NYSBA SUMMER 2004 | VOL. 18 | NO. 3

# 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

The Section's Executive Committee met in Albany in May. In addition to the usual agenda items related to our Fall Meeting in Ottawa, committee work and finances, we were paid a visit by then-NYSBA President Tom Levin. Tom had previously served on the Section's Executive Committee, practices in the area of municipal law and, to our delight, has agreed to become a member of the Section's Executive Committee again now that his year at the epicenter of NYSBA has come to a close.

As is his way, he came to the meeting with an agenda item, an action item really, for the Section. He suggested that we initiate legislation and not wait around to just respond to someone else's proposals.

Collectively, we have enough experience in the panoply of issues that is municipal law to speak knowledgeably about what laws work or do not work. The idea that began the discussion was why do local governments pay court fees to litigate their cases but county governments are exempt from such fees? The ensuing discussion was interesting. One member observed that the counties bear the financial burden of supporting judicial branch offices. Another member opined that it would be easier to eliminate the counties' exemption rather than create another exempt class of litigants. But what are we talking about exactly? How many times does a local government pay a court fee each year? How many actions are filed? How many motions are filed? What is the total amount of money expended to support local government litigation in the courts? Do local governments consider the filing fees cost-prohibitive? Are they high enough to keep them from litigating?

If you are familiar with environmental law, particularly the State Environmental Quality Review Act ("SEQRA"),[1] you probably have enough anecdotal evidence to give a two-hour lecture on the pitfalls, snares and conundrums in the SEQRA process. SEQRA requires all state and local government agencies to assess the environmental impacts of all their actions they either approve, fund or directly undertake and weigh those impacts against any social or economic factors. SEQRA was passed in 1975 to protect the environment, but over time, has the process become more important than the purpose? Should the opportunities to opt out of SEQRA be expanded? Should there be statutory definitions for some of the more frequently litigated concepts, for example, "cumulative impact"?[2] Are there ways to lessen the time and money of compliance by using today's technology more efficiently? What would be the cost?[3] The Environmental Law Section would be a knowledgeable partner in the process of identifying

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where the problems are and quantifying just how costly they are in terms of time and money.

Those in the labor and contract law arenas are most likely familiar with a law commonly referred to as the "Wicks Law." The underlying premise, "to assume the prudent and economical use of public moneys" used for public works and public purchases by municipalities, GML 100-a, was and is laudable. The Court of Appeals acknowledges that the competitive bidding statutes protect "the public fisc by obtaining the best work at the lowest possible price" and prevent "favoritism, improvidence, fraud and corruption in the awarding of public contracts."[4] Do they really protect the public fisc? Why are some municipal projects exempt from competitive bidding each year? Are there indirect costs to the government in complying with the Wicks Law? If so, what are they and how much are they worth? Our research could begin with inquiries to groups like NYCOM and NYSAC to see what research, if any, they have already done on the issue.

Any one of these potential projects would be a lot of work. As Section members, you are pulled between professional and personal demands and count on the Section journal, website and programs to keep informed to better serve your clients. But should we, as a Section, be doing more? Do we have a duty to right a wrong or fix something that is broke beyond what exists in our own filing cabinets? I acknowledge that many of you give selflessly to the public good by taking pro bono matters. However, perhaps working with other like-minded professionals, we can find the time to get out of our individual filing cabinets and right, if not a universal wrong, a state-wide wrong.

**Renee Forgensi Minarik**

## Endnotes

1. 6 N.Y.C.R.R. Part 617.
2. *See generally* Arthur Ientilucci, *SEQRA: Down the Garden Path or Detour for Development*, 6 Alb. L. Envtl. Outlook 102 (2002).
3. Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process,* 12 N.Y.U. Envtl. L.J. 18.
4. *General Contractors of America v. New York State Thruway Authority*, 88 N.Y.2d 56, 68; 643 N.Y.S.2d 480, 484 (1996).

# From the Editor

"Capitol Crisis,"[1] "Chronic Case of Gridlock,"[2] "A Broken Legislature"[3] and "Political Paralysis"[4] are typical of the newspaper headlines over the years chronicling a dysfunctional New York State government. In late June, with no State budget in sight, the Legislature concluded its current session. The lawmakers left behind a litany of unresolved issues affecting the State, including school-funding reform, capping the local share of Medicaid cost, changing the Rockefeller drug laws, voting and budget reform and local government pension relief.

Various "good government" groups have weighed in with their recommendations for government reform. For example, the New York Public Interest Research Group ("NYPIRG") has established a "Reform New York" program intended to increase public accountability of New York State government.[5] The Citizens Budget Commission has issued a report entitled "The Palisades Principles: Fixing New York State's Fiscal Practices."[6] The League of Women Voters and Common Cause are also actively promoting State government reform.

Most recently, the New York State Bar Association, acting upon the initiative of its immediate past-President, A. Thomas Levin, has established a special committee consisting of "former Albany insiders and legal scholars"[7] to examine the operation of State government and to propose new ways to improve the budget and legislative process. Describing the committee's objective, Mr. Levin, who will serve on the panel, stated, "While we recognize the reality of the current operations, we hope to propose a new paradigm for dealing with the complexities of state governance."[8]

Albany Law School Professor Michael J. Hutter, Jr. will serve as the committee's Chair. In addition to Mr. Levin, other members are:

- John M. Armentano of Uniondale (Farrell Fritz, PC), clerk to former Court of Appeals Judge John F. Scileppi;
- Hon. Richard J. Bartlett of Glens Falls (Bartlett Pontiff Stewart & Rhodes, PC), former chief administrative judge, former Assemblyman and past chair of the Temporary Commission on Revision of the Penal Law and Criminal Code;
- Hermes Fernandez of Albany (Bond Schoeneck & King, PLLC), former assistant counsel to the governor;
- Eric F. Lane of Hempstead (Hofstra University School of Law), professor, former chief counsel to the Senate Minority Leader;
- Elizabeth D. Moore of New York (Nixon Peabody LLP), former counsel to Governor Mario M. Cuomo;
- Richard Rifkin of Albany (Department of Law), Assistant Attorney General;
- Phillip C. Pinsky of Syracuse (Pinsky & Skandalis), former counsel to the State Senate Republican Majority Leader;
- Lester D. Steinman of White Plains (Wormser Kiely Galef & Jacobs LLP), Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University; and
- Michael Whiteman of Albany (Whiteman Osterman & Hanna LLP), former counsel to Governors Nelson A. Rockefeller and Malcolm Wilson.

I am honored to have been appointed to this special committee. I welcome your thoughts on how to implement meaningful reforms in State government.

Our Section Chair, Hon. Renee Forgensi Minarik, extends a similar invitation for member assistance to improve local government efficiency and cost-effectiveness in her "Message from the Chair." Judge Minarik focuses on the Wicks Law and the State Environmental Quality Review Act as two statutes requiring examination to determine if the objectives for which those laws were enacted are really being met.

Joshua Sabo, Esq. provides an excellent overview of recent judicial and legislative developments affecting notice requirements under the Eminent Domain Procedure Law. Building upon that foundation, Mr. Sabo outlines recommendations for practitioners to follow, starting with pre-condemnation title work and culminating with the adoption of a determination and findings.

Richard Briffault, Vice-Dean and Joseph P. Chamberlain Professor of Legislation at Columbia Law School, examines the future role that local governments will play in our three-tier system of American federalism in his article, "Home Rule for the Twenty-first Century." Against the background of a new urban dynamic, transformed by changing patterns in land use, transportation, communication, housing and employment, Professor Briffault argues that traditional balances of power between states and local governments must be adjusted to promote local responsiveness, innovation and fiscal autonomy while insuring that local decision-making embodies regional and statewide policy considerations.

Compatibility of office is the subject of our ethics column. Former Assistant Attorney General James D. Cole examines both common law and statutory constraints upon the simultaneous holding of multiple public offices.

Highlighted in the "Municipal Briefs" article are recent decisions addressing State preemption of local alcohol sales restrictions, the antitrust implications of municipal electrical inspection programs, variances from special permit requirements and whether a land-use condition requiring the placement of a conservation easement on an applicant's property constitutes a compensable regulatory taking.

Finally, don't forget to make plans to attend the Section's Fall Meeting on October 1–3 in Ottawa, Canada.

**Lester D. Steinman**

## Endnotes

1. The Journal News, June 27, 2004, at 7B.
2. The New York Times, October 20, 2002, at A1.
3. The New York Times, June 25, 2003.
4. The Journal News, June 27, 2004, at 6B.
5. http://www.nypirg.org.
6. http://www.citizensbudgetcommission.org.
7. NYSBA Press Release, June 6, 2004.
8. *Id.*

# Notice Requirements and the EDPL in 2004

By Joshua A. Sabo

Recent federal court decisions and legislation have changed the scope of the procedural requirements with which a condemnor must comply to be assured that a taking will comport with due process safeguards. This article briefly examines the constitutional protections afforded condemnees and the manner in which New York state courts have traditionally interpreted those constitutional protections. Recent federal court decisions casting doubt on the adequacy of the Eminent Domain Procedure Law to protect the constitutional rights of condemnees are discussed together with the New York State Legislature's response to the federal courts' concerns. As of the date this article is written, the Assembly and Senate had passed legislation amending the Eminent Domain Procedure Law (A.11167), but the bill had not been sent to the Governor. This legislation is examined and the author's recommendation on procedures for condemnors to follow is provided.

The Fifth Amendment to the United States Constitution guarantees, "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." This original amendment to the Constitution only applied to federal actions, not takings of private property by the individual states. That, of course, changed with the adoption of the Fourteenth Amendment, "No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law." Since 1868, the due process protections of the Fifth Amendment have applied to state actions as well.

The New York State Court of Appeals has historically recognized the power of eminent domain to be an inherent attribute of sovereignty existing in every independent state, but limited by the public's right to due process of law.[1] The State of New York codified the right to just compensation for property taken by eminent domain as part of the state Constitution of 1821. Additional state protections limiting eminent domain powers to property taken for public use were apparently present in Section 13 of the Constitution of 1777 and as English common law embodied in provisions of the 1775 Constitution.[2] These ancient eminent domain principles changed very little throughout the years. New York State jurisprudence regarding the limitations on the state's right of eminent domain have been limited to these two same areas that today are specifically set forth in the New York State Constitution, "Private property shall not be taken for public use without just compensation."[3]

The Eminent Domain Procedure Law has been the exclusive procedure for the use of the power of eminent domain since its enactment on July 1, 1978.[4] One of the stated purposes of the statute is "to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain." That purpose is balanced against the legitimate interest of municipalities to acquire property through eminent domain, quickly and efficiently through rules "to reduce litigation."[5]

When New York courts have considered the question of whether the procedural safeguards in the EDPL satisfy due process requirements of the New York State and United States Constitutions, they have decided that existing procedures are adequate to protect a condemnee's right to procedural due process.[6]

The notice requirements of the EDPL set forth in Article 2 are for the stated purposes of: 1) informing the public; 2) reviewing the public use of a proposed public project; and 3) reviewing the impact of the project on the environment and residents of the locality.[7] To achieve those goals, the EDPL requires a public hearing at a location near the proposed taking.[8] Prior to the enactment of the EDPL there was some authority for the proposition that a public hearing was not necessary to comply with the requirements of the federal and state Constitutions.[9] Additional authority existed for the proposition that personal notice of an eminent domain hearing is not necessary and that newspaper publication is adequate to comply with applicable due process requirements.[10]

Article 2 notice requirements have essentially been a checklist for the eminent domain practitioner. As long as counsel for the condemnor followed the straightforward requirements of the EDPL set forth below,[11] there was no need for the condemnor to be concerned about whether a condemnee's due process rights were adequately protected.

- Notice of public hearing detailing the purpose, time and location of the public hearing, the proposed location of the public project and any proposed alternate locations.
- Publication of the notice of the public hearing in an official daily newspaper designated in the municipality where the project is located for five successive issues at least 10 but no

more than 30 days prior to the date of the public hearing.

- Draft and publish full determinations and findings and a synopsis of those determinations and findings in at least two successive issues of the official daily newspaper within 90 days of the conclusion of the public hearings. The synopsis need not contain any information about the way in which judicial review of the determination and findings may be obtained under current law.

However, beginning in 2001, a series of federal court decisions regarding eminent domain proceedings initiated by the Empire State Development Corporation and the Village of Port Chester directly challenged the belief that the notice provisions of the EDPL were sufficient to ensure the due process rights of potential condemnees.[12] The most significant of these decisions are referred to as *Brody I*[13] and *Brody II*.[14]

During early 2001 the condemnees in these landmark cases had initial success in obtaining a temporary restraining order preventing the eminent domain process from moving forward.[15] Later in the year, however, the Second Circuit Court of Appeals vacated the injunction and remanded the case back to District Court (*Brody I*). On remand to District Court, the condemnors moved for and were granted summary judgment in their favor dismissing the condemnee's complaints of due process violations in District Court.[16]

In 2003, while the *Brody* plaintiffs were preparing for and conducting their arguments before the Second Circuit, the New York State Assembly and Senate unanimously passed legislation to amend the notice provisions of the EDPL.[17] The 2003 bill shared many of the same features as the bill passed by the Assembly and Senate in 2004 (A.11167). The major difference between the 2003 and 2004 legislations is that the 2003 legislation was drafted in a way that may have required condemnors to do a full-blown title search before being able to lawfully acquire property by eminent domain. Requiring a title search was far in excess of the due process requirements set forth by the Second Circuit. Enactment of the bill had the potential to make it extremely difficult, time-consuming and expensive for any condemnor to acquire property by eminent domain. On September 22, 2003, the Governor vetoed the 2003 legislation the Legislature had unanimously adopted. Two days later, the Second Circuit Court of Appeals issued its landmark *Brody II* decision.

On September 24, 2003, the Second Circuit Court of Appeals reversed the District Court and remanded the *Brody* case to the District Court for further proceedings.[18] The court in *Brody II* specifically instructed the District Court to consider "whether the lack of individualized notice of the publication of determination and findings, and lack of notice of the legal consequences of that publication, violate due process."[19]

The Second Circuit Court of Appeals has issued a clear warning to every condemnor engaged in a taking after its decision in *Brody II*:

> In [condemnation] cases such as this one, we believe that [the reliance interests of third parties] create a strong incentive for the condemnor to comply with the requirements of due process before the property has been condemned and development has begun, in light of the risk that a court somewhere down the road might order a return of the property.[20]

This threat is one that must be taken seriously by all condemnors. The possibility that a project will be stopped in its tracks for years because of the threat that condemned property must be returned could be a tremendous blow to the use of eminent domain proceedings to achieve important public purposes. Worse yet is the possibility that a project will go forward and, after development has begun, there would be a court order to return property previously condemned. The latter scenario is a recipe for a litigation quagmire that would be disastrous for a condemnor and probably for its eminent domain counsel as well.

In 2004, the New York State Assembly and Senate again unanimously passed legislation (A.11167) to amend the notice requirements of the EDPL. A.11167 would require personal written notice to "assessment record billing owners" of an EDPL public hearing in addition to the newspaper publication of the hearing required by existing law. The notice must be personally served on the "assessment record billing owners" or sent by certified mail. A.11167 would also require personal written notice of the synopsis that is required only to be published in the newspaper under current law. The notice of synopsis served on individual property owners pursuant to the EDPL, as amended by A.11167, is more expansive than the notice required under current law. The new notice requirements must inform individuals about the requirements of EDPL § 207: first, that EDPL § 207 sets the applicable statute of limitations to challenge the determination and findings at 30 days from the completion of the newspaper publication of the synopsis, and second, that the exclusive venue for judicial review of the condemnor's determination

and findings is the applicable Appellate Division. A.11167 would go into effect 120 days after being signed into law.

The term "assessment record billing owner" is a new legal construct defined within A.11167 as "The owner, last known owner, or reputed owner, at such person's tax billing address, of each parcel or portion thereof, of real property which may be acquired by the condemnor for such public project, as shown on the assessment records of the political subdivision in which such parcel or portion thereof is located, as this information, in its most current form, may be obtained from and ascertained by the assessor of each political subdivision."

There will be a disconnect between the requirements of A.11167 and the requirements of the *Brody II* court. When, for instance, a condemnee's tax billing address is an escrow agent, the condemnor would be entirely reliant upon the escrow agent forwarding the eminent domain notice to the property owner in order for the property owner to receive actual notice of the proceeding. It would be entirely possible for a condemnor to comply with the EDPL requirements as amended by A.11167 regarding personal notice, but not comply with the *Brody II* court's requirements that property owners receive personal notice of the proceedings affecting their property.[21]

Eminent domain practice after *Brody II* is not nearly as simple or clear-cut as it was just a few years ago. Given the possibility that a condemnor's failure to provide sufficient notice to a condemnee could be the basis for the return of that property months or years after it was condemned, all condemnors should be extremely diligent and careful to take steps to provide personal notice to condemnees above and beyond what is currently required by the Eminent Domain Procedure Law.

The individual notice provisions being imposed on condemnors are supposed to impose minimal burden on condemnors. In addition to the information in the assessor's office, a condemnor would be well-advised to attempt to serve eminent domain notices at the properties to be condemned and/or make a simple review of the recorded deeds and easements in the county clerk's office to identify the names and addresses of potential condemnees to be used as a basis for the individual notices of EDPL hearings and determinations and findings. Any investigation into the recorded property owners that would be affected by the taking needs to occur in close proximity to the first hearing.

The changes in the notice procedures of the EDPL present new opportunities for those who wish to challenge eminent domain proceedings to improve their likelihood of success. For instance, at an eminent domain hearing, the condemnor is required to outline the proposed location or alternate locations of the public project.[22] In its determination and findings, the condemnor must specify "the approximate location for the proposed public project and the reasons for the selection of the location."[23] When there is a challenge to the determination and findings brought before the Appellate Division, one of the criteria to be used by the appellate courts is to determine whether "the determination and findings were made in accordance with the procedures set forth in this article."[24]

The courts have recognized that the new notice provisions may result in an increase in section 207 challenges.[25] One of the possible attacks on determinations and findings that will be heightened by the new notice provisions is the question of whether the condemnor really considered alternate locations for the project.

The reasoning in a section 207 challenge that may be used with the heightened notice provisions could go something like this: 1) the owners of property in the alternate locations are assessment record billing owners as defined by the new amendments to the EDPL; 2) the owners of property in the alternate locations were not provided individual notice; and 3) the fact that the owners of property in the alternate locations were not provided with individual notice indicates that the condemnor did not really consider the alternate locations. If the condemnor had really considered the alternate locations, the condemnor would have ensured that the procedural due process protections afforded to the potential condemnees were followed and sent them individual notices of the hearings.

This possible argument may not be successful, but it is illustrative of the changes in eminent domain procedure that may be in store as a result of the new notice requirements. Consideration of alternate locations may need to be thought out more carefully and each condemnor needs to decide whether to send individual notices to all property owners in alternate locations.

During 2004, condemnors and their counsel should make every attempt to adhere to the personal notice requirements set forth in *Brody*. At a minimum, condemnors should seek to comply with the procedures set forth in A.11167 even before its provisions become law to demonstrate to the Appellate Division that the condemnor has made an appropriate effort to provide notice of eminent domain proceedings and has not violated the due process rights of condemnees.

## Endnotes

1. *Heyward v. City of New York*, 7 N.Y. 314 (1852).
2. *Heyward* at 324.
3. N.Y.S. Const., art. 1, §7(a).
4. EDPL § 101.
5. EDPL § 101.
6. *See, e.g., Waldo's Inc. v. Village of Johnson City*, 74 N.Y.2d 718, 544 N.Y.S. 2d 809 (1989).
7. EDPL § 201.
8. EDPL § 201.
9. *Brent v. Hoch*, 25 Misc. 2d 1062, 205 N.Y.S. 2d 66, *aff'd*, 13 A.D.2d 505, 211 N.Y.S. 2d 853 (2d Dep't 1961).
10. *Application and Petition of Ford*, 21 N.Y.2d 958, 289 N.Y.S.2d 987 (1968).
11. EDPL §§ 202, 204. In the event that the newspaper of record is not one of general circulation in the locality, publication must also be made as provided in those sections in a daily publication of general circulation in the locality.
12. *Minnich v. Gargano*, 2001 WL 46989 (S.D.N.Y.); *Minnich v. Gargano*, 2001 WL 1111513 (S.D.N.Y.); *Brody v. Village of Port Chester,* 261 F.3d 288 (2d Cir. 2001) ("*Brody I*"); *Minnich v. Gargano*, 2002 WL 727026 (S.D.N.Y.); *Brody v. Village of Port Chester,* 345 F.3d 103 (2d Cir. 2003) ("*Brody II*").
13. *Brody v. Village of Port Chester,* 261 F.3d 288 (2d Cir. 2001).
14. *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003).
15. *Minnich v. Gargano*, 2001 WL 46989. This decision contains an excellent survey of relevant United States Supreme Court cases involving due process considerations. *State of Georgia v. City of Chattanooga*, 264 U.S. 472 (1924) (Publication is adequate notice for the taking of property because the taking is a legislative, not judicial function.); *Sears v. City of Akron*, 246 U.S. 242 (1918) (Determination of public purpose is subject to judicial review.); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925) (Due process is satisfied by summary notice proceedings of the necessity and expediency of the taking, but is not satisfied by summary notice of a valuation proceeding for the land taken.). *Catlin v. United States*, 324 U.S. 229 (1945) (Property owners are entitled to an opportunity for a judicial proceeding as to whether the taking has a public purpose.). *Berman v. Parker,* 348 U.S. 26 (1954) (The role of judicial review as to whether a taking is for a public purpose is extremely narrow.). *Schroeder v. City of New York*, 371 U.S. 208 (1962) (Notice by publication is not adequate when the condemnee's name is known or readily ascertainable.).
16. *Minnich v. Gargano*, 2001 WL 1111513.
17. A.497.
18. *Brody v. Village of Port Chester*, 345 F.3d 103.
19. *Id.* at 121.
20. *Id.* at 121.
21. A.11167 allows for the promulgation of regulations for the ascertainment and reporting of "assessment record billing owner" information. It is entirely possible that the author's concerns will be alleviated by these regulations.
22. EDPL § 203.
23. EDPL § 204(B)(2).
24. EDPL § 207(C)(3).
25. *Brody v. Village of Port Chester*, 261 F.3d 288.

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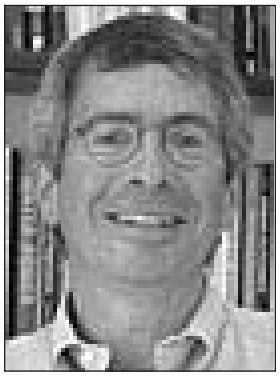
# Home Rule for the Twenty-first Century

By Richard Briffault

## I. Introduction



At this point, four years into the new century, most readers must be tired of the invocation of the "twenty-first century" in law review articles. Yet, "the twenty-first century" in the title of this article is significant. The home rule idea first entered American law in the nineteenth century, an era with different forms of urban political, social, and economic organization, and a different role for local government. As the nature of urban development and the role of local government changes, home rule must change with it.

Home rule is a complex topic. Home rule takes many legal forms and follows many models.[1] There is considerable interstate and even intrastate variation.[2] In some states, home rule follows from a self-executing constitutional grant of power. In other states, the constitutional grant must be implemented by legislation. In still others, home rule is purely statutory. Even within a state, the source and the scope of home rule may vary between cities and counties, or even among cities. In many states, the home rule grant is relatively brief. In others, there is a detailed constitutional and statutory treatment of a broad range of powers and limitations. Moreover, in every state, home rule is shaped by court decisions, with the judicial approach to similar home rule language varying from state to state, and even within a state, depending on the issue presented.

Home rule is also controversial for both scholars and courts. Some scholars have argued that we have too little home rule—that cities are, as Harvard's Jerry Frug has contended, essentially powerless, with or without home rule.[3] Others have argued that there is, if anything, too much home rule, with undue local home rule power contributing to suburban sprawl, exclusionary zoning, and the failure to develop regional responses to regional problems.[4] Still others, like Frug's colleague, David Barron, have suggested that home rule per se is an empty concept that takes on meaning only in light of home rule's ability to advance certain substantive policies.[5]

Home rule issues continue to roil the courts. It is striking just how many home rule cases our courts consider, and how contemporary home rule cases press a wide range of controversial issues, from local tobacco[6] and firearm regulation,[7] to gay and lesbian rights,[8] and domestic partnership ordinances, to campaign finance reform measures,[9] and "living wage" laws.[10] These cases have forced courts to address anew such questions as the scope of local authority to initiate new laws, the meaning of such open-ended phrases as "municipal affairs," "local affair," or "property, affair, or government" of local government; the power of local governments to make new law in areas subject to state regulation; and the relative roles of states and localities in areas that raise both state and local concerns. These cases and others like them often divide the courts that hear them and lead to different outcomes in different states. They suggest that 130 years after the birth of the home rule concept, its meaning remains controversial, uncertain, and highly variable.

I would like to step back from specific cases and controversies and think generally about home rule and its role in the complex urban settings of the early twenty-first century. Specifically, I would like to do four things. First, explain why home rule is important. Second, defend the need for some home rule. Third, consider how changing living patterns have affected home rule and require some changes to traditional home rule doctrines and to state-local relations. Fourth, and finally, to briefly sketch out some specific ideas for improving home rule.

## II. Why Home Rule Is Important

Home rule is important because it fills an important gap in our legal system—the lack of any place for local governments in our legal structure. Politically, American government operates on three levels: federal, state, and local. Local governments are particularly important. Indeed, the vast majority of public services are provided, and much critical public regulation is undertaken, at the local level. Approximately three-quarters of the total number of state and local employees are actually employed by local governments.[11] So, too, the overwhelming majority of state and local elected officials serve at the local level. The states are formally responsible for the provision of most domestic public services, but local governments play the key role in actually delivering such basic services as policing, fire prevention, education, street and road maintenance, mass transit, and sanitation. The events of September 11, 2001, are a pointed reminder of the central place of local governments in our political system. Although September 11 was an

attack on our nation, most of the domestic response involved local governments. It was New York City police, firefighters, and emergency medical personnel who responded to the attacks on the World Trade Center, and it was similar local public health and safety workers from the District of Columbia and various Virginia and Maryland counties who battled the consequences of the terrorist attack on our most important federal military installation, the Pentagon. So, too, in the anthrax scare of October 2001, much of the public response involved local public health personnel.[12]

As these examples suggest, local public safety and public health workers, indeed, local governments generally, are critical components of our governmental system. Yet, although politically crucial, local governments have a far more tenuous legal status. Our federal constitution is entirely silent with respect to local governments. It makes no reference to local government at all. From a constitutional perspective, American federalism is a two-tier system, not the three-tier system we actually experience in our governance.

Home rule is important because it takes a step toward bringing the legal status of cities and counties into closer alignment with their critical place in our government structure. Home rule gives local governments some control over their own political structure; some authority to adopt new laws and initiate new regulations concerning matters of local concern; and, somewhat more uncertainly, a measure of protection from state displacement when state and local measures come into conflict.

To be sure, home rule does not raise local governments to the level of sovereign entities within our system. Home rule does not confer federal constitutional status on local governments.[13] Even within state systems, home rule does not change the fact that local governments are creatures of state law. Home rule is conferred by the states and can be taken back by the states. Local governments are legally dependent on their states in just the way that states are not dependent on the federal government. Yet, home rule does provide some appropriate formal legal recognition of the distinctive and important place of local governments in the federal-state-local, and especially the state-local, governmental scheme.

## III. Why Home Rule Is Valuable

Home rule appropriately advances a number of important values in our system. I will focus on four: democracy, diversity, community, and innovation.

### A. Democracy

A healthy democracy requires that its citizens have opportunities to participate in the political process. Local government provides citizens with opportunities for participation in public decision making, opportunities that are simply unavailable in larger units of government. Democratic participation is more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national levels. The costs of participation in terms of the time, energy, and money needed to reach out, engage, and persuade other members of the polity are likely to be lower in smaller, local units, than in larger ones. Moreover, the need for local democracy has grown as the federal and state governments have grown more complex and access to them for the ordinary citizen has become more difficult.

Local democracy promotes national democracy. As Alexis de Tocqueville observed nearly two centuries ago,

> the strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government but it has not got the spirit of liberty.[14]

But local democracy requires some measure of local autonomy, of home rule. People will bother to participate in local government decision making only if local governments have real power over matters important to local people.[15] Local democracy thus requires local autonomy, much as local autonomy advances the prospects for local democracy.

### B. Diversity

Home rule permits different localities to adopt different local public policies. If all political decisions were centralized at the state level, it would be difficult to vary these policies to take into account varying local needs, circumstances, and preferences. Centrally determined policies might frustrate large numbers of people, who would be subject to government decisions they oppose. Home rule is a form of decentralization that allows local governments to tailor public services and regulation to their particular communities. Home rule permits cities and suburbs, liberal communities and conservative communities, ethnically diverse and ethnically homogeneous settings, to adopt policies that reflect their differing values and conditions. It thus increases the likelihood that people will be happy with their government.

### C. Community

Localities are not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decision making together. They are often communities, that is, groups of people with shared concerns and values, tied up with the history and circumstances of the particular places in which they are located. People live in localities, raise their children there, and share many interests related to their homes, families, and immediate neighborhoods. Much of the power of the idea of home rule is connected to the idea of locality as "home" and of the distinctive connection of government as "rule" with place-based association. With the increasingly regional, national, indeed, global scale of our economy, society, and culture, the need for distinctive, small-scale communities becomes ever more pressing. If our society values its residential communities, home rule is important because it enables such communities to engage in self-government.

### D. Innovation

Many years ago, Justice Brandeis famously offered a defense of federalism in terms of the possibility that state autonomy provides for innovation. As he observed, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[16] Well, if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation, and reform. Thousands of local governments provide thousands of arenas for innovation. Moreover, the multiplicity of local governments also provides a basis for testing the value of innovations. Cities are sensitive to political developments in other cities, as they look to each other to define appropriate policies and models of governance. Evidence that a local innovation has spread to other localities provides some external verification of the value of a new policy idea or program. As Professor, now Federal Appeals Court Judge, Michael McConnell has observed, "[i]f innovation is desirable, it follows that decentralization is desirable."[17] I would add that the legal means to decentralize power to the local level is home rule.

Nor is the argument about policy innovation purely an academic one. A review of recent home rule cases around the country provides striking evidence of the local willingness to experiment with new policies concerning public health and safety,[18] individual rights,[19] social welfare,[20] political reform,[21] and the private provision of public services.[22]

Indeed, these innovations are instructive in linking up the justifications for home rule. Many of these measures like campaign finance reform, the living wage movement, recognition of gay and lesbian couples, and restrictions on youth access to tobacco emerged out of grassroots political movements frustrated by special interests and legislative gridlock at the state and national level. They reflect the distinct preferences of localities that may diverge from state norms, and they constitute an effort to define and promote the distinct values of particular communities.

## IV. How Changing Living Patterns Must Affect Home Rule

These considerations on the value of home rule also give us some sense of what ought to be home rule's two principal limits: externality and fiscal capacity. Democracy, diversity, community, and innovation all presuppose that the consequences of home rule decision making are borne largely within local boundaries. Democracy requires that those bound by a local government action have the opportunity to participate in the local decision making process. Diversity (or decentralization) assumes that diverse local decisions reflect the preferences of only those affected by the decision. Community self-government relies on a tight nexus between community and the area subject to community decisions; that the community is governing itself, not others. Finally, even the value of innovation assumes that the locality bears the costs as well as the benefits of an experiment, since only then can the locality and others intelligently decide whether the innovation is a good one worth replicating elsewhere.

All these values are undermined when local actions have significant external effects. In those cases, the locality is governing others, without their participation, and not just ruling the local home. External effects can occur in at least three ways. First, a locality's rules can have a direct cross-border effect on adjacent municipalities, such as when a local zoning decision sites a polluting facility at the municipal border, with the pollution borne by prevailing winds to the next town. Second, a local rule can exclude a particular land use, such as a utility plant, a waste disposal site, or affordable housing, from the locality. Though such a rule does not impose the undesired use on a specific community since there may be multiple alternative sites, such rules typically have ripple effects, with other adjacent communities adopting similar rules, thus ultimately affecting the entire region. Finally, even when localities do not copy each other, the sheer multiplicity of varying local rules on similar behavior can have a burdensome effect on individuals, businesses, and activities operating in many localities at once. It may be difficult to find out about the many local rules and even more costly to comply with

multiple different local rules. These are costs that are also borne beyond local borders.

The question of external effects reminds us that although home rule issues are typically framed as a matter of state-local relations or state-local conflict, they also have a significant interlocal dimension. To the extent that one locality projects its rule beyond its own borders, it is undermining the ability of its neighbors to engage in home rule. So, too, state power is not simply in tension with local power. The states have the opportunity and the responsibility to write rules of the road that protect home rule localities from each other.

The second constraining factor on local home rule is fiscal capacity. Home rule implicitly assumes that all localities, or all localities of a particular type, or above a certain population threshold, have an equal opportunity to be self-governing, so that differences in local decisions, local services provided, or the scope of local programs are attributable primarily to differences in local preferences, not local resources. This in turn assumes that all home rule localities have comparable capacities to provide the services and programs that their residents want. This may not mean that all localities are equal, but it does assume that all have the capability to pay for the services that local residents expect and that the states have come to rely on localities to provide. To the extent that localities lack this capacity, or that some localities have it far more than others, the home rule system lacks fundamental fairness.

The question of local fiscal capacity has both a state-local and an interlocal dimension. The state-local aspect looks to whether the state has endowed the local government with fiscal resources and the legal authority to tap those resources that are sufficient to fund a meaningful local program. The interlocal component looks to the differences among localities to see whether home rule is comparably available to all similar localities, or whether, due to wealth differences, only some localities have capacity to make real choices.

Externality and fiscal capacity have long been constraints endemic to the very idea of home rule. They help us to define the notion of "home" and remind us that "rule" requires resources. But these issues have taken on increased urgency in recent years due to changing patterns of urban and metropolitan growth. Home rule originated at a time when cities were relatively discrete, tightly bounded areas—relatively dense nodes of population separated by lightly populated fringe areas from other similar localities. Residents of a particular city had relatively high levels of interaction with each other and much less intense interactions with residents of other places. Work, residence, shopping, school, recreation, and religious worship were all focused on the home community.

Today, due to massive changes in transportation, communications, land-use planning, and job and housing location patterns, the urban setting has been significantly transformed. Metropolitan areas are composed of sprawling low-density development, with urbanized areas now closely abutting each other. There is no sharp separation of one community from another; rather, multiple communities bump into each other. Nor are people tightly bound to particular communities. With a significant spatial separation of work, residence, commerce, and other activities, people now range widely across many different localities in the course of their daily lives.[23] They are subject to the rules of many communities, but they can only vote in one of them. As a result, where once external effects were relatively limited, now they are pervasive.

Contemporary land use patterns also compound issues of fiscal capacity and inequality. In many areas, residential uses are increasingly separated from commercial and industrial uses into different localities. With commercial and industrial property usually subject to higher rates of assessment and taxation than residential property, this separation can create a substantial gap in tax bases. Moreover, studies have found widespread economic and racial housing segregation, particularly in areas with large numbers of relatively small localities.[24] Poor and moderate-income residential communities typically have more limited fiscal capacity than high-income residential areas or more mixed use communities. In many areas, these fiscal gaps have widened, undermining the possibility of meaningful home rule for all communities within a region.[25]

These developments suggest that many of the justifications for home rule are in growing tension with the structure of our metropolitan areas. For home rule to flourish, some of our concepts must adapt, and, in particular, the state must play a greater role in what must be seen as a state-local and interlocal government system.

## V. Redesigning Home Rule for the Twenty-first Century

In light of these concerns, how do we design, or redesign, home rule for the twenty-first century? How can we have a home rule system that enables people to use local governments as innovative, locally responsive, self-governing democracies, while effectively dealing with the pervasive externality and fiscal capacity issues of contemporary local governments? My approach has four elements: (1) maximize the opportunity for local self-determination so long as the consequences of local action are borne largely within

local boundaries; (2) limit local powers that have extra-local effects; (3) require the state to play a greater role in managing interlocal conflicts or supra-local issues; and (4) require the state to build up local fiscal capacities in order to make home rule meaningfully available to all local communities.

Consistent with this approach, I would like to make seven proposals. These are presented as general concepts, not specific statutory drafts. I have no illusions that any of these measures are likely to be adopted any time soon, if at all. Although some may be consistent with home rule doctrines or legal rules in some states, most would require at least judicial reinterpretation of home rule provisions if not state constitutional amendments to make them possible. I put them forward to give us a sense of what kinds of steps might help to bring the ideal of home rule into closer alignment with contemporary needs.

### 1. Presumption of Local Power

There should be a broad presumption of local power to act on matters that affect the locality or the people within it. This is central to the basic democratic, decentralizing, innovative thrust of home rule. This goal is often thwarted by narrow judicial readings of home rule grants that try to convert phrases like "local affairs" or "municipal affairs" or local "property, affairs, or government" into a language of limitation rather than a grant of power.[26] Courts will sometimes decline to find home rule authority if the matter is not distinctly related to one locality, but rather crops up in localities all over the state. In those cases, a court may conclude that the matter is not a local or municipal affair, but one of statewide significance.[27] This seems entirely mistaken. The fact that a question is not unique to a locality does not mean it is not also local. Public health, public safety, neighborhood development, and individual rights issues arise everywhere. The essence of home rule is to enable people of different communities to find different answers to the same questions, to tailor government action to local needs, circumstances, and preferences.[28] Local action should be rejected if the regulation has cross-border consequences, burdens interlocal activity, or interferes with state policies that must apply statewide. But local action should not be rejected simply because the action addresses an issue that could arise in multiple localities.

### 2. Limiting State Preemption

State displacement of local action should be limited to cases of clear conflict or clearly stated preemption. Implied preemption should be strongly disfavored. By clear conflict, I mean instances where a local ordinance would attempt to allow what the state would forbid. In those cases, a person in compliance with local law would be in violation of state law. So long as the state law is valid, the state should be able to enforce it. On the other hand, a local law that forbids what a state law does not forbid should usually be considered valid. In that case, a person can comply with both state and local laws. Moreover, permitting local regulation to add to state regulation is essential if home rule is to survive. State regulation is now widespread in most areas. If a state standard-setting or regulatory law was considered to determine both the ceiling as well as the floor for regulation, there would be no space for local regulation once the state had acted. That would choke off home rule and frustrate the democratic, decentralizing, and innovative goals that animate it.

Similarly, in order for state legislation to preempt a local ordinance, preemptive intent should be clearly stated in the law, and not implied by a court. State legislatures are highly capable of displacing local laws when they choose to do so. Both state and local regulation of an area can coexist, so long as local legislation does not thwart state policies. But the best judge of that is the state legislature, not the courts. Indeed, state courts, for the most part, have been moving away from broad notions of field preemption and now rely more on the notion of state-local coexistence.[29] But there are many contrary decisions, and preemption cases on balance seem more ad hoc than principled.[30] Instead of attempting to discern an uncertain legislative intent, courts should require legislatures to make preemption express.

### 3. When Local Laws Should Prevail over Inconsistent State Laws

We should give some thought as to whether there are areas where local laws should supersede state statutes even if there is an outright conflict or an express state declaration of preemption. The question is whether there are some matters where the local interest is so strong, the implications for local self-governance so significant, the extraterritorial effects so limited, and the burdens of interlocal variation on statewide commerce so mild, that local control can be tolerated. I can think of two possibilities: the structure of local governance, including the organization of local elections; and, perhaps more controversially, local control of the municipal employment relationship. By local governance and elections, I mean such issues as the relative powers of the mayor and council; the size of the council; the use of at-large or district elections or proportional representation or nonpartisan elections; whether or not to adopt term limits; and whether or not to adopt campaign finance regulations, including contribution restrictions or public funding.

These matters go to the heart of the local capacity for democracy and self-governance; they reflect local

preferences; they permit local innovation; and they have little or no effects on other localities or on the state as a whole. I should note that this is already an area of considerable local initiative. In New York, for example, New York City, by local law, adopted public funding of municipal election candidates more than a decade ago,[31] and in the fall of 2003 considered, but ultimately rejected, a switch to nonpartisan elections for local offices.[32] Some states make this an area of home rule protected from state interference. Indeed, quite strikingly, more than ten years ago the California Supreme Court upheld Los Angeles' adoption of a public funding scheme for candidates for local office, despite a state law banning public funding in all elections.[33] The California court reasoned quite rightly that financing the campaigns of candidates for local office is a matter of predominantly local concern. This does not mean that the state should be barred from legislating in this area and providing default or background norms, but it does mean that localities should be able to adopt their own alternatives.

Protecting local regulation of municipal employment is no doubt more controversial. With many municipal workers living outside local borders, local decisions arguably have an extra-local effect, although not a regulatory one. But these issues go to the heart of a local government's ability to choose the services and service levels it will provide, and to its ability to pay for them. State requirements in this area often act like unfunded mandates, impairing local home rule capacity. Some states, including California and Colorado, place aspects of the city and county employer-employee relationship within the core of home rule.[34] Indeed, in 2003 the California Supreme Court relied on the state home rule article to invalidate a state law requiring binding arbitration of economic issues between counties and unions representing firefighters and law enforcement officers.[35] The court said that counties are free to choose binding arbitration, but that due to the centrality of the public employment relationship to home rule, binding arbitration cannot be imposed on them. Recognizing the interests of local workers, and the potential for extra-local effects, it would be worth considering protecting the local employment relationship from costly state mandates.

### 4. Unfunded Mandates

The suggestion that state regulation of the local employment relationship is like a mandate of course opens up the general issue of unfunded mandates. Unfunded mandates are a central issue in intergovernmental relations. At the national level, the Unfunded Mandates Reform Act of 1995 curbs some new federal impositions on state and local governments.[36] Some states have adopted rules attempting to prevent the imposition of state mandates on localities.[37]

Unfunded mandates can be a major infringement on local fiscal autonomy, as they commandeer local governments to state ends and divert local resources from local control to state-determined programs. Unfunded mandates impair government accountability in general, since the state legislature is free to impose costs on local taxpayers without paying any political penalty, while local officials are held accountable for costs over which they have no control.

To be sure, not all unfunded mandates are undesirable. The attack on unfunded mandates assumes that individual localities ought to make the decision, by weighing the costs and benefits to themselves, of whether to undertake a program, provide a service, perform a function, or make a payment. This makes sense when all the costs and benefits of the program, service, function, or payment are borne within the particular jurisdiction; when there is no broader interest in the matter; and when there is no cost from interlocal variation in programs or standards. But that is not always the case.

Pollution emitted in one municipality can have its principal effect downwind or downstream in another municipality. For the emitting locality, the costs of pollution control might outweigh the benefits, but when the interests of the other affected localities are taken into account, the benefits from pollution control might outweigh the costs. The state is in a better position to address problems with such external effects. Nor is it clear that a locality forced to curtail its pollution ought to be compensated for its costs. The attack on unfunded mandates assumes, as a baseline matter, that localities have a protected interest in not assuming certain costs. But if the people of a state make a decision that certain behavior is unacceptable as a matter of state policy, then it is certainly debatable whether localities should be compensated for no longer engaging in such unacceptable behavior. Moreover, interlocal competition may limit the capacities of localities to pursue their own political agendas, particularly when they would regulate business, promote equality, or aid the needy within their borders. Mandates may at times be necessary for the enactment of programs that localities would adopt but for the prisoner's dilemma of intergovernmental competition.

Thus, a ban on all unfunded mandates might go too far. Mandates involve the analysis of the cross-cutting concerns of state and local autonomy, the desirability of interjurisdictional variation in programs and standards, and the effective and equitable resolution of a vast array of policy problems. The model here might be the proposal for partial protection of local autonomy from state interference discussed above. True home rule would benefit from a mandate relief measure focused on state legislation that drives up

local costs in areas of limited extralocal effects, such as local public employment and contracting. Here, state mandates impose costs that drain local revenues and interfere with the ability of local governments to perform their functions, but, unlike environmental mandates, these mandates do not address problems of interlocal spillovers. Mandates should be permitted when justified in terms of the dynamics of interlocal relations. They should be restricted when they are no more than state displacement of local preferences with respect to matters whose costs and consequences are largely borne within local borders and by local constituents and taxpayers.

### 5. Fiscal Home Rule

The question of mandates opens up the broader topic of local fiscal capacity. Right now, nearly all states sharply limit local fiscal powers or deny that home rule includes the power to tax.[38] Although most states give at least some local governments the power to tax property, this is generally subject to extensive constitutional and statutory restriction, including, in different states, assessment limits, rate limits, and community-wide levy limits. State legislatures have broad powers to create exemptions from taxation. Moreover, few local governments have home rule authority to impose other types of taxes, such as sales or income taxes, which are central to contemporary public finance and would both expand and stabilize local tax bases and reduce the burden on local landowners. If a local government seeks an additional source of revenue, or seeks to raise the rate of any previously authorized nonproperty tax, it has to go hat in hand to the legislature and governor, and, as often as not, its plea will be rejected.

Thus, one appropriate step for strengthening home rule would be to grant local governments some fiscal autonomy, including the power to adopt new taxes and raise tax rates. This is consistent with the norms of democratic, decentralized, innovative decision making that animate home rule. If local people decide that they would rather pay higher taxes in order to fund new programs, or to avoid cutting existing programs, that should be up to them. Given the widespread political hostility to taxes, it is unlikely that such decisions will be undertaken lightly. Moreover, local government taxing decisions are constrained not just by their voters but by an often intense interlocal economic competition for businesses, jobs, and taxpayers. The ability of mobile residents and firms to flee a high-tax jurisdiction to a low-tax neighbor, along with local electoral control, provides a significant check on local taxing decisions. It is far from clear whether the extra constraint of state legislative and gubernatorial approval is necessary or desirable.

### 6. Local Fiscal Capacity

Although fiscal home rule is consistent with the values underlying home rule and would certainly empower many localities, it is not clear that all would benefit, or benefit equally from it. Fiscal home rule would be far less valuable in poor areas with limited taxable resources than in more affluent areas. Moreover, as I have suggested, interlocal economic competition is likely to hold down local use of any new taxing authority. Cities may reasonably be reluctant to raise additional revenue if they believe that doing so would drive mobile taxpayers into the waiting arms of adjacent communities. Fiscal home rule is necessary to complete home rule, but the combination of limited local resources with the dynamics of interlocal competition means that it may not be sufficient to give localities the resources they need to provide their residents with the facilities and services for which the state has chosen to rely on them.

To address the dilemmas of limited local fiscal capacity and interlocal wealth differences, home rule also needs to include some state fiscal support. In effect, the state should be obligated to determine a basic level of local public services for all communities; to determine the cost of that basic level; and to determine whether each locality has the tax base to provide that basic level. For those that fall short, the state would have to make up the difference. The goal would not be perfect interlocal equality, but rather simply to assure that all home rule localities have the fiscal capacity to actually undertake home rule.

This proposal is based on some initiatives in the school finance reform movement that would require the state to guarantee to each school district the resources to meet a state-set standard of basic education.[39] Perhaps the reference to school finance reform is by itself enough to kill the whole proposal, although I would emphasize that I seek not equal outcomes (which is the goal of many school finance reformers), but equal fiscal autonomy. Admittedly, this would be a costly and complex undertaking. But, when a state entrusts the responsibility for basic public functions in such areas as public safety, public health, and local transportation to local governments, as most states do, the state also has some responsibility to see that local governments have the resources to carry out the job.

### 7. State and Local Roles in Land Use Regulation

Finally, states need to take a greater role in guiding, monitoring, and, where appropriate, intervening with respect to the local power that has the greatest extra-local, indeed regional effect—land use. Local land use regulation, including zoning and subdivision control, is critical to local control over community

development, and thus to local self-government. Yet, local land use rules have had a powerful, and often detrimental, effect on regional development. Local density controls, restrictions on lot size, restrictions on affordable housing, and exclusions of regionally necessary (albeit locally undesirable) facilities contribute to regional sprawl, traffic congestion, housing costs, infrastructure costs, loss of open space, and other environmental harms. To be sure, sprawl cannot be laid at the local doorstep alone. New developments in transportation and communications technologies, federal highway and tax policies, and cultural preferences have all been critical. But local policies that have the effect of driving up the cost of housing, pushing new housing to the metropolitan periphery, or making it prohibitively difficult to build regionally necessary infrastructure facilities are surely part of the problem.

It would be undesirable to take away local land use authority, but local exercise of land use regulation must be more effectively informed by, and subject to, state and regional concerns. The state needs to take a greater role in spelling out permissible and impermissible forms of land use regulation, and in deciding what types of land use controls are appropriate for particular areas. Localities need to be required to keep regional concerns in mind when they make land use decisions that have regional implications. Indeed, this is now the practice in some states.[40]

To assure that this is done, the state needs not only to articulate more land use regulatory criteria, but also to create new institutions with the authority to review local land use actions and set aside those with undue regional harms. Ideally, these institutions would operate at the regional and not the state level, and would in their appointments, staffing, and accountability be as much bottom-up—that is, looking to the aggregate of local interests—as they would be top-down controls on local autonomy. Ideally, their powers would also be broader than simply that of approving or disapproving local actions that have regional impacts. They might, for example, have authority to permit developments or restrictions, provided the locality makes offset payments to, or receives offset payments from, other affected communities. So, too, they might be able to broker interlocal deals that would facilitate regional sharing arrangements. These institutions could facilitate cooperative local decision making rather than impose external solutions.[41] But to make the ideal of interlocal cooperation possible, they would need the authority to block local decisions and set aside local rules when appropriate in order to vindicate broader regional and state interests.

## VI. Conclusion

I will be the first to admit that many of my proposals are both incomplete and ambitious. Although some are already the rule in some states, many depart substantially from existing law and would require either new judicial doctrines, state constitutional revisions, or significant changes in prevailing political attitudes. Some would appear to empower localities, while others would curb them. But the common, unifying theme is that these proposals would better harmonize home rule with both the underlying values that provide home rule with so much of its normative force and the political, economic, and social structure of metropolitan areas at the dawn of the twenty-first century.

## Endnotes

1. *See* WILLIAM D. VALENTE, DAVID J. MCCARTHY, RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 266-69 (2001).
2. *See generally* DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001).
3. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).
4. I must admit that I have contributed to this literature. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM . L. REV. 346 (1990).
5. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).
6. *See, e.g.*, Amico's Inc. v. Mattos, 789 A.2d 899 (R.I. 2002) (upholding local power to regulate smoking in restaurants); Modern Cigarette, Inc. v. Town of Orange, 774 A.2d 969 (Conn. 2001) (upholding local power to ban cigarette vending machines); Vatore v. Comm'r of Consumer Affairs, 634 N.E.2d 958 (N.Y. 1994) (upholding local regulation of cigarette vending machines); Take Five Vending Ltd. v. Town of Provincetown, 615 N.E.2d 576 (Mass. 1993) (upholding local prohibition of cigarette vending machines); *see also* Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321 (1999) (finding that New York municipalities have the authority to adopt a wide range of youth access restrictions and to regulate environmental tobacco smoke). *But see* Allied Vending, Inc. v. City of Bowie, 631 A.2d 77 (Md. 1993) (finding local regulation of cigarette vending machines preempted by state law); Automatic Refreshment Serv., Inc. v. City of Cincinnati, 634 N.E.2d 1053 (Ohio Ct. App. 1993) (same).
7. *See, e.g.*, Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266 (Ill. 1984) (upholding local ordinance banning possession of handguns); Richmond Boro Gun Club, Inc. v. City of New York, 896 F. Supp. 276 (E.D.N.Y. 1995) (upholding local ban on possession of assault weapons); Robertson v. City & County of Denver, 874 P.2d 325 (Colo. 1994) (upholding most of a Denver ordinance banning manufacture, sale, or possession of assault weapons); Citizens for a Safer Cmty. v. City of Rochester, 627 N.Y.S.2d 193 (N.Y. Sup. Ct. 1994) (upholding ordinance banning possession or sale of semi-automatic rifles

and shotguns); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993) (upholding ordinance banning possession and sale of assault weapons). *But see* Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996) (finding local regulation of firearms preempted by state law); Morial v. Smith & Wesson Corp., 785 So. 2d 1 (La. 2001) (upholding state law barring municipality from bringing tort claims against firearms manufacturers).

8. *See, e.g.*, Tyma v. Montgomery County, 801 A.2d 148 (Md. 2002); Lowe v. Broward County, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000), *review denied*, 789 So. 2d 346 (Fla. 2001); Crawford v. City of Chicago, 710 N.E.2d 91 (Ill. App. Ct.), *appeal denied*, 720 N.E.2d 1090 (Ill. 1999); Slattery v. City of New York, 686 N.Y.S. 2d 683 (N.Y. Sup. Ct. 1999), *aff'd*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999); Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. Ct. App. 1998); City of Atlanta v. Morgan, 492 S.E.2d 193 (Ga. 1997). *But see* Connors v. City of Boston, 714 N.E.2d 335 (Mass. 1999) (local ordinance providing benefits to domestic partners of municipal employees found preempted by state law); Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995) (same). More than one hundred localities have adopted employment discrimination measures protecting gays and lesbians. *See* Michael A. Wood, *The Propriety of Local Government Protection of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 554–55 (2003).

   In February 2004, Mayor Gavin Newsom dramatically expanded the local role with respect to the rights of gays and lesbians when he determined that same-sex couples could receive marriage licenses. In the ensuing weeks, before the California Supreme Court ordered them to stop, San Francisco officials performed more than 4,000 same sex marriages. San Francisco did not claim any home rule authority to set its own marriage laws. Rather, the city contended that California's law violated state constitutional guarantees. San Francisco's action inspired officials in several cities around the country to issue marriage licenses to same-sex couples. *See* Shawn Hubler, *Nothing But "I Do" Will Do Now for Many Gays*, S.F. CHRON., Mar. 21, 2004, at A1. Although these local actions regarding same-sex marriage do not fall within home rule per se, they demonstrate the significance of localities as sources of policy innovation, as democratic representatives of the distinctive values and preferences of their particular communities—values and preferences that may differ from that of the rest of their state or of the nation as a whole—and as contributors to national political debates.

9. *See, e.g.*, Johnson v. Bradley, 841 P.2d 990 (Cal. 1992) (finding Los Angeles public funding law not preempted by inconsistent state law). According to a study completed by the Center for Governmental Studies in June 2003, eleven local governments have adopted programs that provide public financing for candidates in local elections. The largest and oldest of these is New York City's program, which was enacted in 1988, and includes contribution limitations, disclosure requirements, and significant partial public funding (on a matching funds basis) for participating municipal candidates. *See* Paul S. Ryan, *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections* (Center for Governmental Studies 2003), *at* http://www.cgs.org/publications/docs/nycreport.pdf (last visited Mar. 5, 2004). Other localities that provide public funding for candidates include Austin, Texas, Boulder, Colorado, Long Beach, Oakland, San Francisco, and Tucson. *See* Center for Governmental Studies, *Public Financing Laws in Local Jurisdictions* (2003), *at* http://www.cgs.org/publications/docs/chart.pdf (last visited Mar. 5, 2004). A 2002 inventory compiled by the National Civic League found that more than 130 cities and counties, in seventeen states and the District of Columbia, have adopted some form of campaign finance regulation. *See* National Civic League, *Index of Local Reforms*, *at* http://www.ncl.org/npp/lcfr/inventory.html (last updated Feb. 2002).

10. *See, e.g.*, Rachel Harvey, *Labor Law: Challenges to the Living Wage Movement: Obstacles in a Path to Economic Justice*, 14 U. FLA. J.L. & PUB. POL'Y 229, 229–30 (2003) (finding that eighty-three cities and counties have adopted living wage ordinances); *see also* Living Wage Resource Center, *Living Wage Wins*, *at* http://www. livingwagecampaign.org/shortwins.php (last visited Mar. 1, 2004) (noting more than 110 local governments, including school districts and road commissions, as well as cities and counties, that have adopted living wage ordinances); William Quigley, *FullTime Workers Should Not Be Poor: The Living Wage Movement*, 70 MISS. L.J. 889, 929–30 (2001) (describing living wage ordinances in St. Louis, Oakland, Los Angeles, Houston, and Gary, Indiana). Living wage proponents contend that by raising wages paid by firms that do business with local government or receive local government benefits, the living wage can combat poverty and promote urban economic development. Nearly all living wage ordinances have focused on firms that either do business with a local government or receive benefits from local government. This has tended to insulate living wage requirements from legal challenge since the requirements can be seen as voluntarily accepted conditions for doing business with the locality. *See* Harvey, at 256–57 (discussing federal court's rejection of a challenge to Berkeley, California's living wage ordinance). As of the end of 2003, two localities, New Orleans, Louisiana, and Santa Fe, New Mexico, had tried to go further and raise the minimum wage for all firms doing business within the locality. The Louisiana Supreme Court held that the New Orleans ordinance is preempted by a state law prohibiting local regulation of the minimum wage paid by private employers. *See* New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002). As of this writing, the Santa Fe ordinance is legally valid. *See* Santa Fe, N.M., Ordinance 2003–8 (Feb. 22, 2003), *at* http://www.santafenm.gov/cms/kunde/rts/sfwebcisanta/fenmus/ Docs/207438086-01-19-2004-16-11-31.pdf (last visited Mar. 1, 2004).

11. *See* VALENTE ET AL., *supra* note 1, at 6.

12. *See* Richard Briffault, *Facing the Urban Future After September 11, 2001*, 34 URB. LAW. 563, 574–75 (2002).

13. *Cf.* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (state provision of home rule to municipality does not automatically extend to the locality the state's immunity from federal antitrust liability).

14. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 62–63 (J.P. Mayer ed., 1969).

15. *See* Frug, *supra* note 3, at 1070.

16. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

17. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987).

18. For local innovations concerning tobacco and firearms regulation, see *supra* notes 6 and 7.

19. For local measures concerning gay and lesbian rights, see *supra* note 8. *See also* Sims v. Besaw's Café, 997 P.2d 201 (Or. Ct. App. 2000) (en banc) (upholding local power to create a cause of action for discrimination based on sexual orientation).

20. For local measures concerning the living wage, see *supra* note 10.

21. For local measures concerning campaign finances, see *supra* note 9. *See also* Frank v. City of Akron, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003) (upholding local contribution and disclosure law); Matter of Roth v. Cuevas, 624 N.E.2d 689 (N.Y. 1993) (local measure imposing term limits on local elected officials); City of Seattle v. State, 668 P.2d 1266

(Wash. 1983) (upholding local program for partial public funding of candidates); State v. Hutchinson, 624 P.2d 1116 (Utah 1980) (upholding local disclosure requirement).

22. *See, e.g.*, Civil Serv. Comm'n v. City of New Orleans, 855 So. 2d 351 (La. 2003); Haub v. Montgomery County, 727 A.2d 369 (Md. 1999).
23. *See, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1116, 1132–44 (1996).
24. *See, e.g.*, DAVID RUSK, CITIES WITHOUT SUBURBS 27–44 (2d ed. 1995).
25. *See, e.g.*, MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 5–65 (2002).
26. *See, e.g.*, McCrory Corp. v. Fowler, 570 A.2d 834 (Md. 1990) (county ordinance prohibiting discrimination in employment held beyond the scope of home rule authority).
27. *See id*.
28. *See, e.g.*, Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266 (Ill. 1984); State v. Hutchinson, 624 P.2d 1116 (Utah 1980).
29. *See, e.g.*, DJL Rest. Corp. v. City of New York, 749 N.E.2d 186 (N.Y. 2001); City of Chicago v. Roman, 705 N.E.2d 81 (Ill. 1998); Town Pump, Inc. v. Bd. of Adjustment, 971 P.2d 349, 357 (Mont. 1998).
30. *See, e.g.*, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (county ordinance regulating large livestock confinement facilities not preempted by state law prohibiting county zoning of agricultural land and structures but impliedly preempted by state laws requiring state permits for those facilities). *Compare* Jancyn Mfg. Co. v. County of Suffolk, 518 N.E.2d 903, 906 (N.Y. 1987) (when state environmental regulations did not prohibit a certain chemical additive but local law did, there was no conflict: "No right or benefit is expressly given to a manufacturer of cesspool additives by the state law which has then been curtailed or taken away by the local law"), *with* Lansdown Entm't Corp. v. New York City Dep't of Consumer Affairs, 543 N.E.2d 725, 727 (N.Y. 1989) (state law prohibiting the sale of alcoholic beverages after 4:00 A.M. but explicitly permitting bar patrons to consume their drinks until 4:30 A.M. preempts New York City ordinance imposing a 4:00 A.M. closing time).
31. *See* Ryan, *supra* note 9.
32. *See* New York City Charter Revision Comm'n, *Enhancing Access, Opportunity, and Competition: A Blueprint for Reform* 19-83, *at* http://home.nyc.gov/html/charter/ pdf/final_report 2003.pdf (last visited Sept. 4, 2003) (proposing a system of nonpartisan elections for municipal offices, and arguing that New York City has the home rule authority to adopt such a system). The proposal was rejected by New York City voters by a margin of 70% to 30%. *See* Jonathan P. Hicks & Michael Cooper, *City Votes Down an Effort to End Party Primaries*, N.Y. TIMES, Nov. 5, 2003, at A1.
33. *See* Johnson v. Bradley, 841 P.2d 990 (Cal. 1992).
34. *See* CAL . CONST. art. XI, § 1(b); COLO. CONST. art. XX, § 6.
35. County of Riverside v. Superior Court, 66 P.3d 718 (Cal. 2003). *See also* City & County of Denver v. State, 788 P.2d 764 (Colo. 1990) (invalidating state law banning most municipal residency requirements for municipal employees); Sonoma County Org. of Pub. Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979) (invalidating state law that prohibited the distribution of certain state funds to local public agencies that granted their employees cost-of-living increases); City of New York v. Patrolmen's Benevolent Ass'n, 676 N.E.2d 847 (N.Y. 1996) (invalidating state law that would displace city's procedure for binding arbitration of collective bargaining disputes with state mechanism); Ector v. City of Torrance, 514 P.2d 433 (Cal. 1973) (municipal home rule provision governing residency supersedes inconsistent state law). Judicial validation of local control over local public personnel may sometimes be extended to local measures dealing with public procurement. *See, e.g.*, United States Elevator Corp. v. City of Tulsa, 610 P.2d 791 (Okla. 1980) (state competitive bidding act does not apply to home rule municipality that has its own competitive bidding procedures for public contracts). In most states, however, the legislature can displace local ordinances concerning the municipality and impose its own vision of municipal employer-employee relations; Uniformed Firefighters Ass'n v. City of New York, 405 N.E.2d 679 (N.Y. 1980); City of La Grande v. Pub. Employees Ret. Bd., 576 P.2d 1204 (Or. 1978); *see also* U.S. Advisory Comm'n on Intergovernmental Relations, *Local Government Authority: Need for State Constitutional, Statutory, and Judicial Clarification* 14 (1993) (local public employment is a frequent subject of state legislation and of state-local legal and political conflicts).
36. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (current version at 2 U.S.C. §§ 1501-04 (2004)).
37. *See* VALENTE ET AL., *supra* note 1, at 246–51.
38. *See id.* at 343.
39. *Id.* at 383–84, 396–97.
40. *See, e.g.*, Thomas G. Pelham, *From the Ramapo Plan to Florida's Statewide Concurrency System*, 35 URB. LAW. 113 (2003); C. Robert Steringer & Kurt Wanless, *Oregon Land Use Symposium—The Twenty-fifth Anniversary of S.B. 100*, 77 OR. L. REV. 807 (1998).
41. On the possibilities for interlocal cooperation, see, for example, Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 119–53 (2003); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001); Mary E. Mohnach, Comment, *Intermunicipal Agreements: The Metamorphosis of Home Rule*, 17 PACE ENVTL . L. REV. 161 (1999).

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***This article is based on an Address given to the Fall Meeting of the New York State Bar Association Municipal Law Section and the American Bar Association State and Local Government Law Section on October 24, 2003, in Albany, New York.***

***"Home Rule for the Twenty-first Century," by Richard Briffault is reprinted by permission from* The Urban Lawyer, *vol. 36, no. 2, Spring 2004, published by the Section of State and Local Government Law, American Bar Association, in cooperation with the University of Missouri-Kansas City School of Law.***

# Compatibility of Office

By James D. Cole

## Introduction

Compatibility of office addresses the question of whether one may hold more than one office or position of employment. There are two sources of incompatibility—statutes that prohibit holding designated multiple offices, and application of the common law test for compatibility of office.

Generally, like ethics standards and the prohibition on interests in contracts detailed in Article 18 of the General Municipal Law, the compatibility doctrine is designed to maintain public confidence in the integrity of government. Underlying all three are standards to ensure that governmental responsibilities are exercised solely in the public interest, and to avoid even the appearance of impropriety.

## Statutory Incompatibility

Scattered through the laws of the state are statutes prohibiting the holding by one person of specific offices and positions of employment. See, for example, section 411 of the County Law, prohibiting a county judge, family court judge, surrogate, district attorney, sheriff, county clerk or any other elective county officer from holding at the same time any other elective county or town office or the position of city supervisor; section 3-300(3) of the Village Law prohibiting the holding of an elective and an appointive village office; section 20(4) of the Town Law prohibiting holding more than one elective town office; and section 3 of the General City Law prohibiting any member of the common council of the city from holding certain other paid city offices. Therefore, it is prudent to review any body of law that relates to the positions in question to determine if there are any such provisions.

## Common Law Incompatibility

The common law doctrine of compatibility of office is a long-standing one that continues to be applied by the courts and in administrative opinions of the Attorney General.[1] Under these authorities, two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency in the duties of the two positions. The common law rule also applies to positions of employment.[2]

> Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second. Obviously, in such circumstances were both posts held by the same person, the design that one act as a check on the other would be frustrated.[3]

A preliminary test of compatibility is whether the duties of the two positions intersect. If they don't, there is no potential for incompatibility. If, however, they do, the question is whether one position is subordinate to the other or whether the duties of the two positions are inconsistent or in conflict.

## Subordination

Subordination usually is easily detectable. Generally, it manifests itself in the public employer-employee context and where one office has supervisory authority over another position. In some instances, there are elements of both subordination and conflicts of duties. For example, in *Dupras v. County of Clinton*, the court decided that membership on the County Legislature is incompatible with employment as senior clerk in the county Board of Elections.

The court reasoned that the legislator votes on the budget and personnel of the Board of Elections and the salary of the commissioners, who supervise and may remove her at their pleasure. Also, the court found that recusal is not a viable remedy because the Board's budget is determined taking into consideration the needs of other county departments and the limited resources of the county.

> [Thus, the legislator] would have to recuse herself from the entire budgetary process to remove any suggestion of conflict of interest or appearance of impropriety. This would be unacceptable since it would deprive Perry's constituents of a voice in a significant aspect of the Legislature's responsibilities.[4]

The Attorney General used the same reasoning in finding that membership on the town council is incompatible with working as a deputy highway superintendent or laborer in the highway department.[5]

The following are two more examples of subordination. The Attorney General has opined that one should not simultaneously hold the positions of county manager and county treasurer. The opinion found that the manager is responsible for coordinating and supervising administrative functions for the legislative body, which includes the functions of the county treasurer. Therefore, one position would be subordinate to the other.[6] A person may not simultaneously hold the positions of town supervisor and town code enforcement officer. The town supervisor is a member of the town council and employees and officers of the town are under the direct supervision and control of the council.[7]

## Conflicts of Duties

Conflicts of duties are sometimes difficult to determine because the duties of the positions may be set forth in several locations, including state law, local laws, charters or through local practice. Also, if the duties intersect and there is some conflict, the initial question is whether recusal is an appropriate remedy. Recusal is viable only when the holder of the offices can substantially perform the duties of the positions. The following are some examples of conflict questions.

In Op. Att'y Gen. (Inf.) 98-44, the Attorney General found that a county fire investigator should not also serve as a building inspector in the county. A fire inspector examines whether the cause of the fire is a violation of the fire or building code. If the fire inspector, when acting as building inspector, issued a permit authorizing occupancy, he may be reluctant to make the appropriate finding. Moreover, the opinion noted that even a proper finding that causation is unknown or unrelated to any code violation reasonably could be suspect in the view of the general public because of the appearance of a conflict of duties.

Another opinion concluded that one should not hold the positions of town clerk and confidential secretary to the town supervisor because this would erode the fiscal checks and balances built into the provisions of the Town Law.[8] The Attorney General also found that the positions of coroner and part-time corrections officer are incompatible because the coroner is required to inquire into all deaths, whether natural or unnatural, occurring to an inmate of a correctional facility.[9]

## Recusal

In some instances, it is foreseeable that the holding of two positions will result in conflicts of duties, but they are neither numerous nor significant. In other instances, conflicts may not be inevitable. In these situations, recusal is an appropriate remedy. The following are some examples of application of recusal.

The offices of assistant county attorney and deputy town attorney are compatible but a person holding both positions would have to recuse himself from participating in any matter involving conflicting county and town duties.[10] Occasionally, matters may affect the interests of both municipalities but the Attorney General did not foresee frequent conflicts between the duties of the offices that would make recusal an inappropriate remedy.

The Attorney General found that the positions of town planning board member and mayor of a village are compatible as are the positions of member of the town zoning board of appeals and of the legislative body of a village.[11] Although it is conceivable that zoning matters may affect the interests of both municipalities, recusal is an appropriate remedy to avoid divided loyalties. Because each municipality has its own zoning law, recusal would be infrequent.

Thus, recusal is an appropriate remedy where there are occasional conflicts between two positions. If, however, conflicts are frequent, necessitating many recusals, one would not be able to fully perform the duties of the offices and they would be incompatible. Also, recusal from a significant function is not a viable remedy.[12]

## Code of Ethics

Section 806 of the General Municipal Law requires every municipality to adopt a code of ethics setting forth the standards of conduct reasonably expected of its officers and employees. A code of ethics can include in its provisions a prohibition on holding certain offices or positions of employment. Additional authority for such a prohibition is the grant of home rule authority in section 10 of the Municipal Home Rule Law, which permits local governments to enact local laws, consistent with the Constitution and general state laws, relating to their property affairs or government and the powers, duties, qualifications, and other terms and conditions of employment of their officers and employees.[13]

## Impact of Incompatibility

Under the common law rule, the acceptance of a second office that is incompatible with the first results in the vacating of the first office by operation of law.[14] In the case of statutory prohibitions, the wording of the statute will determine whether the prohibition is on "holding" the second office or on being a "candidate" for the second office.[15]

## Local Law Exception

The Attorney General has concluded that in appropriate circumstances a local government may utilize its local law authority to supersede the common law doctrine of compatibility of office.[16] In that the common law doctrine of compatibility of office is a statement of public policy by the courts, a local government may overcome the doctrine by utilizing its home rule authority to enact a local law.[17] Such a local law should be enacted only where it serves the public interest, for example, in a small municipality where there are not enough residents willing to serve in governmental positions or who possess the required expertise.[18] Also, in contemplating the enactment of such a local law, the legislative body should consider the severity of any conflict that would result.[19]

## Conclusion

While the doctrine of compatibility of office is straightforward, its application can be difficult. Fact-finding is required to determine fully the powers and duties of the positions under review. They may be set forth in state law, local enactments and/or result from local practices. The preliminary question is whether the duties of the positions intersect. If they do, are they compatible?

## Endnotes

1. *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304–05 (1874); *O'Malley v. Macejka*, 44 N.Y.2d 530, 535, 406 N.Y.S.2d 725, 727 (1978).
2. *Dupras v. County of Clinton*, 213 A.D.2d at 953, 624 N.Y.S. 2d at 309–310 (3d Dep't 1995).
3. *O'Malley v. Macejka*, 44 N.Y.2d at 535, 406 N.Y.S. 2d at 727.
4. *Dupras v. County of Clinton, supra* note 2.
5. Op. Att'y Gen. (Inf.) No. 96-12.
6. Op. Att'y Gen.( Inf.) No. 98-22.
7. Op. Att'y Gen. (Inf.) No. 87-82.
8. Op. Att'y Gen. (Inf.) No. 89-66.
9. Op. Att'y Gen. (Inf.) No. 92-35.
10. Op. Att'y Gen. (Inf.) No. 91-62.
11. Op. Att'y Gen. (Inf.) No. 86-68.
12. *Dupras v. County of Clinton, supra* note 2 (the budget).
13. Municipal Home Rule Law § 10(1)(i) and (ii)(a)(1); *see* Op. Att'y Gen. (Inf.) No. 97-50; *Golden v. Clark*, 76 N.Y.2d 618, 563 N.Y.S. 2d 1 (1990).
14. *People ex. rel. Ryan v. Greene*, 58 N.Y. 295 at 304–305.
15. *See Hurowitz v. Board of Elections of the City of New York*, 53 N.Y.2d 531, 443 N.Y.S.3d 54 (1981); *People v. Purdy*, 154 N.Y. 439 (1897).
16. Op. Att'y Gen. (Inf.) No. 94-2; Op. Att'y Gen. (Inf.) No. 92-8.
17. Municipal Home Rule Law § 10(1)(i) and (ii)(a)(1).
18. Op. Att'y Gen. (Inf.) No. 94-2.
19. *Id.*

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# Municipal Briefs

By Lester D. Steinman

## Alcoholic Beverages

Enforcement of local zoning code provisions to outlaw the sale of alcoholic beverages on premises licensed for such sale under the State's Alcohol Beverage Control Law is preempted by State law and criminal prosecutions based upon violations of those locals law are dismissed.[1]

In *Courtesy Mobil*, defendants were charged with violating section 285-36(O)(6) of the Greenburgh Town Code, which forbids gasoline station convenience stores from maintaining an inventory of grocery items constituting more than 45% of the wholesale dollar value of the total displayed inventory. The Code provision fixed the permitted percentage below the minimum inventory percentage required under the State Liquor Authority regulations in order to qualify for a license to sell alcoholic beverages. Defendants were charged based upon their presumed compliance with the provisions of their State Liquor Authority license, which requires that groceries constitute a minimum of 50% of the value of the total displayed inventory.

Finding that no actual calculation of the percentage of defendants' grocery inventory was made, the court ruled that there was insufficient evidence to establish that the defendants had violated the Town's ordinance. In any event, the court found that the Town Code provision upon which the prosecution was based was invalid. Notwithstanding the fact that the Town ordinance is couched in terms of regulating grocery inventory percentages of gasoline convenience stores, rather than a direct prohibition on alcohol sales, the legislation was "expressly tailored, on its face, to 'directly affect the field preempted by State law' (citations omitted)."[2] Where, as here, the municipal regulation requires that the grocery percentage be less than that minimally required to obtain a State license to sell alcohol, the impermissible motive becomes apparent. Moreover, insofar as the legislation regulates the internal operations of a business, not land use, the court finds that the provision in question is an invalid exercise of the Town's zoning authority.

In *Amerada Hess*, as part of an application by its tenant, Amoco Oil Corporation, to include the premises within a Gasoline Service Station District, a former owner of the property filed a Declaration of Restrictive Covenants barring *inter alia* the sale of alcoholic beverages on the property. The covenant was made enforceable by the Town Board and could not be amended without the consent of the property owner and the Town. Notwithstanding this covenant, the defendant sublessee of the premises, Hess Mart, Inc., obtained a State liquor license to sell alcoholic beverages in the convenience store it operated attendant to the retail gasoline facility.

In response to complaints that alcoholic beverages were being sold, Town enforcement officers visited the premises, witnessed displays of beer and issued summonses for violating provisions of the Town Code which prohibited the retail sale of products at such convenience stores, other than those specifically permitted by the Town Board. Finding the defendants not guilty of violating the Town Code, the court ruled that they could not be held criminally responsible for the sale of alcoholic beverages duly licensed by the State. Regardless of whether the owner voluntarily consented to the filing of the restrictive covenant, the court found that the Town Board acted illegally in conditioning the rezoning upon the imposition of covenants and restrictions that would prohibit the sale of alcoholic beverages at the subject premises. In so doing, the Town Board improperly invaded a field which had been preempted by a comprehensive and detailed State regulatory scheme. Moreover, as in the *Socony Mobil* case, the court declared that the imposition of such a prohibition was an attempt to regulate defendants' business and constituted an unlawful exercise of the Town's zoning power.

## Electrical Inspections

The common practice of many municipalities to delegate exclusive authority to the New York Board of Fire Underwriters to conduct electrical inspections required by building owners to obtain a certificate of occupancy from those municipalities has been called into question by the Second Circuit Court of Appeals as a potential violation of the federal antitrust laws.[3] As a result of this decision, municipalities have amended their ordinances to open up the process to other qualified inspectors.

In *Parker v. Brown*,[4] the United States Supreme Court established the State action immunity doctrine which shields anti-competitive restraints imposed by States from liability under the Sherman Antitrust Act. Subsequent decisions by the Court made it clear that local governments may avail themselves of *Parker* immunity for their anti-competitive actions to the extent those actions are an authorized implementation of State policy.

Here, the State enacted the Uniform Fire Prevention and Building Code for commercial and residential buildings and directed local governments to administer and enforce the Code. Further, the New York Secretary of State promulgated regulations pursuant to the Code (i) requiring property owners to obtain a certificate of occupancy from local government; (ii) prohibiting local government from issuing such a certificate of occupancy unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code; and (iii) authorizing local government to designate those who would conduct such inspections. The appeals court found that this legislative/administrative framework "sufficiently demonstrates the Village's broad 'authority to regulate' for purposes of State action immunity" and that the anti-competitive conduct was a foreseeable result of that regulatory scheme.

Nevertheless, the Second Circuit declined to affirm the District Court's grant of summary judgment to the defendants. Rather, the appeals court remanded the case to the District Court to determine whether the municipality actively supervised the Board's anti-competitive conduct, as required for the Board, and possibly the municipality, to be entitled to State action immunity.

## Special Permits

Town Law section 274-b(3) authorizes a zoning board of appeals to grant area variances from any requirement in a zoning ordinance, including special use permit requirements. Moreover, where the Town Board has exercised its discretion under section 274-b(5) to empower an "authorized board" such as the planning board or other administrative body to waive any requirement of a special use permit, an applicant has two means to obtain relief from an inability to comply with the zoning prerequisites for the issuance of a special permit.[5]

Here, the applicant was seeking relief from provisions of the Town of Wappingers Code mandating a distance of 1,000 feet between a gasoline station and certain residential zone boundaries and a distance of 2,500 feet between gasoline stations. The Court of Appeals determined that these standards were "clearly dimensional or physical requirements subject to area variance relief."

In a second case involving special permits, the Court of Appeals held that where a town board votes by a simple majority to override a recommendation of a county planning board and to grant a special permit, but fails to obtain the super-majority required for approval under General Municipal Law section 239-m, the Town Board's action constitutes a denial and is the final agency action reviewable in an Article 78 proceeding. By contrast, the county planning board's recommendation is purely advisory and that board is not a necessary party to the litigation.[6]

## Regulatory Takings

A condition of site plan approval requiring the applicants to place a conservation restriction on portions of their property that lie within certain Environmental Protection Overlay Districts ("EPODs") does not constitute a compensable taking.[7]

In reaching this result, the appeals court rejected the petitioners' contention that the conservation restriction constituted an exaction compensable for failure to satisfy the rough proportionality test set forth in *Dolan v. City of Tigard*.[8] Citing the Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[9] the Court stated that "an 'exaction' in this context refers to land use decisions conditioning approval of development and the dedication of property to public use." Finding no such dedication here, the court declared that no compensable taking had occurred because the "conservation restriction bears a reasonable relationship to the Board's objective of protecting the environmentally sensitive EPOD areas within petitioners' property."

## Endnotes

1. *People v. Courtesy Mobil and Socony Mobil*, 3 Misc. 3d 11, 776 N.Y.S.2d 692 (App. Tm., 2d Dep't 2003); *People v. Amerada Hess Corp. and Hess Mart, Inc.*, 196 Misc. 2d 426, 765 N.Y.S.2d 202 (Dist. Ct., Nassau Co., 2003), *aff'd*, 3 Misc. 3d 134A (App. Tm., 2d Dep't 2004).
2. 3 Misc. 3d at 13, 776 N.Y.S. 2d at 693-694.
3. *Electrical Inspectors, Inc. v. Village of East Hills, et al*, 320 F.3d 110 (2d Cir. 2003).
4. 317 U.S. 341 (1940).
5. *Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297 (2004).
6. *Headriver, LLC v. Town Board of the Town of Riverhead*, 2004 WL 943226 (N.Y.).
7. *Smith v. Town of Mendon*, 4 A.D.3d 859, 771 N.Y.S.2d 781 (4th Dep't 2004).
8. 512 U.S. 274 (1994).
9. 526 U.S. 687 (1999).

NEW YORK STATE BAR ASSOCIATION

# Municipal Law Section Fall Meeting

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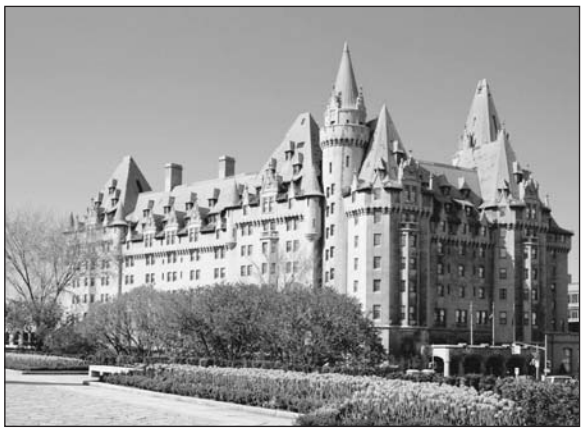

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**Honorable Renée Forgensi Minarik**
New York State Court of Claims, Rochester

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**Robert B. Koegel, Esq.**
Remington, Gifford, Williams & Colicchio, LLP, Rochester

**Program Co-Chair**
**Jennifer K. Siegel McNamara, Esq.**
Assistant County Attorney
Suffolk County Attorney's Office, Hauppauge

***THE PROGRAM OFFERS YOU UP TO 6 MCLE CREDIT HOURS - including 1 hour in ethics***

SCHEDULE OF EVENTS

### Friday, October 1

**3:00 pm** — **Registration** - Main Lobby

**3:30 pm** — **Tour of Parliament Hill** - Space is limited to the first 50 registrants Meet in the hotel lobby at 3:00 pm. Please sign up on the Meeting Registration Form. **$10.00 per person.**

**6:30 - 7:30 pm** — **Reception** - Gatineau Room

**7:30 pm** — **Dinner** - Quebec Suite

### Saturday, October 2

**7:30 am** — **Registration** - Drawing Room Foyer

**7:30 am** — **Executive Committee Breakfast Meeting** - Palladian Room

**8:15 am** — **Continental Breakfast** - Drawing Room Foyer

**9:00 - 9:15 am** — **GENERAL SESSION** - Drawing Room

**Welcoming Remarks**
**Honorable Renée Forgensi Minarik**
Section Chair

**Robert B. Koegel, Esq.**
Program Co-Chair

**Remarks by A. Thomas Levin, Esq.**
Immediate Past-President, New York State Bar Association

**9:15 - 10:05 am** — **The New Brownfield Programs - Private and Municipal**

***Speaker:*** **Doreen A. Simmons, Esq.**
Hancock & Estabrook, LLP
Syracuse

**10:00 - 12:00 pm** — **Spouse/Guest Trolley City Tour** - Climb aboard these unique forms of transportation and see the city of Ottawa. Sites include Confederation Boulevard (the ceremonial route), Museum of Civilization, the National Art Gallery, Rideau Hall, The Supreme Court and more. Please sign up on the Meeting Registration Form.
**$20.00 per person, minimum of 25 required.**

## SCHEDULE OF EVENTS (cont'd)

**10:05 - 10:20 am** **Coffee Break**

**10:25 - 11:15 am** **Municipal Ethics Boards: Are You My Client?**

***Speakers:***

**Steven G. Leventhal, Esq.**
Leventhal Law Offices
Roslyn

**Jennifer K. Siegel McNamara, Esq.**
Assistant County Attorney
Suffolk County Attorney's Office
Hauppauge

**Owen B. Walsh, Esq.**
Oyster Bay

**11:15 - 12:05 pm** **Indian Sovereignty and Casino Gambling**

***Speaker:***

**Robert C. Batson, Esq.**
Albany Law School
Albany

**2:10 pm** **Tour of Parliament Hill** - Space is limited to the first 50 registrants. Meet in the hotel lobby at 1:30 pm. Please sign up on the Meeting Registration Form. **$10.00 per person.**

**6:15 pm** **Shuttle bus departs** - Front entrance of the Château Laurier for the Canadian Museum of Civilization

**6:30 - 8:00 pm** **Reception** - Canadian Museum of Civilization/Canada Hall
Canada Hall retraces the European discovery and settlement of Canada from the Viking period onwards. As you enter the hall, you will walk along a long, winding corridor that highlights the history of Canada. Please sign up on the Meeting Registration Form.

### Sunday, October 3

**8:00 am** **Registration** - Drawing Room Foyer

**8:30 am** **Continental Breakfast** - Drawing Room Foyer

**9:00 - 9:10 am** **GENERAL SESSION** - Drawing Room

**Welcoming Remarks**

**Honorable Renée Forgensi Minarik**
Section Chair

**Jennifer K. Siegel McNamara, Esq.**
Program Co-Chair

**9:10 - 10:25 am** **Cross-Border Transactions - Importing Canadian Prescription Drugs**

***Speakers:***

**Charlene M. Indelicato, Esq.**
Westchester County Attorney
White Plains

**David C. Rosenbaum, Esq.**
Fasken Martineau DuMoulin LLP
Toronto

**10:25 - 10:45 am** **Coffee Break**

**10:45 - 12:00 pm** **Hot Topics in Telecommunications**

***Speakers:***

**John M. Campolieto, Esq.**
Municipal Attorney
Rochester

**Gordon E. MacNair**
Program Chair
City of Ottawa
Ottawa

**Ernest L. McArthur, Esq.**
Legal Counsel
City of Ottawa
Ottawa

# Section Committees and Chairs

*The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on the back page) or Committee Chairs for information.*

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Signature _____

TOTAL ENCLOSED $ _____

*Please return this application to:*

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**Lester D. Steinman**
**Editor-in-Chief**




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# MUNICIPAL LAWYER




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ISSN 1530-3969