. Each of these areas is discussed below.

Prohibited Interests in Contracts

Gen. Mun. Law § 801 provides, subject to over a dozen exceptions, that "no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee" if the official has some power as to that contract. The current law's restrictions on municipal officials' interests in contracts with their municipalities[5] are among the most unclear, confusing, and unfair provisions in the consolidated laws to which municipal officials are subject. Courts have also been reluctant to find violations of these provisions, unless the "contract" at issue is of the most obvious kind,[6] perhaps reflecting aversion to the opacity of the statutory language and the draconian results that such a finding may produce—making the contract void *ab initio* and unratifiable, despite recusal and competitive bids, transforming the official into a criminal (a misdemeanant), and preventing the municipality from entering into the contract, no matter how beneficial it might be for the municipality, during the official's entire tenure.

The Bill only compounds those defects by amending Gen. Mun. Law § 800(3) to add a benefit to one's "spouse" to the definition of "interest."[7] The amendment would mean, for example, that a village trustee would violate section 801 (and thus commit a crime, punishable by a year in prison) if the village public works department purchases material and supplies from the area's only hardware store, 6%-owned by the trustee's wife, even if the trustee fully recuses himself from having anything to do with such purchases and even if his wife forgoes receiving even a dime as a result of the purchases; and the contract is null and void *ab initio*.[8] Such a provision, even when it is understood, can wreak havoc in small, rural municipalities where goods and services are not as readily available as in more populated areas. More importantly, because they are so confusing, these provisions set a trap for honest public servants (dishonest ones will simply ignore the provisions and rely on the courts' reluctance to enforce section 801), a trap made all the worse by the addition of "spouse" to the definition of "interest." The problems that section 801 is intended to redress (self-dealing) can be, and should be, fully addressed by a strong disclosure and recusal provision.

Furthermore, the Bill's amendment to section 801, adding a restriction on municipal lawyers' interests in legal services contracts with their municipality, will impose a significant burden on smaller municipalities that must rely on appointed outside counsel (village attorney or town attorney) and their firms rather than on in-house counsel and that must either pay the cost of going out for bids for, e.g., litigation counsel, including hiring another attorney to evaluate any proposals by the municipality's own municipal counsel, or forgo hiring counsel of their

choice, in particular, their municipal attorney whom they know and trust.[9] Hiring such separate counsel will also likely prove an added expense.

Moreover, this amendment to section 801 completely fails to address the most significant issue that arises with respect to municipal lawyers: appearing before an agency of the municipality on behalf of a private client. Currently, for example, Article 18 does not prohibit an associate town attorney from appearing on behalf of a private client before the town zoning board of appeals where the ZBA has its own counsel. Nor does Article 18 prohibit that separate ZBA attorney from appearing before the town planning board.[10] Article 18 should not countenance such appearances.

Thus, the Bill is wedded to, and even expands, a mischievous provision, section 801, that should instead, as noted, be repealed and replaced with a strong, clear, and comprehensive disclosure and recusal requirement. Indeed, disclosure and recusal when a conflict of interest arises is one of the most important provisions of an ethics law. But the anemic disclosure and recusal provision added by the Bill, a new Gen. Mun. Law § 803-a, proves woefully inadequate because it applies only where the official or his or her spouse has an interest in a municipal contract, or in a land use application falling within the narrow ambit of Gen. Mun. Law § 809.[11] The Bill would still permit a town supervisor to hire his business partner, as long as it was not the supervisor's own firm, or give town business to someone who holds a loan on which the supervisor has personally defaulted. Disclosure and recusal must apply to any action (or failure to act) by an official that may benefit the official, his or her private business or employer, or anyone with whom the official has a business or financial relationship.

Codes of Ethics

Of particular concern, the Bill fails to provide a basic code of ethics for municipal officials and indeed does not even address many of the most fundamental conflicts of interest, such as misuse of office (the Bill would still permit a village mayor to hire her husband as a village employee), misuse of municipal resources, gratuities (the Bill would still permit municipal officials to accept most tips), political solicitation of subordinates and those who do business with the municipality (the Bill would still permit a superior to "ask" a subordinate or developer to buy a ticket to the official's political fundraiser), or post-employment provisions (the Bill would still permit a planning board member to resign today and appear tomorrow before the planning board for a developer on the very same matter the board has long been considering). The Bill also fails to correct the vague gifts provision of Gen. Mun. Law § 805-a(1)(a) that provides virtually no guidance to municipal officials, particularly those without ready access to legal counsel, and indeed makes no attempt to plug the huge gaps in the prohibited conduct provisions of section 805-a.

Instead, the Bill continues down the long-discredited path of imposing an onerous, state-mandated prohibition on interests in municipal contracts (section 801) while cutting municipalities adrift on fundamental ethics provisions.[12] In mandating certain additional provisions in local ethics codes ("use of public resources for personal or private purposes, nepotism, circumstances requiring recusal and abstention"), while not even mentioning such critical provisions as misuse of public office and post-employment restrictions,[13] the Bill continues to thrust upon the municipality itself the responsibility for adopting an effective code of ethics to plug the enormous holes in Article 18, with virtually no assistance from the state, such as a clear and comprehensive state code of ethics for all municipal officials in the state.

This approach reflects, on a more fundamental level, the failure to appreciate the nature and structure of local government or to apprehend the distinction between state government and municipal government, which depends heavily on volunteers, may be geographically isolated, and not infrequently lacks ready access to sophisticated legal counsel. In particular, the Bill assumes that municipalities will adopt their own ethics code that addresses the broad array of conflicts of interest and establish their own local ethics board, with full enforcement power, to avoid control by the county (discussed below). But practice over the past four decades has proven time and again that the enactment of an effective local ethics law and the voluntary establishment of an effective local ethics board present insurmountable obstacles for most municipalities and that, as a result, few municipalities in New York State, even those mandated to have a code, have either an effective code of ethics or an effective ethics board. Furthermore, no code of ethics exists at all for the thousands of municipalities not mandated by current law or the Bill to adopt one—that is, all municipalities except political subdivisions, school districts, and fire districts.[14] To assume that this Bill would magically change that history appears questionable, at best.

Boards of Ethics

But the most pernicious amendments in the Bill occur in Gen. Mun. Law § 808, which regulates boards of ethics. Currently, although every county, city, town, village, school district, and fire district must have a code of ethics, boards of ethics are optional.[15] Few municipalities have functioning ethics boards, and almost none of those functioning ethics boards have enforcement power meeting the requirements of the Bill. As a result, few municipalities enforce Article 18 or the municipal ethics codes, an unacceptable situation.

The Bill mandates ethics boards for all counties, for all cities, towns, and villages with a population of 50,000 or more, and for all Boards of Cooperative Educational Services (BOCES)[16]—a total of about 127 of the approximately 1,641 counties, cities, towns, villages, and BOCES in the state (excluding New York City and its constituent

units).[17] All other cities, towns, and villages, as well as all school districts must still adopt a local ethics code (and virtually all have done so), as must all fire districts; but they need not establish a local ethics board. Instead, under the Bill the county ethics board acts as the board of ethics for all municipalities within the county, except school districts, that have not created their own ethics board. School districts that have not established an ethics board are subject to the ethics board of the BOCES for the supervisory district within which the school district is located.[18] Since few municipalities have an ethics board that meets the Bill's requirements in regard to investigative authority and the power to impose civil fines, reflecting the difficulty that municipalities face in granting such power to their ethics board, one may expect that the enactment of the Bill will decrease the number of ethics boards and concomitantly increase the number of municipalities subject to the jurisdiction of counties / BOCES ethics boards.

Westchester County, for example, contains about 45 cities, towns, and villages, only five of which have a population exceeding 50,000 (Westchester also has two BOCES), and over 50 fire districts.[19] The Bill potentially mandates, therefore, that the Westchester County Board of Ethics interpret, administer, and enforce *mandated local ethics codes for almost 100 municipalities*, in addition to the County itself—and any other municipalities (such as public libraries or urban renewal agencies)[20] that voluntarily adopt a code of ethics but do not create an ethics board meeting the requirements of the Bill. Likewise, the Westchester County Board of Ethics must interpret and enforce Article 18 *in all municipalities within the county*—well in excess of 100—that have not formed their own ethics board, again assuming, as seems likely, that few municipalities will establish an ethics board meeting the requirements of the Bill. Similarly, the Bill requires that the two BOCES in Westchester interpret, administer, and enforce Article 18 *and the mandated local ethics codes* for about 46 local school districts,[21] except those, presumably few, districts that create an ethics board, complying with the Bill's mandates.

The burden thus placed upon the counties and BOCES can scarcely be conceived. Indeed, this burden is compounded by the requirement that the county / BOCES ethics boards administer financial disclosure for all of the municipalities subject to those ethics boards' jurisdiction, in accordance with each municipality's individual financial disclosure law, which would include interpreting varying local financial disclosure laws and forms, distributing blank financial disclosure forms, receiving completed forms, reviewing them for completeness and possible conflicts of interest, making them available to the public, ruling on privacy requests, and prosecuting non-filers and late filers.[22] Yet the contents and format of the forms, and the requirements of the financial disclosure law, often vary widely from municipality to municipality, just like local ethics codes. Counties are barely able to meet those requirements for their own filers, let alone for untold additional filers in municipalities throughout the county. Only a handful of ethics boards, including county ethics boards, in New York State have any staff. Query if the Bill will as a practical matter require counties to hire staff for their ethics boards.

Apparently, the Bill assumes that all of these municipalities will establish their own local ethics board, or create a cooperative board of ethics, to avoid being subject to the county board or BOCES board, a backhanded recognition that counties and municipalities within the counties are often at odds; but 40 years of history belies that assumption. The voluntary creation of local ethics boards is likely to be all the more difficult because under the Bill all local ethics boards, regardless of the size of the municipality, must have enforcement power, including the power to investigate possible violations and impose fines. An ethics board *should* have those powers, but mandating them in small municipalities will almost certainly prevent such municipalities from establishing an ethics board. As a result, this enormous, unfunded, state-mandated burden will fall squarely upon the counties and BOCES. Currently counties need not establish an ethics board, but if they do, the board *must* render advisory opinions to municipalities within the county; many county ethics boards refuse to do so.[23] Mandating the establishment of county ethics boards and their enforcement of local ethics codes and financial disclosure requirements would not seem likely to improve that record. So, too, municipalities within the county, to avoid being subjected to county ethics authority while avoiding establishing a local ethics board with teeth, may simply create an ethics board in name only, as is already often the case.[24] Although the Bill would permit municipalities to establish cooperative boards of ethics,[25] an excellent idea, few municipalities are likely to do so if, as under the Bill, such cooperative boards must have enforcement power, for municipalities would not wish to bear the expense of enforcement against officials other than their own.

A far better approach would require every county, city, town, village, and school district to establish an ethics board to interpret Article 18 and any local code of ethics, to provide ethics training to the municipality's officers and employees, and to administer financial disclosure, if any, within the municipality. But only counties and larger cities, towns, and villages (those with a population of 10,000 or more) should be required to have ethics boards with enforcement power because enforcement of ethics laws by local ethics boards presents a significant challenge in small municipalities, which often lack the required resources for effective enforcement; and many cities, towns, and villages in New York State are small. For example, 84% of towns, 94% of villages, and 18% of cities have populations under 10,000.[26] Although few enforcement matters arise in small municipalities (and, therefore, the lack of ethics enforcement there would

result in relatively few violations going unpunished), when such matters do arise, they consume substantial time, money, resources, and legal expertise.

While not perfect, this approach would ensure that every political subdivision and school district had an ethics board to interpret and train on the ethics law and that larger political subdivisions enforced that law. Smaller municipalities could, if they found it necessary, grant enforcement power to their existing ethics boards, consistent with state law. Not perfect but, balancing the competing realities, very good. And in ethics one must never let the perfect become the enemy of the good. As an aside, one should note that requiring a state agency to administer, or even just enforce, municipal ethics would not only violate the principles of municipal home rule but would mandate a significant state bureaucracy, with offices throughout the state and a staff sensitive to local issues and the differences among various types, sizes, and locations of municipalities.

With respect to the membership of ethics boards, while the Bill properly eliminates the *requirement* that an officer or employee of the municipality sit on the ethics board, the Bill fails to prohibit such dual positions.[27] Yet, permitting a municipal official to sit on the ethics board—typically these officials are relatively high level, such as the municipal attorney—undermines the independence of the ethics board, both in reality and in perception. The apparent presence of such a "mole" on the ethics board chills municipal officers and employees from seeking advice or filing a complaint, for fear that their action will be reported to their superior.

In addition, while the Bill replaces the at-will service of ethics board members under current Article 18 with a term of office, the Bill fails to specify the minimum term of office; a one-year term is effectively at-will, thereby significantly undercutting the independence of ethics board members. The Bill would permit three-member ethics boards, for which quorums often become difficult; would permit even-numbered ethics boards, which risk tie votes; and would permit ethics boards that are so large that they become unwieldy and prone to leaking confidences. The Bill also fails to require that ethics boards be bi-partisan or multi-partisan, thus risking the politicization of the board. Furthermore, the Bill fails to specify requirements for service on the ethics board, such as restrictions on lobbying, doing business with the municipality on behalf of a non-municipal party, serving in a political party position, or running for party or elective office, all of which activities seriously undermine the perception of the ethics board's impartiality. Finally, the Bill contains no provisions regulating ethics board staff. In particular, since few municipalities will be able to afford clerical or legal staff for their ethics board, thus requiring the board to rely upon such staff of the municipality, provisions must be enacted that ensure that confidential information of the ethics board is not shared with anyone outside the board, lest the independence and integrity of the board be subverted, both in appearance and in fact. The Bill fails to address this critical issue.[28]

With respect to ethics training, the Bill does mandate that the members of every ethics board in the state be trained in Article 18, the local ethics code, financial disclosure laws, and "decisional law"—a worthy goal—but requires that such training be approved by the State Comptroller.[29] Not only does such a requirement grant to the Comptroller the sole gate-keeping function on what is and is not acceptable ethics training, but it also fails to provide any assurance that the Comptroller's Office will promptly review for approval ethics training programs. As a result, ethics board members may go for months or even years without any training. Training of municipal ethics board members should be handled the same as training of zoning board and planning board members—largely by the municipal associations, bar associations, and academic centers, such as the Government Law Center, Municipal Law Resource Center, and Cornell University. At the same time, the Bill fails to require ethics boards to train their municipality's officials, one of the most important functions of an ethics board and one that is critical to the success of the ethics code.

With respect to the provision of advice by the ethics board, another critical function, the Bill fails to clarify to whom advice may be given and what it may address.[30] Advice should be available only to those officials whose conduct, or whose subordinate's conduct, is at issue and may address only future conduct, not past conduct, which is an enforcement matter. Similarly, the Bill contains no protection for the confidentiality of ethics boards' information and records. Yet the absence of such protection may significantly chill municipal officers and employees seeking advice or filing complaints.

Perhaps worst of all, the Bill establishes a maximum penalty of $1,000 for an ethics violation,[31] a sum that is paltry in the state's larger municipalities, some of which have thousands of employees. Since the Comptroller has taken the position that counties, cities, towns, and villages may not use their home rule power to vary the provisions of section 808—and, of course, other kinds of municipalities have no such power—according to the Comptroller, the $1,000 cap may not be increased by local law.[32]

Financial Disclosure

Finally, the Bill fails to give relief, sought by municipalities for almost 20 years, from the financial disclosure requirements of Article 18.[33] In particular, the Bill fails to clarify who must file financial disclosure statements, fails to tie financial disclosure to the conflicts of interest provisions, and fails to address the excessiveness of the disclosure required.

A Better Way and a Process for Reform

History teaches that the opportunity for significant ethics reform comes only once in a generation, when the political forces just happen to align.[34] Enactment of the Bill would not only squander the one chance in this generation for significant revision of Article 18 but would do so with amendments that move municipal ethics in New York State from bad to worse.

Article 18 requires a complete overhaul to address its many defects, revealed in the 46 years since its enactment. For almost 20 years, the Municipal Law Section of the New York State Bar Association has sought such an overhaul of Article 18. For over ten years, such an overhaul has been a legislative priority of the State Bar Association itself.

Sensible proposals for complete reform of Article 18—which the Bill is not—have been made over the decades, most notably in the bill of the Temporary State Commission on Local Government Ethics, introduced in the legislature in 1991 (S. 6157 / A. 8637). That bill met all of the requirements of an effective statewide ethics law for municipalities: it contained a comprehensive code of ethics, sensible disclosure, and effective enforcement, although it would have created a state oversight agency that is no longer feasible, sensible, or financially viable. Not surprisingly, the Commission's bill garnered the support of the state Association of Counties, Association of Towns, and Conference of Mayors, as well as the support of local municipal associations, good government groups, individual municipalities and municipal officials across the state, the State Bar Association's Municipal Law Section, the Retail Council, and over 40 newspaper editorials from Long Island to Buffalo. It died in committee. An amended version of that proposal, with the support of the State Bar Association, was then introduced in the Senate in 1999 (S. 4693). Reflecting perhaps a desperate attempt to garner legislative support by permitting municipalities to opt out of Article 18 by opting into a comprehensive revision set forth in a new Article 18.1—a compromise that proves ill-advisable because it fails to address fundamental problems with Article 18—that bill also foundered in the legislature.

To examine these and a number of other government ethics issues, the President of the New York State Bar Association established a Task Force on Government Ethics, one of the subcommittees of which is focusing on municipal ethics.[35] Out of that task force have come recommendations for a comprehensive, strong, and workable reform of Article 18, recommendations supported by regulators and regulated alike, including representatives of the state Association of Counties, Association of Towns, and Conference of Mayors, as well as by academics and a broad range of municipal attorneys who appear before, on behalf of, and against municipalities statewide. These recommendations, which will be presented to the Association's House of Delegates in January, provide a roadmap for a desperately needed overhaul of Article 18 and deserve the support of the governor and the legislature.

Conclusion

Although the Bill fails to address the manifold problems of Article 18 and displays a lack of appreciation for how municipalities work and the burdens they already face, it has resurrected legislative interest in municipal ethics reform. So, too, the new governor has expressed his commitment to such reform. Since the successful enactment of a sensible and effective state ethics law for municipalities requires a broad-based partnership, with full input, of those who enact the law (the governor and the legislature, on behalf of the state and municipal citizens), those who are regulated by it (the officials themselves, in particular as represented by the state associations), and those who must interpret it (municipal attorneys in both the public and private sectors), the new governor should establish a task force, composed of representatives of these groups, to hammer out a draft bill reflecting the recommendations of the Association's Government Ethics Task Force.

Endnotes

1. S. 7400-A (2010), A. 10682-A (2010) (hereafter "the Bill"). The Bill passed the Senate on June 17, 2010, but, thankfully, died in the Assembly when the session's clock ran out.
2. *See generally* Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE LAW REV. 243 (1991); Temporary State Commission on Local Government Ethics, *Final Report*, 21 FORDHAM URB. LAW J. 1 (1993); Henry G. Miller, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTES (County Attorneys' Association of the State of New York), Vol. 4, No. 2, Winter 1996, at 5; Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA / MLRC MUNICIPAL LAWYER, Vol. 23, No. 4, Fall 2009, at 16.
3. *Final Accounting in Estate of A.B.*, 1 Tucker 247, 249 (N.Y. Surr. 1866) (Tucker, Surr.).
4. *See supra* note 2.
5. Gen. Mun. Law §§ 800-804, 805.
6. *See, e.g., Lexjac, LLC v. Beckerman*, No. 07-CV-4614 (E.D.N.Y., Sept. 30, 2008).
7. S. 7400-A, § 1, amending Gen. Mun. Law § 800(3).
8. Gen. Mun. Law §§ 800(3), 801, 804, 805. None of the exceptions in Gen. Mun. Law § 802 would apply.
9. *See* S. 7400-A, § 2, adding Gen. Mun. Law § 801(3).
10. *Cf.* Gen. Mun. Law § 805-a(1)(c)-(d).
11. S. 7400-A, § 3, adding Gen. Mun. Law § 803-a.
12. *See* 1964 N.Y. Laws ch. 946, § 1 ("it is the purpose of this chapter [enacting Article 18] to define areas of conflicts of interest in municipal transactions [i.e., prohibiting certain interests in municipal contracts], leaving to each community the expression of its own code of ethics").
13. *See* S. 7400-A, § 4, amending Gen. Mun. Law § 806(1)(a).
14. *See* Gen. Mun. Law § 806(1)(a); Gov. Eliot Spitzer, Exec. Order No. 11 stating that New York State includes more than 4,200 taxing jurisdictions. The Attorney General's Office has concluded that New York State includes 10,521 local governments, consisting of 57 counties (excluding the five counties of New York City), 62 cities, 932 towns, 556 villages, 996 school districts / BOCES, 991 authorities, and 6,927 special

districts (http://www.ag.ny.gov/bureaus/legislative/government_consolidation/govs.html (all websites cited in this article were last visited October 14, 2010).

15. Gen. Mun. Law §§ 806(1)(a), 808(1), (3).

16. *See* S. 7400-A, § 8, amending Gen. Mun. Law § 808(1). New York City and its constituent units are excluded from current Article 18, except for the financial disclosure provisions. *See* Gen. Mun. Law §§ 800(4), 810(1). The Bill apparently intended to make no change in that regard. New York City has had an extensive code of ethics for its public servants, and an active ethics board, since 1959. *See* NYC Local Law No. 73, 74, 75 (1959), enacting former NYC Ad. Code §§ 898.1-0, B1-7.0, 897-1.0, respectively; *see also* 1959 NY Laws ch. 532, revising former NYC Charter § 886, available at http://www.nyc.gov/html/conflicts/downloads/pdf2/Old%20NYC%20Ethics%20Laws.pdf. Since 1989, when New York City's ethics board was given enforcement power, it has had an active enforcement program, including the imposition of 98 fines in 2009 totaling over $160,000. *See* 2009 Annual Report of the Conflicts of Interest Board, at 45 (Exhibit 9), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/annual_reports/annual_report_2009_final.pdf. The City's current conflicts of interest and financial disclosure laws are set forth in NYC Charter Chapter 68 and NYC Ad. Code § 12-110, respectively, available at http://www.nyc.gov/html/conflicts/html/law/law.shtml.

17. *See* New York State Department of State, Local Government Handbook, at 5 (Table 1), 40-41 (Table 6), and 54-55 (Table 9), available at http://www.dos.state.ny.us/LG/publications/Local_Government_Handbook.pdf; New York State Dept. of Education website, http://www.p12.nysed.gov/mgtserv/boces/. New York State is comprised of 57 counties, 61 cities, 933 towns, 553 villages, and 37 BOCES, excluding New York City and its constituent units.

18. S. 7400-A, § 8, adding Gen. Mun. Law § 808(1)(d). In city school districts of cities having a population of 125,000 or more (Buffalo, Rochester, Syracuse, and Yonkers), the city's ethics board, rather than the BOCES ethics board, serves as the ethics board for the school district. Proposed Gen. Mun. Law § 808(1)(d)(iii).

19. *See* http://www.nysegov.com/citguide.cfm?context=citguide&content=munibycounty2&swis_county=55; Westchester County Department of Planning Databook, 23, 34, available at http://www.westchestergov.com/planning/research/Databook/Databook.pdf; http://emergencyservices.westchestergov.com/index.php?option=com_content&view=article&id=510&Itemid=1084; http://www.p12.nysed.gov/ds/directory.html; http://nyintegrity.org/local/municipalities.html. Harrison, Mt. Kisco, and Scarsdale are each a town/village.

20. "Municipality" is broadly defined in Gen. Mun. Law § 800(4) and includes some 4,200 taxing jurisdictions in New York State (*see* Gov. Eliot Spitzer, Exec. Order No. 11) and thousands more non-taxing jurisdictions. The Attorney General's Office has calculated that New York State includes 10,521 local governments. *See supra* note 14.

21. *See* http://www.newyorkschools.com/counties/westchester.html. Since the City of Yonkers has a population exceeding 125,000, the Yonkers City School District will be subject to the City of Yonkers ethics board, unless the district creates its own ethics board. The Putnam-Northern Westchester BOCES ethics board would also be serve as the ethics board for the six Putnam County school districts, unless they establish their own boards of ethics. *See* http://www.newyorkschools.com/counties/putnam.html.

22. *See* S. 7400-A, § 8, adding Gen. Mun. Law § 808(1)(e) and amending Gen. Mun. Law § 808(4). *See also* Gen. Mun. Law §§ 810(9), 811(1)(c), (d), 813(9)(f)-(i), (k), (m), 813(10)-(16). Upon the expiration of the Temporary State Commission, its "powers, duties and functions" devolved upon the local boards of ethics. 1987 N.Y. Laws ch. 813, § 26(c).

23. *See* Gen. Mun. Law § 808(2).

24. *See, e.g.*, Chris McKenna, *'Dodge City without Wyatt Earp': Ethics boards either absent or too weak to protect public*, Times-Herald Record, Dec. 14, 2003, available at http://archive.recordonline.com/archive/2003/12/14/wcamethi.htm.

25. S. 7400-A, § 8, adding Gen. Mun. Law § 808(1)(c).

26. *See* New York State Department of State, Local Government Handbook, at 5 (Table 1) and 54-55 (Table 9), available at http://www.dos.state.ny.us/LG/publications/Local_Government_Handbook.pdf.

27. *See* S. 7400-A, § 8, amending Gen. Mun. Law § 808(1).

28. *Id.*

29. S. 7400-A, § 8, amending Gen. Mun. Law § 808(5).

30. *See* S. 7400-A, § 8, amending Gen. Mun. Law § 808(2).

31. S. 7400-A, § 8, adding Gen. Mun. Law § 808(2-a)(e)(ii).

32. *See, e.g.*, 24 Op. State Compt. 125 (1968) (opining that a town board has no authority to delegate its subpoena power to the town board of ethics); *contra*, 1993 Op. Atty. Gen. (Inf.) 1022 (93-14) (opining that a local government by local law may provide for enforcement of violations of local ethics regulations through the imposition of fines and initiation of proceedings for equitable relief) and 1991 Op. Atty. Gen. (Inf.) 1135 (91-68) (opining that a local government by local law may grant its ethics board investigative and enforcement authority). Note, however, that the Bill includes language that arguably may in fact permit a municipality to increase the maximum amount of the fine. *See* S. 7400-A, § 14 (authorizing a code of ethics to be "more stringent than article 18 of the general municipal law"). Indeed, the Comptroller may have chosen that "more stringent" language rather than the more limiting language in current Gen. Mun. Law § 806(1)(a) precisely to permit such increased enforcement and penalties. *See* Gen. Mun. Law § 806(1)(a) (local ethics codes may "regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited").

33. *See* Gen. Mun. Law §§ 810-813. *See also supra* note 2. Curiously, the Bill would repeal Gen. Mun. Law § 813, regulating the Temporary State Commission, even though the provisions of that section expired on December 31, 1992, while they remain relevant to local ethics boards upon which the "powers, duties and functions" of the Commission devolved. *See* 1987 N.Y. Laws ch. 813, § 26(c).

34. *See* 1964 N.Y. Laws ch. 946; 1987 N.Y. Laws ch. 813.

35. *See NYSBA News Release: State Bar President Stephen P. Younger Creates Task Force on Government Ethics* (June 30, 2010), available at (http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=39665&TEMPLATE=/CM/Con`tentDisplay.cfm).

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Model Green Building Ordinance Proposed for Adoption by New York Municipalities

By Michael B. Gerrard and Jason James

Michael B. Gerrard

After failing to pass in the 111th Congress, comprehensive federal climate legislation appears stalled until at least 2013. Regulation of greenhouse gas emissions under existing federal law, while progressing, has encountered challenges. Even state initiatives, such as California's A.B. 32, lie on less than certain ground. But not all action to reduce greenhouse gas emissions must be taken on the federal or state level. Through regulating buildings, municipalities can play a crucial role in reducing greenhouse gas emissions while improving the health and welfare of their local communities.

In 2009, the residential and commercial building sector was responsible for more than 50 percent of total annual U.S. energy consumption,[1] 74 percent of total U.S. electricity consumption,[2] and 39 percent of total U.S. greenhouse gas emissions.[3] While state energy codes require a minimal level of efficiency, municipalities in New York and other states can enact stronger regulations and thereby reduce this substantial source of emissions.

We propose that one of the most effective ways a municipality can act to reduce these emissions is to enact a green building ordinance that mandates not only energy efficient buildings, but a full spectrum of carbon-cutting practices. Green buildings also use water more efficiently, are built from reused and sustainable materials, and reduce the negative environmental impact of buildings in several other ways.

Municipal ordinances requiring green building practices have proliferated around the country over the last several years. These ordinances vary widely in their design, content and coverage, and in the quality of their drafting. This patchwork of laws complicates the work of architects, engineers and lawyers who must try to conform their clients' projects to local requirements. Many opportunities are lost to improve the energy and water efficiency of buildings.

In an effort to address these problems, Columbia Law School's Center for Climate Change Law (CCCL) has undertaken an effort to draft a model municipal ordinance on green buildings. The first step was to compile as many such existing ordinances and policies as possible; we found 163 of them, and have posted them on our web site.[4] We then analyzed them to find their best features and create a model ordinance. We posted a draft version of this model, together with detailed commentaries on its features, the rationale behind the choices it embodies, the associated legal issues, and various optional add-ons in June 2010.[5]

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We are now releasing a revised version of the ordinance incorporating comments we received on the draft ordinance. The model and commentary are primarily the work of lawyers at CCCL and Arnold & Porter, with several outside reviewers providing comments, including the Center for Code Reform, U.S. Green Building Council (USGBC), and the City of New York's Mayor's Office of Environmental Coordination. (We adopted most but not all of the recommendations of the reviewers.) It is our hope that municipalities will consider adoption of this ordinance. The law is designed for New York state municipalities, but with minor revisions it can be adopted for use in other states.

Design of Ordinance

Some large municipalities have adopted their own detailed green building codes with extensive technical specifications, many of them tailored to high-rise buildings. Others, such as the City of New York, have very detailed energy codes. Most small municipalities are not able to write a green building standard from scratch, so use of a third-party standard in the model ordinance was essential. The International Code Council has proposed one such third-party standard, an International Green Construction Code, a 193-page document of technical specifications.[6] However, we concluded that considering and adopting this level of specification was also beyond the capabilities of most smaller municipalities.

Instead, we have looked to what has emerged as the nation's leading system of green building standards, the Leadership in Energy and Environmental Design (LEED) rating system of the non-profit USGBC. LEED is a performance-based system and not a prescriptive standard; different building or site features,

such as high energy efficiency or a green roof, entitle a project to LEED points. If enough LEED points are accumulated, the building may receive a certain level of LEED certification. This level of certification may increase from the plain vanilla (certified) to, progressively, silver, gold and platinum. The LEED system is being updated on an ongoing basis, and new versions are also appearing to reflect different kinds of projects—e.g., new construction and major renovations, health care facilities, schools and others.

Under the CCCL model ordinance, most commercial and high-rise residential buildings are covered by the LEED-NC 3.0 standard, the latest LEED standard for new construction and major renovations. Schools, however, are covered by the LEED for Schools standard. Covered buildings must meet the silver level, which is the level most often adopted by the existing green building ordinances that we found. To meet the silver level, buildings must attain half of all possible LEED points. Since many factors other than energy efficiency provide for LEED points, the model ordinance has the option of also requiring a certain minimum number of points from among those specifically pertinent to energy, obviating the concern that builders may accumulate the needed points without sufficient attention to energy savings.

Because green building standards are steadily progressing, even a very strong ordinance enacted today could seem lax five years from now. The model ordinance provides that a municipality may take administrative action (without requiring a new vote by its city council or other governing body) to move to an updated or entirely different standard, provided that standard meets certain criteria specified in the ordinance. For those municipalities that are uncomfortable allowing an administrative official to adopt a different standard, the model ordinance provides an option specifying that the municipality's governing body adopts these changes. We rejected the idea (adopted in some places) of automatically adopting revised standards as they are released by the USGBC; that would raise concern about improper delegation of governmental authority to non-governmental entities.

Official certification of green buildings via USGBC procedures has sometimes led to long delays and also raises a delegation problem if required by the law. Thus, the model ordinance declined to require USGBC certification. Instead, in order to obtain a building permit, the application must demonstrate that the building is designed to achieve the 50 LEED points required for silver level certification. In other words, the building does not have to be certified by the USGBC but must only merit the number of points required to achieve LEED silver in the judgment of the designated municipal official.

Once completed, the building would receive a certificate of occupancy only when it was determined to have achieved these points. If during construction it turns out that certain points cannot be achieved as planned, leaving the building short of the number of points required for LEED silver, a temporary certificate of occupancy may be available until either those points are achieved or satisfactory mitigation measures are taken. The ordinance provides an option requiring the temporary certificates of occupancy to be made public, intending to hasten mitigation measures. Some existing ordinances provide that a building permit cannot be issued unless the building has been LEED certified by USGBC, but that does not work—USGBC certification is not available until after construction is complete.

This LEED silver requirement would apply to new construction of municipal buildings, most commercial buildings, and high-rise multifamily residential buildings, provided the buildings have at least 5,000 square feet of conditioned space. The ordinance would not cover large buildings that do not consume much energy, such as parking garages. It would also apply to major modifications of such buildings (defined as rehabilitation work in at least two major building systems; construction work affecting at least half the building's floor area; or construction increasing the square footage by at least half). The ordinance covers instances where a builder simultaneously applies for multiple minor renovation permits in an attempt to evade the regulation, narrowing a potential loophole.

LEED is not well suited for smaller buildings. Thus, for new construction of one- and two-family dwellings, and low-rise multifamily residential buildings, the model ordinance instead requires an adequate rating under the Energy Star Homes Rating System, a set of guidelines for energy efficiency developed by the U.S. Environmental Protection Agency and the U.S. Department of Energy. This rating system does not encompass as many green building features as LEED. However, its successful use in other jurisdictions makes it a strong initial choice, and it can easily be updated if a more multifaceted green homes standard emerges. We have not required that single family homes undergoing renovation abide by the ordinance out of concern that this could unduly raise the cost of many kitchen and bathroom renovations.

Implementation

Determinations of compliance with the LEED standards, Energy Star ratings, and other requirements would be made by a Green Building Compliance Official, a municipally designated official; it will often but not always be the building inspector. This official is empowered to conduct inspections, issue stop work orders, and take other enforcement actions. Smaller

towns and villages may not be able to support an inspector with sufficient training to make these determinations; the model ordinance is accompanied by a model inter-municipal agreement that would allow several municipalities to pool their resources in hiring inspectors.

Applicants may apply for a partial exemption from the requirements based on hardship or infeasibility. Some of the factors that could lead to such an exemption include unavailability of the necessary green building materials or technologies, or incompatibility of green building requirements with other governmental rules. Even applicants that receive a partial exemption must include as many green building features as feasible. Optional provisions would allow municipalities to exempt some historic buildings, or buildings where the added cost of complying with the green building standard would exceed a set percentage.

Appeals from determinations of the Green Building Compliance Official may be made to an appellate body designated by the municipality (typically the board of zoning appeals).

Options

In recognition that an efficiently built building can be operated inefficiently, the green building laws of New York City and Washington, D.C. provide for benchmarking—a process under which a building's energy and water usage is compared to that of comparable buildings. The model ordinance includes benchmarking as an optional provision. Public disclosure of benchmarking information is intended to encourage more efficient operation of buildings.

Another option aimed at post-construction efficiency applies to buildings owned or mostly occupied or funded by a municipality. It would require existing buildings in these categories to meet the LEED standards for operations and maintenance of existing buildings (called LEED EB:OM); municipalities may widen the applicability of these operations and maintenance standards if they wish.

Legal Issues

A number of potential legal issues have been raised in connection with municipal green building ordinances. We have attempted to draft an ordinance that would have none of the identified vulnerabilities. We have posted a working paper analyzing each of these issues.[7] These are the principal items:

Federal preemption. The federal Energy Policy and Conservation Act[8] preempts state and local regulation of appliances that are covered by federal efficiency standards. The model ordinance does not mandate any appliance standards. Certain LEED points could be gained by use of especially efficient appliances, but the selection of which LEED points to seek, and how to obtain them, is left up to the applicant.

State preemption. The New York State Energy Conservation Construction Code[9] establishes energy efficiency standards to be enforced by municipalities, but it explicitly allows municipalities to adopt more stringent requirements.[10] The New York State Uniform Fire Prevention and Building Code[11] does generally preempt inconsistent provisions on such subjects as fire safety, fuel gas, and plumbing. Again, certain LEED points might be gained by devices that go beyond what is required by the Fire Prevention and Building Code, but the ordinance does not require selection of these devices. The model ordinance provides procedural options if any actual inconsistencies are found between the LEED or Energy Star requirements, on the one hand, and the preemptive federal or state codes, on the other hand. Should serious questions arise in this regard, the New York State Code Council has the power to grant waivers from the state codes.

Non-delegation. Local legislative bodies may not relinquish legislative functions to private individuals, associations or corporations.[12] The model ordinance does not do so; it adopts certain standards from the USGBC and the Energy Star program, but the municipality retains control over revisions to and enforcement of these standards.

Incorporation by reference. The New York State Constitution bars incorporation by reference of outside laws.[13] However, the courts have interpreted this to apply only to incorporation of actual laws, and not of standards created by third party organizations.[14] This issue arose when New York City adopted an ordinance regulating bats used in high school baseball games, incorporating by reference the bat rules of Major League Baseball. The U.S. District Court found this to be permissible.[15]

Antitrust. One of the LEED credits requires use of wood that has been certified by the Forest Stewardship Council, which could disadvantage non-certified wood producers. The model ordinance also provides that Energy Star ratings must be assessed by people with certain qualifications, disadvantaging persons without those qualifications. Aside from the reasonableness and noncompetitive purposes of these requirements, municipalities that are advancing state policies have important immunities from the antitrust laws.[16]

Comments Sought

We are continuing to accept comments on the ordinance. Please submit them to michael.gerrard@law.columbia.edu. While continuing to update the green

building ordinance to reflect changes in the field, we are also working on model ordinances on the siting of renewable energy facilities such as wind and solar installations.

Endnotes

1. U.S. Energy Information Administration, *Annual Energy Outlook 2009 Early Release: Tables 2, 4, 5, and 18* (Dec. 2008), *available at* http://www.eia.doe.gov/oiaf/aeo/aeoref_tab.html. This number consists of 42% building operations (residential, commercial, and industrial building HVAC, hot water and plug load), 8% building construction and the embodied energy of building materials.
2. U.S. Dept. of Energy, *2009 Buildings Energy Databook*, Table 1.1.1., *available at* http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=1.1.1.
3. *Id.*, Table 1.4.1, *available at* http://buildingsdatabook.eren.doe.gov/docs/xls_pdf/1.4.1.pdf.
4. http://www.law.columbia.edu/centers/climatechange/resources/municipal.
5. *Id.*
6. http://www.iccsafe.org/igcc.
7. The working paper is available at http://www.law.columbia.edu/centers/climatechange/resources/municipal.
8. 42 USC §§ 6021 et seq.
9. NY Energy L. §§ 11-101 - 11-110.
10. NY Energy L. § 11-109(1).
11. NY Exec. L. §§ 370-383 (further parts of code available in NYCRR).
12. *People v. Mobil Oil Corp.*, 422 NYS2d 589, 591 (Dist. Ct. Nassau Co. 1979).
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14. *People v. Halpern*, 361 NYS2d 578 (City Ct., City of Long Beach 1974).
15. *USA Baseball v. City of New York*, 509 F.Supp.2d 285, 299 (SDNY 2007).
16. *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 US 365, 370 (1991); *see also Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2003).

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