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Municipal Lawyer

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

A Message from the Chair

Patricia Salkin

Just arriving home from our Fall Meeting in Canandaigua, on behalf of the Section, I extend a hearty and special thank-you to our meeting co-chairs, Tom Jones and Tom Levin

The joint meeting with the Environmental Law Section was a great success. On Friday afternoon there was an informative program on gas extraction and the issues surrounding the Marcellus shale regions of the State. Saturday's joint session was organized into two tracks—one for experienced attorneys that explored complex issues related to climate change and green development from a municipal perspective; and the second track provided nuts and bolts training for newer attorneys on issues including the comprehensive plan, zoning, historic preservation and environmental review. The Sunday morning program began with a presentation on the new Rules of Professional Conduct recently adopted by the Appellate Division at the request of the State Bar Association. This led to a spirited and interactive discussion among attendees. Presentations on FOIL and newly enacted state legislation of interest to municipal attorneys rounded out the program. No doubt, attendees received tremendous value for their participation in this program. Thank you also to our fall meeting sponsors—Barton & Loguidice, P.C.; Kodak/E-BizDocs, Inc.; and Meyer, Suozzi, English & Klein, P.C.—their support helped to keep the meeting costs more affordable.

You're Invited

The Executive Committee also met in Canandaigua. We are reorganizing our Committee structure and the Executive Committee, providing a great opportunity for members who have not been active to now do so. We are searching for committee chairs, co-chairs and vice-chairs for many of our existing committees. If you want to volunteer to get involved with land use and environment, green development, ethics, public finance, legislation, technology and/or membership, please send me an e-mail at psalk@albanylaw.edu. The committees will all meet in-person on Thursday, January 28, 2010 in New York

Inside

City during the Annual Meeting. There will likely be one conference call prior to that meeting. In addition, we have recently amended our by-laws to create additional seats on our Executive Committee, which is the governing body of the Section. We are looking for members interested in active involvement and committed to attending three in-person meetings per year—one in New York City, one in Albany, and one that could be anywhere in the state (although we have gone to Vermont and Canada and in 2010 we will be in Washington, D.C.). While all members are welcome to express interest, we are especially interested in hearing from women and minority members of our Section. Please e-mail your interest to Lester Steinman, Chair of the nominations committee at lsteinman@pace.edu.

May It Please the [U.S. Supreme] Court

Not admitted to the U.S. Supreme Court? We have organized a special group admission as part of our October 2010 Fall Meeting in Washington, D.C. We have been allocated only 50 seats for lawyers desiring admission at the special ceremony on Monday, October 18. Each admittee will be able to bring one guest to watch. We expect the seats to fill up quickly. A special mailing is going out to Section members requesting early sign-up for the admission program (and Fall Meeting). Check your mail and visit our Web site for more information. You can also contact our staff liaison, Linda Castilla, for more details at lcastilla@nysba.org.

New York City Annual Meeting

The final details are being put on the Annual Meeting agenda for New York City on Thursday, January 28. (See program agenda starting on p. 34). Remember, this year the venue has been moved to the New York Hilton. Watch for more information on CLE sessions planned that address emergency preparedness—from swine flu to floods; a special session on improving public presentation and speaking skills with actor/attorney Matthew Arkin; labor issues for 2010 focusing on work force reduction; a hot topics panel that will explore internal investigation of a municipal department, RLUIPA and building codes, and green ordinances; an examination of the new municipal consolidation legislation in New York; and municipal ethics. Special thanks to Jennifer Siegel McNamara and Linda Kingsley for putting this program together. I look forward to seeing many of you in January.

Patricia E. Salkin

From the Editor

Is your zoning code precise enough in defining permitted and prohibited activities? A recent decision from the Town of Webster in Monroe County provides a cautionary tale.[1]

The Webster Town Code prohibited boats, house trailers and mobile homes "stored in any front yard in any residential district." The town issued a violation to a resident for parking a boat and trailer in the front yard of his residence.

At trial, the code enforcement officer and a neighbor of the defendant both testified to seeing a boat and trailer parked on the defendant's driveway in the front of his premises on the date and time set forth in the appearance ticket and supporting deposition.

The defendant admitted that the boat and trailer were parked in the driveway in his front yard from time to time when they were not in use. However, the defendant argued that the word "stored" implied a long-term placement of the trailer and boat, which he denied.

The Webster ordinance did not define the term "stored." Nor did it put any time limits on the parking of a boat and trailer in one's front yard. From this the court concluded that the code did not prohibit "temporary parking" of a boat and trailer.

Also, the court found that it seemed unlikely that the code enforcement officer would issue a ticket to a homeowner who had parked a boat and trailer over a single night. Ultimately, the court concluded that intermittent parking of the trailer and the boat in the front yard did not amount to those vehicles being "stored" in the front yard.

Zoning and planning boards often confront and struggle to consistently apply unclear language in the municipal zoning ordinance. Although the temptation is to continue to slog through on a case by case basis, I would recommend that attorneys advising those boards be proactive.

Prepare a memorandum to the legislative body explaining the problems the planning or zoning board is encountering and suggesting curative legislation that would resolve those problems. With the language clarified, the Board will operate more effectively, applicants will have a clearer understanding of what is expected of them and litigation is likely to be avoided.

Articles in this issue of the *Municipal Lawyer* address a diverse set of environmental, labor, land use, ethics and liability issues. Kevin G. Ryan of the Ryan Law Group, LLP examines the applicability of the National Environmental Policy Act to Stimulus program projects funded under the American Reinvestment and Recovery Act ("ARRA") and suggests certain ways to expedite the environmental review process. ARRA funding opportunities for which application deadlines have not passed are also detailed.

Labor relations issues in difficult economic times are the subject of an article written by Richard K. Zuckerman of Lamb & Barnosky, LLP. The article focuses on legal and practical issues which municipal clients must anticipate and presents a variety of creative options available to confront and resolve those issues.

Whether a zoning board of appeals may take into account a deceitful representation when evaluating an area variance application is the lead case explored in the Land Use Case Law Update written by Henry M. Hocherman and Noelle V. Crisalli of Hocherman Tortorella & Wekstein, LLP. Also included in their quarterly review of key land-use cases are whether a police district is subject to local zoning in connection with construction of a radio tower, the interrelationship between billboard restrictions contained in the Federal Highway Beautification Act and local zoning and the interpretation of the "replacement in kind" provision of the SEQRA regulations.

A call for a statewide municipal ethics code is the subject of an article by Steve G. Leventhal of the law firm of Leventhal and Sliney, LLP. A municipality's duty to remove fixed objects from the roadside, otherwise known as the "clear recovery zone concept," is examined by Karen M. Richards, Associate Counsel, Office of University Counsel, the State University of New York.

Finally, Section Chair Patricia Salkin reviews the joint Fall meeting held with the Environmental Law Section and previews the upcoming Annual Meeting program. Also included in her message are details regarding the Section's Fall 2010 meeting in Washington, D.C. and the opportunity to participate in a special ceremony for lawyers desiring admission to the U.S. Supreme Court.

Lester D. Steinman

Endnote

1. *People v. Pethick*, 21 Misc. 3d 787, 864 N.Y.S.2d 901 (Just. Ct., Monroe Co. 2008).

The American Reinvestment and Recovery Act and Environmental Impact Review

By Kevin G. Ryan

Although the American Reinvestment and Recovery Act ("ARRA") was passed last February, it is far from fully implemented. Some economic stimulus programs have gotten off to a relatively quick start—for example, federal reimbursements to states for Medicaid funding.[1] But projects involving bricks and mortar have been slower to get off the mark. It has been reported, for example, that as of September 30, 2009 only $3.4 billion or 7% of the $48 billion allocated under ARRA for transportation projects had been spent.[2] While this lag between intentions and performance has arguably blunted the effect of the stimulus, a silver lining for municipal governments is that funding opportunities continue to be available, such as the $650 million in education aid that was announced in early October.[3]

One of the concerns state and local governments have had since the earliest days of the stimulus program is getting through the inevitable red tape that comes with federal aid. In particular, there has been concern that projects may be stalled by environmental requirements, including the National Environmental Policy Act ("NEPA"). Part One of this article will briefly describe the applicability of NEPA to projects under the stimulus program and offer some suggestions on ways to expedite the process. Part Two presents a table describing a few representative ARRA funding opportunities for which application deadlines have not passed.

I. ARRA and NEPA

NEPA, ARRA and "Shovel Ready" Projects

Much has been made of the notion that, in order to get money into the economy as quickly as possible, ARRA money should go to projects that are "shovel ready."[4] As this term is not formally defined in the legislation, one concern with regard to the effect of NEPA on ARRA funding for state and local projects has been that the term connotes a project that must either not require environmental review or one for which such review has already been completed at the time of the application for ARRA funding. This is incorrect. In relevant part, section 1609(b) of ARRA states,

> Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.[5]

Although rapid compliance appears to be mandated, there is nothing in the above language or elsewhere in the bill that limits funding opportunities to projects for which NEPA has already been completed or for which NEPA is not required. Section 1609(c) requires reports to Congress every ninety days until September 30, 2011 "on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation."[6] According to the legislative history, this language was offered in response to more specific language which would have required *completion* of NEPA review within nine months of funding.[7] Thus, NEPA review is indeed contemplated, and, although there is no deadline for completion, the 90-day reports are intended to ensure that any NEPA reviews are accomplished as quickly as possible.

"One of the concerns state and local governments have had since the earliest days of the stimulus program is getting through the inevitable red tape that comes with federal aid."

When Must a State or Local Project Undergo NEPA Review?

Although many stimulus projects will be federal from inception, this article concerns *state and local* projects that receive funding under ARRA. The question is whether the new or expanded federal involvement in such projects triggers NEPA review. Put another way, at what point does federal involvement in a state or local project "federalize" it for purposes of NEPA? The answer depends on several factors relating to the nature and degree of the federal involvement. A brief outline of the relevant considerations follows.

Section 102 of NEPA states a general policy that federal agencies must "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making [sic.] which may have an impact on man's environment."[8] Of particular relevance here, for "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official

on…the environmental impact of the proposed action" is required.[9] Together these provisions form the basis for the regulations of the Council on Environmental Quality ("CEQ") requiring the preparation of Environmental Assessments ("EA") and, if applicable, Environmental Impact Statements ("EIS").[10]

At the outset it is important to distinguish several separate but related concepts: (1) "action," (2) "major federal action" and (3) "significantly affecting the environment." The term "action" is defined in part as "new and continuous activities, including projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies."[11] It also includes "new or revised agency rules, regulations, plans, policies, or procedures [and] legislative proposals."[12] Subsection (b) provides examples of typical federal actions, notably including, "Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities."[13]

As alluded to above, not every "action" is necessarily "major." On the meaning of "major" the regulation offers the following Delphic formulation: "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly."[14] As to the meaning of "significantly," the regulations offer various "considerations" framed in terms of "context" and "intensity." Context revolves around geographic coverage, such as national, regional, and local.[15] Intensity has to do with the degree of impact on such things as public health, historic features, highways, endangered species, and the like.[16]

Naturally, these vague and overlapping terms have required some parsing by the courts. It is beyond the scope of this article to analyze the cases that attempt to decipher these terms as they relate to the question of when federal involvement in a state or local project causes the project to become subject to NEPA as a "major federal action." However, some key considerations cited by the courts in determining the question are highlighted below.

Factors that have been considered by the courts to determine when a project becomes federalized include: whether the project is financed wholly or in part by federal funds, whether relevant decision-makers are federal officials, and whether the project would proceed in the absence of federal participation.[17] Similarly, the degrees of "federal control over, responsibility for, or involvement with an action" have been cited as important considerations.[18] Courts in the Second Circuit have particularly emphasized the decision-making role of the federal government. In *Landmark West! v. U.S. Postal Service*, the court wrote,

> [t]he distinguishing feature of "federal" involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes [the decision-maker] has judgment to exercise. Cases finding "federal" action emphasize authority to exercise discretion over the outcome.[19]

Thus, the question whether a state or local project becomes federalized as a result of the infusion of stimulus funds must be determined on a case-by-case basis, taking into account the amount of stimulus money compared to the cost of the overall project; the nature of the stimulus funding (i.e., whether the funds are applied directly to a given project), and whether the disbursing federal agency retains any decision-making role over the project.[20]

In short, the mere infusion of stimulus funding does not necessarily mean a project must undergo NEPA review. Careful attention must be paid to the relative proportion of the funding, the manner in which the funds are disbursed, and the degree of federal substantive control of the project.

"[T]he mere infusion of stimulus funding does not necessarily mean a project must undergo NEPA review."

NEPA Compliance—Options for Expedition

Categorical Exclusions

In accordance with the exhortation that ARRA-funded projects expedite environmental impact review, an applicant for stimulus funding should first check to determine whether its project falls within a categorical exclusion as set forth in the regulations of the federal agency through which funding would be obtained. As under the New York State Environmental Quality Review Act ("SEQRA"), NEPA requires that federal agencies publish lists of actions normally not subject to environmental review (which in New York would be Type II actions). Known as "categorical exclusions," such federal actions are by definition not considered to have a potential significant affect on the environment, in which case they need not undergo NEPA review. Thus, in order to determine whether NEPA applies to a given federally funded project, a practical first step is to determine whether the project is categorically excluded from further NEPA consideration by regulations of the funding agency.

Programmatic NEPA Determinations

As noted above, section 1609 of ARRA emphasizes both the importance and speed of NEPA review. One instance in which expeditious review may be achieved is when a project falls within a prior programmatic NEPA review. For example, the National Oceanic and Atmospheric Administration is reviewing applications for funding under the Fisheries Community-based Restoration Program ("CRP").[21] This program predates ARRA and underwent a Programmatic Environmental Assessment ("PEA") in 2006. This assessment resulted in a Finding of No Significant Impact ("FONSI") for the CRP.[22] In such circumstances, it would be reasonable to suggest that a CRP project funded under ARRA that fits the parameters studied in the PEA need not undergo further NEPA review. Even in cases of projects that deviate from the programmatic parameters, a narrow project-specific Environmental Assessment ("EA") could be undertaken to determine whether the new element could have a significant environmental effect. If the analysis indicates that this is not the case, then a project-specific FONSI could be issued.

"[W]hile ARRA does not *require pre-compliance with NEPA for a project to be eligible for federal funding, section 1609(b) makes clear that Congress wants NEPA review…to be completed as expeditiously as possible."*

Of course, if a project type has been covered by an agency programmatic EIS and Record of Decision ("ROD"), then it would appear that an ARRA-funded project coming within the parameters studied and covered in the EIS and ROD would likewise not have to undergo further environmental review. Again, however, any limited deviations from such parameters could be analyzed in a project-specific EA. If the EA were to find no potentially significant impacts, then a project-specific FONSI could be issued. Otherwise, an EIS of limited scope could be prepared to reflect the presumably narrow range of effects not otherwise covered in the previous programmatic EIS. The resulting ROD would discuss these project-specific impacts, alternatives, and mitigation measures.

EA Referencing Prior SEQRA Review

Another potential means of expediting NEPA review exists where a project has already undergone a full review, including an EIS and Findings Statement, under the State Environmental Quality Review Act ("SEQRA"). The NEPA regulations call for coordination of federal and state environmental reviews.[23] Normally this means that state and federal agencies conduct concurrent reviews of a proposed project, preferably with joint hearings concerning any draft EIS. However, where a full SEQRA review has already been completed it may be possible to avoid a redundant NEPA EIS. This is because SEQRA goes beyond mere disclosure of impacts by mandating avoidance or mitigation of adverse impacts to the maximum extent practicable (consistent with other essential social and economic considerations).[24] That is, owing to the mitigation measures already required pursuant to the previous SEQRA review, it may be possible to demonstrate in a NEPA EA, citing the SEQRA record, that a project will not have significant environmental effects requiring further analysis under NEPA.

In conclusion, while ARRA does *not* require pre-compliance with NEPA for a project to be eligible for federal funding, section 1609(b) makes clear that Congress wants NEPA review, where applicable, to be completed as expeditiously as possible. Several options for doing so are addressed above, including: NEPA categorical exclusions, prior NEPA programmatic review, and, potentially, reference in a NEPA EA to a prior full review under SEQRA.

II. ARRA Funding Opportunities

While the deadlines for applications for many funding opportunities have passed, a considerable number of programs continue to be available and new opportunities are still being announced. An attempt to catalog the many hundreds of funding opportunities under ARRA is obviously beyond the scope of this article. However, Table 1 (see p. 8) provides summary information concerning several representative open funding opportunities. It lists funding agencies, programs; funding purposes and project types; eligibility; and current application deadlines (if any). This information was derived from government Web sites, including grants.gov and agency-specific sites, as well as agency contacts.

On a cautionary note, Table 1 is intended only as a starting point for inquiries concerning ARRA funding opportunities. Whether particular listed programs would be appropriate for any particular project and whether resources should be expended in pursuing funding under any particular ARRA program would require more detailed analysis of the funding opportunity and the proposed project.

Endnotes

1. Diana Manos, *GAO Reports Medicaid Funding From ARRA Is Helping States*, Healthcare Finance News, September 25, 2009 at http://www.healthcarefinancenews.com/news/gao-reports-medicaid-funding-arra-helping-states ("So far, the 16 states studied have drawn down $20.3 billion in Medicaid FMAP grants, comprising 87 percent of the funds available under ARRA for the period ending Sept. 15.").
2. Mike Grabbell, *Stimulus Transportation Spending Lags Predictions*, www.cleantechies.com, October 5, 2009 at http://blog.cleantechies.com/2009/10/05/stimulus-transportation-spending-lags-predictions/ (citing comments of Transportation Secretary Ray LaHood and Representative John Mica).
3. Sam Dillon, *Education Agency Will Offer Grants For Innovative Ideas*, N.Y. Times, October 7, 2009. For further information concerning this funding opportunity, *see* Table 1 on p. 8.
4. *See, e.g.*, Jennifer Steinhauer, *A Race To Be The First To Use Stimulus Money*, N.Y. Times, March 16, 2009 at http://www.nytimes.com/2009/03/17/us/17shovel.html?scp=15&sq=%22SHOVEL%20READY%22&st=cse.
5. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609(b), 123 Stat. 304, (2009).
6. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609(c), 123 Stat. 304, (2009).
7. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609, 123 Stat. 304, (2009).
8. 42 U.S.C. § 4332(A).
9. 42 U.S.C. § 4332(C).
10. *See generally* 40 C.F.R. Parts 1501, 1502.
11. 40 C.F.R. § 1508.18 (a).
12. *Id*. It should be noted that there is a certain circularity in the definition of the term "action" relative to "major federal action" as the former is contained within the definition of the latter. *See* 40 C.F.R. § 1508.18.
13. 40 C.F.R. § 1508.18 (b).
14. 40 C.F.R. § 1508.18.
15. 40 C.F.R. § 1508.27(a).
16. 40 C.F.R. § 1508.27(b).
17. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 328-29 (9th Cir. 1975).
18. *Atlanta Coal. On the Transp. Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979).
19. 840 F. Supp. 994, 1007 (S.D.N.Y. 1993) (citations omitted), *aff'd*, 41 F.3d 1500 (2d Cir. 1994).
20. *See generally* Mandelker, *NEPA Law and Litigation*, § 8:20 (financial assistance and partnership).
21. This funding opportunity is no longer accepting applications. *See* NOAA Funding Announcement, April 6, 2009, 74 Fed. Reg. 9793.
22. Memorandum from William T. Hogarth, Ph.D., Asst. Admin. for Fisheries, National Marine Fisheries Service, to Rodney F. Weiher, Ph.D., NEPA Coordinator, Office of Policy and Strategic Planning, *re*: Finding of No Significant Impact on the Supplemental Programmatic Environmental Assessment on NOAA Fisheries' Implementation Plan for the Community-based Restoration Program—DECISION MEMORANDUM.
23. 40 C.F.R. § 1506.2.
24. 6 N.Y.C.R.R. § 617.11(d)(5). *See also* Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 Albany L. Rev. 1241 (1982); Michael B. Gerrard, Daniel A. Ruzow, & Philip Weinberg, Environmental Impact Review In New York, § 6.03[5] (2008).

Kevin G. Ryan is a Co-Chair of the Environmental Impact Assessment Committee of the Environmental Law Section of the New York State Bar Association. He is the founding member of the Ryan Law Group, LLC of Larchmont, New York. He recently represented the SEQRA lead agency in the SEQRA review of what is believed to be the largest private urban redevelopment project ever proposed in Westchester County.

The author wishes to thank Lester D. Steinman of the Edwin G. Michaelian Municipal Law Resource Center for providing access to research prepared by Gail M. Mulligan, an intern at the Center. In addition, the author wishes to thank Laurie Dallos, Esq. of the Ryan Law Group, LLC for assistance in researching the funding opportunities listed in Table 1 on p. 8.

TABLE 1

Selected Open ARRA Funding Opportunities as of October 16, 2009

Federal Agency	Programs Funded	Total ARRA Funding	Funding Purpose and Project Types	Eligibility	Application Deadline	Other
USEPA	Clean Water State Revolving Fund Drinking Water State Revolving Fund	$4 billion (NY allocation: $432,564,200)[1] $2 billion (NY allocation: $86,811,000)[2]	High priority infrastructure projects for clean water and safe drinking water, including: biosolids; brownfields; wastewater systems; nonpoint source pollution control; wetlands, etc.[3]	States —for loans and grants (per ARRA) to local communities with water quality and wastewater infrastructure needs	Continuing[4] (except states had 45 days from ARRA passage to certify intent to request)[5]	20% of grants for "green projects"[6]
USEPA	Leaking Underground Storage Tank Program	$200 million (NY allocation $9,235,000)[7]	Leaking Underground Storage Tank cleanups: "corrective action activities …traditionally funded by LUST cleanup dollars"[8]	States – for state underground tank programs[9]	Continuing[10]	
Economic Development Administration	Public Works and Economic Development Facilities Program	$100 million[11]	Public works construction, rehabilitation to generate, retain private sector jobs and capital	States. Municipalities. Indian tribes. Institutes of higher education. Non-profit organizations (in cooperation with government)[12]	June 10, 2010[13]	
Economic Development Administration	Economic Adjustment Assistance Program	$50 million[14]	Technical, planning and infrastructure assistance [including assistance to establish revolving loan funds (RLFs)] in regions experiencing adverse economic changes that may occur suddenly or over time	States. Municipalities. Indian tribes. Institutes of higher education. Non-profit organizations (in cooperation with government)	June 10, 2010[15]	
HUD	Office of Affordable Housing Preservation	$250 million	Energy and green retrofit investments in covered property	Owners of properties receiving certain federal assistance[16]	February 16, 2011	
Dep't of Education	Race to the Top Grants	$4.3 billion	Plans to achieve 4 ARRA educational reform priorities: (1) implementing standards and assessments, (2) improving teacher effectiveness and achieving equity in teacher distribution, (3) improving collection and use of data, (4) and supporting struggling schools[17]	States. But 50% of funding must be devoted to sub-grants to local educational agencies ("LEAs")[18]	Phase 1: late 2009; Phase 2: Spring, 2010[19]	
USDA	Rural Business Enterprise Grant Program	$20 million	"On-site technical assistance to local and regional governments, public transit agencies, and related non-profit and for-profit organizations in rural areas; the development of training materials; and the provision of necessary training assistance to local officials and agencies in rural areas"	States. Counties. Municipalities. Authorities. Indian tribes	Applications to be accepted until earlier of depletion of funds or date to be published in year 2010[20]	

Endnotes

1. http://www.epa.gov/water/eparecovery/docs/Final_SRF_eco_recovery_allotments.pdf.
2. Source: *see* footnote 1 above.
3. http://www.epa.gov/owm/cwfinance/cwsrf/factsheets.htm.
4. CWSRF requirements apply.
5. http://www.epa.gov/water/eparecovery/docs/604bARRA_guidance_memo_FINAL.pdf [EPA Guidance Memorandum re Award of Water Quality Management Planning Grants with Funds Appropriated by [ARRA], dated March 12, 2009. Sec. III, Application Requirements].
6. http://www.epa.gov/water/eparecovery/.
7. http://www.epa.gov/swerust1/eparecovery/statealloc.htm.
8. Guidance To Regions For Implementing The LUST Provision Of The American Recovery And Reinvestment Act Of 2009, June 2009, EPA-510-R-09-003.
9. http://www.epa.gov/swerust1/eparecovery/index.htm.
10. DWSRF requirements apply.
11. http://www.eda.gov/PDF/FY09ARRAFFOFINAL031309.pdf [Full Award Announcement, Sec.II.A, Award Information].
12. http://www.eda.gov/PDF/FY09ARRAFFOFINAL031309.pdf [Full Award Announcement, Sec.III, Eligibility Information].
13. Grants.gov notes, "Funds are available for obligation until September 30, 2010; however, it takes a minimum of 90 days from EDA's receipt of a complete application until award, when funds are obligated." For further information see following web page: http://www07.grants.gov/search/search.do;jsessionid=NlHyK4lQgllvMV4Xf9rSSRQQGcgMtLKkq9cp923nRJ9BbnxhznS!785172635?oppId=45786&mode=VIEW.
14. http://www.eda.gov/PDF/FY09ARRAFFOFINAL031309.pdf [Full Award Announcement, Sec.II.A, Award Information].
15. *See* footnote 13 above.
16. *E.g.*, pursuant to section 202 of the Housing Act of 1959 (12 U.S.C. § 17012), section 811 of the Cranston- Gonzalez National Affordable Housing Act (42 U.S.C. § 8013, or Section 8 of the United States Housing Act of 1937 as amended (42 U.S.C. § 1437f).
17. http://edocket.access.gpo.gov/2009/pdf/E9-17909.pdf [Federal Register, July 29, 2009].
18. http://www07.grants.gov/search/search.do;jsessionid=G8yRKYHTPsRnhL2w77Vs5WgcsJ22z8gyBBB5xLb1Lp0P5YQdRGhd!-82303134?oppId=49325&mode=VIEW.
19. *See* footnote 18 above.
20. http://www07.grants.gov/search/search.do;jsessionid=cnWcKc3Q1yJFXQJ5MzJW03zy0xsmQQfMFbjM9ZwhGXyG29tP6t93!-82303134?oppId=46399&mode=VIEW.

Municipal Labor and Employment Law in Tough Economic Times

By Richard K. Zuckerman

Tough economic times can present our municipal clients with difficult financial and political problems which we, as municipal lawyers, are often called upon to solve. This article will describe and discuss some of the labor relations-related legal and practical issues which we and our clients need to anticipate and address. It will also present and analyze a variety of creative options available to our clients in successfully confronting and resolving those issues.

Introduction

While it is important to be able to present to and discuss with our clients the options which follow, there is a more macro-level-type of consideration that I believe needs to be a part of any discussion about what to do with our unions and personnel. I describe it as being careful to counsel our clients to do "the right thing." Phrased another way, just because a client *can* unilaterally do something does not necessarily mean that the client *should* do it. Our role as counsel includes ensuring that this global consideration permeates any discussion about the "what, who, when, where, why and how" of the decision-making process.

Factors our clients should consider prior to making any union or personnel-related decision include, among others, the impact of the decision upon the affected employees and their union, financial and political considerations, public relations and the court of public opinion, and the client's short- and long-term goals and the impact that the options under review will have on each. While each one may be critically important and self-evident in nature, it is surprising how often one or more is ignored or simply forgotten during the rush to act. Failure to take the time to think them through may cause our clients to make decisions for today which will come back to haunt them, their employees and unions.

With these thoughts in mind, let us turn to an analysis of some of the types of labor-related decisions a municipal client may unilaterally make, i.e., which the client may implement without prior negotiations with, and the consent of, its affected unions.

Examples of Decisions Which the Courts and PERB Have Held an Employer May Unilaterally Implement

Abolishing Employee Jobs/Positions

An employer's decision to eliminate jobs due to economic reasons need not be negotiated.[1] The decision must be made in "good faith," i.e., for economic or efficiency reasons, and not in order to skirt an employee's tenure and/or disciplinary hearing rights.[2] There are also several potentially applicable statutory, administrative and/or collective bargaining agreement-based layoff and/or recall procedures which need to be considered and implemented in a layoff situation.[3]

As is true with regard to almost all of the examples provided in this article, be sure before acting to confirm that your client's decision is not prohibited or restricted in some way by your collective bargaining agreement. Check for a provision in the contract that constitutes an affirmative waiver of the union's duty to bargain over the terms and conditions of employment related to your decision. Remember that, in almost all instances, there will be a duty to bargain over the "impact" of a unilaterally imposed decision following a demand to do so by the affected union.[4]

Eliminating or Reducing Services to the Public

An employer does not normally need its union's permission before eliminating or curtailing services to the public.[5] The employer may, as a result, unilaterally curtail the level or extent of those services by, e.g., reducing the number of hours during which the services will be offered and then shortening employees' workweeks to conform to the new hours of operation.[6] The critical Taylor Law-related aspect of this type of decision is that the New York State Public Employment Relations Board ("PERB") will require proof of an actual curtailment of services to the public. It will not be sufficient to implement a plan that is only "more efficient" in that it produces the same level of work or services in less working time, or involves having only a "skeleton crew" working.

In order to meet this "curtailment of services" standard, the employer will have to be able to establish its business reasons for the curtailment. It will also likely be required to prove that the curtailment in fact reduced the hours during which services were provided to the public, that affected employees were, as a result, working fewer number of hours, that they were

all working the same number of hours following the curtailment (e.g., going from a 35- to a 28-hour week), and that those hours covered the same period of time (e.g., 9:00 a.m. to 4:00 p.m.).[7]

Of more critical importance, of course, is whether an employer which implements these actions can concomitantly and proportionately reduce employee salaries. Although the case law is confusing and at times somewhat contradictory, the answer appears to be yes.[8]

Not Filling Vacancies

This is also known as "attrition." PERB has held that a union's demand that vacancies be filled, or that they be filled within a defined period of time, restricts the employer's right to effect a staff reduction and is, therefore, non-mandatory.[9]

Reducing or Changing Staffing Levels

An employer has the inherent right to determine staffing levels. This includes deciding how many people will be at work at any given time, as well as how many people will perform a particular task such as riding in a patrol car or on a piece of fire apparatus.[10] Because safety is a mandatory subject of negotiation,[11] PERB will implement a balancing test when an action implicates both staffing and safety concerns. Where an action raises a safety issue, but it is outweighed by the employer's right to establish staffing requirements, the staffing issue must be dealt with, but as part of impact negotiations.[12]

Changing Hours/Days of Operation

As was discussed earlier, it is a management prerogative to decide the time span during which work is to be performed. An employer may, accordingly, decide to increase, reduce or simply shift its hours of operation.[13] *How* the work is to be performed within that time frame may, however, be mandatorily negotiable.[14]

Restricting the Use of Leave Time

The number of employees an employer hires and chooses to place on duty at any given time is a managerial prerogative.[15] An employer may, therefore, unilaterally reduce the number of available vacation slots so that more employees are on duty at a particular time,[16] even though a reduction in the amount of leave available to an employee must be negotiated.[17]

Assigning Bargaining Unit Work to Non-Unit Personnel

This is known as, among other things, "subcontracting" (having someone not in the bargaining unit do the work) "civilianizing" (having a civilian rather than, e.g., a police officer, perform the work) and "privatizing" (having private sector employees perform the work). An employer may assign unit work to non-unit personnel in some, but not all, situations.

For example, if the "work" has not been exclusively performed by unit members for a sufficient period of time, there will be no duty to bargain over the decision to subcontract the work.[18] Alternatively, if the reassigned tasks are not substantially similar to those previously performed by unit members, the work may be reassigned without prior negotiation.[19] The decision by a school district to subcontract certain programs and services to a BOCES is a non-mandatory subject of negotiation.[20]

Where there is a significant change in the job qualifications of the personnel needed to perform the work, there may well be no duty to bargain over the decision to remove the work from the unit.[21] In this situation, a balancing test is invoked, with the interests of the employer and the unit, both individually and collectively, weighed against the other. The transfer of job functions from uniformed to civilian employees and, conversely, from civilian to uniformed employees, constitutes a *per se* change in job qualifications and, thus, a change in the level of service.[22] An employer may also act unilaterally if required to do so due to an outside decision beyond its control.[23]

If negotiations are required over a decision, the employer is responsible for initiating and, absent an emergency, concluding negotiations with the union prior to effectuating the decision.[24] Even if there is no duty to bargain over the decision to reassign the unit's work, the employer will still, as previously noted, likely have to bargain over the impact of the decision upon a timely demand by the union that it do so.[25]

Implementing Sick Leave Control Policies

An employer may unilaterally impose certain sick leave management policies.[26] Some specific items, such as requiring an employee to provide a doctor's note,[27] rescheduling work for the purpose of controlling sick leave abuse,[28] and changing the time when employees must notify an employer of an impending absence[29] are, in contrast, mandatorily negotiable.

Implementing General Municipal Law §§ 207-a- and 207-c-Related Policies and Procedures

An employer may unilaterally implement procedures and policies designed to effectuate the employer's rights pursuant to these statutes.[30] Certain specific items, such as implementing procedures which involve a change in the extent or amount of employee participation in the process, may have to be negotiated.[31] Similarly, discontinuing fringe benefit and other payments provided by practice to employees on a GML § 207-a or 207-c leave of absence must be negotiated,

even if there is no statutory entitlement for the employees to receive them.[32]

Assigning Certain Additional or New Job Duties

An employer may unilaterally assign job duties which are an inherent aspect of the duties and functions of the position.[33] If, however, the performance of these additional duties lengthens the workday or significantly increases employees' workload, then the employer must negotiate the assignment.[34] Likewise, requiring employees to perform duties which are not within the inherent nature of their job is a mandatory subject of bargaining.[35]

Changing Class Size

The number of students assigned to a class may be unilaterally changed by the employer.[36] Here too, though, the impact of a change in class size is a mandatory subject of bargaining,[37] and also requires compliance with both the Commissioner of Education's Regulations addressing class size[38] and any applicable contractual restrictions.

Changing Active Employee Insurance Benefits

An employer may unilaterally change an insurance plan and/or the benefits provided by the plan if the employer does not, in doing so, change a preexisting term and condition of employment.[39] The employer may, however, otherwise have to negotiate changes to insurance benefits which materially change terms and conditions of employment,[40] including a change in the plan itself, eliminating dual coverage,[41] changing the amount of the premium paid by employees[42] and changing the amount of employees' co-payments.[43]

Employers may have somewhat more discretion to unilaterally effect changes in retiree insurance benefits. New York law[44] requires participating employers to pay a minimum of 50% of the cost of individual premium or subscription charges for the coverage of retired employees and 35% for the coverage of their dependents who are enrolled in the statewide health insurance plans. If an employer is contributing more than the minimum levels set forth in the law, then it may in many instances unilaterally reduce to the minimum levels its contributions for retirees' health insurance premiums, unless there is a contrary agreement between the employer and the retiree and/or union.[45] Be aware, though, that an employee who retires during or following the expiration of the collective bargaining agreement is deemed to be an active employee for negotiability purposes.[46]

If an employer makes a representation that it will pay a certain cost for the insurance premiums for a retiree, and the retiree relies upon this promise in deciding to retire from employment, and the employer nevertheless unilaterally reduces its contributions for the retiree, the employer may be estopped and/or otherwise contractually precluded from unilaterally reducing its preexisting insurance contribution level.[47]

While many public employers may make these decisions without union consent, school districts, BOCES and special act schools are prohibited from doing so unless there is a corresponding diminution in these benefits for their active employees.[48] On September 4, 2008, Governor Paterson vetoed Senate Bill Number S-6457, which would have prohibited all public employers from unilaterally diminishing health insurance benefits or contributions made on behalf of retirees or their dependents below the current level unless there was a corresponding diminution in benefits for the active employees.

Implementing Public Safety Employee Disciplinary Procedures

Because employee discipline is a *prohibited* subject of bargaining for certain police, and possibly other public safety units, the employer may establish procedures needed to implement the disciplinary procedures affecting covered employees, and may also refuse to implement previously bargained procedures.[49] Whether this applies to a particular unit depends upon, among other things, the law or rule governing the affected employees and when it became applicable.[50]

Filing a Managerial/Confidential Petition

Certain managerial and/or confidential employees may be removed from the bargaining unit and made a part of management if they meet the requisite PERB-established standards. A managerial employee is defined as one who "formulates policy" or "may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of the agreement or in personnel administration, provided that the role is not of a routine or clerical nature, and requires the exercise of independent judgment."[51]

Whether an employee is confidential is determined by the application of a two-part test. The employee must be designated to assist a managerial employee in the delivery of specific duties[52] and act in a confidential capacity to the managerial employee.[53]

Implementing Employee Evaluation/Attendance Monitoring/Supervisory Policies

These may be unilaterally implemented, provided that there is no change in the nature or extent of the employee's involvement in the process.[54]

Creating a New Position and Establishing the Initial Salary

The creation of a new position and establishment of the initial salary are both managerial prerogatives.[55] Bargaining may be required with respect to the step placement of a newly hired employee on the salary schedule where a past practice exists regarding same.[56]

Changing the Type of Equipment to Be Used

Determining the type of equipment to be used by employees does not require decisional bargaining.[57]

Unilateral Action in an Emergency Situation: Compelling Need

An employer may unilaterally implement an otherwise negotiable decision where there is a "compelling need" to act in an emergency-type situation, provided that the employer has negotiated to impasse on the issue, and provided further that the employer continues to negotiate following implementation.[58] Financial problems are neither a compelling nor emergency situation.[59]

Areas in Which the Courts and PERB Have Required Employers to Successfully Negotiate With Their Unions Before Acting

Furloughing Employees

While an employer may unilaterally direct employees not to report to work, it may not unilaterally decide that the employees should not be paid during their absences.[60] There may not, however, be a duty to bargain if the employer has an existing practice of offering voluntary furloughs and/or is contractually privileged to act.[61]

Implementing a Lag Payroll

This is a mandatory subject of negotiation.[62]

Delaying Step Movement

An employer may not, in the absence of a contractual right or practice to do so, unilaterally delay employees' step movements after a contract has expired.[63]

Substituting Part-Time Employees for Full-Time Employees

An employer may not unilaterally replace full-time employees with part-time employees if there has been no change in the nature or level of services.[64]

Changing the Procedures Pursuant to Which Overtime Is Earned or Paid

While management generally has the right to decide whether overtime is needed, compensation for overtime work is a mandatory subject of negotiation.[65] This includes cost-savings efforts such as eliminating overtime payments until employees have actually worked the applicable federal Fair Labor Standards Act work cycle and/or not counting leave time as time worked for purposes of calculating overtime entitlements.

Discontinuing Employment Perks

These include employer-provided meals,[66] free bottled water[67] and coffee,[68] and free parking.[69]

Early Retirement/Separation Incentives

These are mandatorily negotiable even though (because) they provide a benefit to employees.[70]

Conclusion

Whether the particular action your client is considering falls within the ambit of a non-negotiable management prerogative will ultimately depend upon the specific circumstances before you, as well as any applicable contract provisions, rules, procedures and practices and the current state of the law at PERB. When in doubt about how to provide counsel about the applicable law, be guided by the following principle stated by PERB nearly 40 years ago: "…decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees."[71] When in doubt about everything else, be guided by the principle known as: "Do the right thing."

Endnotes

1. S*ee, e.g., City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971); *Burnt Hills-Ballston Lake Cent. Sch. Dist.*, 25 PERB ¶ 3066 (1992).
2. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981).
3. *See, e.g.*, N.Y. Civ. Serv. Law §§ 80, 80-a, 81, 85, 86; N.Y. Educ. Law §§ 2510, 2585, 3012; 3012-a; 3013; 3031; 8 N.Y.C.R.R. Part 30.
4. *See, e.g., West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46 (1974).
5. *See, e.g., City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971); *Burnt Hills-Ballston Lake Cent. Sch. Dist.*, 25 PERB ¶ 3066 (1992).
6. *See, e.g., Lackawanna City Sch. Dist.*, 13 PERB ¶ 3085 (1980); *but see County of Broome*, 22 PERB ¶ 3019 (1989) (an employer may not unilaterally reduce employees' hours if the total hours or services provided by the employer are not actually reduced).
7. *Id.; see also Oswego School District*, 5 PERB ¶ 3011 (1972), *aff'd*, 6 PERB ¶ 7008 (3d Dep't 1973).
8. *See, e.g., Lackawanna City Sch. Dist.*, 12 PERB ¶ 4552 (1979), *rev'd*, 12 PERB ¶ 3122 (1979), *on remand*, 13 PERB ¶ 4543 (1980), *aff'd*, 13 PERB ¶ 3085 (1980) *and compare with Schuylerville Cent. School District*, 14 PERB ¶ 3035 (1981), *Rush-Henrietta Central School District*, 27 PERB ¶ 4631 (1994); *Vestal Central School District*, 15 PERB ¶ 3006 (1982), *aff'd*, 16 PERB ¶ 7020 (3d Dep't 1983); *Onondaga Cortland Madison BOCES*, 37 PERB ¶ 3025 (2004).

9. *See, e.g., Niagara Falls Police Captains & Lieutenants Ass'n*, 33 PERB ¶ 3058 (2000).

10. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976); *State of New York (Dep't of Transp.)*, 27 PERB ¶ 3056 (1994); *Town of Carmel*, 31 PERB ¶ 3006 (1998); *Lake Mohegan Fire District*, 41 PERB ¶ 3001 (2008).

11. *See, e.g., City of New Rochelle*, 10 PERB ¶ 3078 (1977), *aff'd*, 11 PERB ¶ 7002 (2d Dep't 1978).

12. *See, e.g., City of White Plains, supra; Lake Mohegan Fire District, supra*.

13. *See, e.g., Lackawanna City Sch. Dist., supra*.

14. *See, e.g., Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).

15. *See, e.g., Matter of Int'l Ass'n of Firefighters of City of Newburgh, Local 589 v. Helsby*, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dep't 1977), *lv. denied* 43 N.Y.2d 649 (1978).

16. *See, e.g., State of New York (Dep't of Corr. Serv.–Elmira Corr. Facility)*, 39 PERB ¶ 3004 (2006), *citing Town of Carmel*, 31 PERB ¶ 3006 (1998), *conf'd*, 267 A.D.2d 858, 701 N.Y.S.2d 169 (3d Dep't 1999).

17. *See, e.g., State of New York (Div. of Military & Naval Affairs) v. New York State PERB*, 23 PERB ¶ 4592 (1990), *aff'd*, 24 PERB ¶ 3024 (1991), *aff'd*, 26 PERB ¶ 7001, 187 A.D.2d 78, 592 N.Y.S.2d 847 (3d Dep't 1993).

18. *See, e.g., Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005 (2008), *aff'd*, 42 PERB ¶ 7004 (4th Dep't 2009), *on remand*, PERB Case No. U-26091(7/23/2009); *County of Onondaga*, 24 PERB ¶ 3014 (1991); *Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985).

19. *See, e.g., Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985).

20. *See, e.g., Vestal Cent. Sch. Dist.*, 30 PERB ¶ 3029 (1997), *aff'd*, 94 N.Y.2d 409 (2000) (employer's decision to contract with BOCES for printing services was not mandatorily negotiable); *Webster Cent. Sch. Dist. v. Public Employment Relations Bd.*, 75 N.Y.2d 619 (1990) (Education Law § 1950 reflects Legislature's intention that school districts' decisions to participate in cooperative educational programs not be subject to mandatory negotiation).

21. *See, e.g., West Hempstead Union Free Sch. Dist*, 14 PERB ¶ 3096 (1981); *Town of Mamaroneck*, 33 PERB ¶ 3010 (2000), *quoting Fairview Fire Dist.*, 29 PERB ¶ 3042 (1996) (substitution of civilian employees for police officers reflects an employer's determination that the specialized training and skills of a police officer are not needed to complete the work).

22. *Fairview Fire Dist.*, 28 PERB ¶ 4608 (1995), *citing State of New York Dep't of Corr. Servs. v. Kinsella*, 27 PERB ¶ 3055 (1994) (employer's civilianization of uniformed services represented "a *de facto*" change in qualifications), *aff'd*, 29 PERB ¶ 3042 (1996); *see also County of Suffolk*, 38 PERB ¶ 4547 (2005) (where no employee suffered loss of employment or benefits as a result of the transfer of work from police officers to civilians, the balance of employer and employee interests tips in the employer's favor); *see also County of Suffolk*, 38 PERB ¶ 4575 (2005) (county did not violate its duty to bargain when it transferred work from police officers to civilian police operations aides).

23. *See, e.g., Germantown Cent. Sch. Dist.*, 25 PERB ¶ 4573 (1992), *aff'd*, 26 PERB ¶ 3003, *aff'd*, 205 A.D.2d 961, 613 N.Y.S.2d 957 (3d Dep't 1994) (unilateral subcontracting out school cafeteria services upheld because the district was on austerity and statutorily precluded from operating the program).

24. *See, e.g., Wappingers Cent. Sch. Dist.*, 19 PERB ¶ 3037 (1986).

25. *See, e.g., Wappingers Cent. Sch. Dist.*, 26 PERB ¶ 3014 (1993).

26. *See, e.g., Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046 (1986).

27. *See, e.g., Triborough Bridge & Tunnel Auth.*, 15 PERB ¶ 3124 (1982).

28. *See, e.g., County of Nassau*, 18 PERB ¶ 3034 (1985).

29. *See, e.g., Spencerport Cent. Sch. Dist.*, 16 PERB ¶ 3074 (1983).

30. *See, e.g., City of New York*, 40 PERB ¶ 6601 (2007), citing *Schenectady Police Benevolent Ass'n v. New York State PERB*, 28 PERB ¶ 7005 (1995); *but see Vill. of Highland Falls*, 40 PERB ¶ 4525 (2007), *aff'd on other grounds*, PERB Case Nos. U-26843, 26844 (July 23, 2009).

31. *See, e.g., Town of Orangetown*, 40 PERB ¶ 3008 (2007) (employer could not unilaterally prohibit employees from videotaping and/or audiotaping initial medical evaluation).

32. *See, e.g., County of Nassau*, 23 PERB ¶ 4595 (1990).

33. *See, e.g., State of New York (SUNY Stony Brook)*, 33 PERB ¶ 3045 (2000).

34. *See, e.g., South Jefferson Cent. Sch. Dist.*, 13 PERB ¶ 3066 (1980).

35. *See, e.g., Fairview Fire Dist.*, 12 PERB ¶ 3083 (1979).

36. *See, e.g., Pearl River Union Free Sch. Dist.*, 11 PERB ¶ 3085 (1978).

37. *See, e.g., Orange County Community Coll. Faculty Ass'n*, 10 PERB ¶ 3080 (1977).

38. 8 N.Y.C.R.R. § 100.2 (i), (j).

39. *See, e.g., Unatego Cent. Sch. Dist.*, 20 PERB ¶ 3004 (1987), *aff'd*,134 A.D.2d 62, 522 N.Y.S.2d 995 (3d Dep't 1987), *motion for lv. to appeal denied*, 71 N.Y.2d 805, 529 N.Y.S.2d 76 (1988); *see also County of Dutchess*, 32 PERB ¶ 4559, *aff'd*, 32 PERB ¶ 3047 (1999), *aff'd*, 274 A.D.2d 930, 712 N.Y.S.2d 187 (3d Dep't 2000).

40. *See, e.g., County of Nassau*, 14 PERB ¶ 4550 (1982).

41. *See, e.g., City of Mount Vernon*, 18 PERB ¶ 3050 (1985), *aff'd*, 18 PERB ¶ 7018 (Sup. Ct., Albany Co. 1985), *aff'd*, 126 A.D.2d 824, 510 N.Y.S.2d 742 (3d Dep't 1987).

42. *See, e.g., Triborough Bridge & Tunnel Auth.*, 27 PERB ¶ 3076 (1994).

43. *See, e.g., County of Yates*, 22 PERB ¶ 3017 (1989).

44. N.Y. Civ. Serv. Law § 167(2)(a).

45. *See, e.g., Lippman v. Sewanhaka Cent. High Sch. Dist.*, 17 PERB ¶ 4521, *aff'd*, 17 PERB ¶ 3049 (1984), *rev'd*, 104 A.D.2d 123, 483 N.Y.S.2d 446 (3d Dep't 1984), *aff'd*, 66 N.Y.2d 313 (1985).

46. *See, e.g., Triborough Bridge & Tunnel Auth.*, 29 PERB ¶ 3012 (1996).

47. *See, e.g., Allen v. Bd. of Educ. of the Union Free Sch. Dist.*, 168 A.D.2d 403, 563 N.Y.S.2d 422 (2d Dep't 1990), *appeal dismissed*, 77 N.Y.2d 939 (1991).

48. 2008 N.Y. Sess. Laws Ch. 43.

49. *See, e.g., Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 563 (2006).

50. *See, e.g., Town of Walkill*, PERB Case No. U-27426 (July 23, 2009) and cases cited therein.

51. *See, e.g., Town of Dewitt*, 32 PERB ¶ 3001 (1999), *quoting* N.Y. Civ. Serv. Law § 201.7(ii).

52. *See* Civil Service Law § 201.7(a)(ii).

53. *See, e.g., State of New York (Office of Parks, Recreation & Historic Preservation)*, 39 PERB ¶ 3007 (2006).

54. *See, e.g., Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶ 3053 (1987); *Triborough Bridge & Tunnel Auth. & Metropolitan Trans. Auth.*, 21 PERB ¶ 3065 (1988).

55. *See, e.g., Averill Park Cent. Sch. Dist.*, 10 PERB ¶ 4560 (1977).

56. *See, e.g., Bellmore Sch. Union Free Sch. Dist.*, 34 PERB ¶ 3009 (2001).

57. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976).

58. *See, e.g., Bd. of Educ. of Enlarged City Sch. Dist. of City of Jamestown, NY*, 6 PERB ¶ 3075 (1973) (implementation of school calendar); *see also Wappingers Cent. Sch. Dist.*, 5 PERB ¶ 4512 (1972), *aff'd*, 5 PERB ¶ 3074 (1972) ("compelling need" found where school district, just before the start of a new school year, unilaterally changed teachers' workload where the school district had negotiated with the union to impasse and recognized its continuing obligation to bargain).

59. *See, e.g., County of Chautauqua*, 22 PERB ¶ 3016 (1989) (county's interest in economic savings did not constitute a "compelling need" that relieved it of its duty to negotiate over the subcontracting of laundry services).

60. *See, e.g., State of New York (SUNY Albany)*, 16 PERB ¶ 3050 (1983).

61. *See, e.g., Patchogue-Medford Union Free Sch. Dist.*, 28 PERB ¶ 3026 (1995).

62. *See, e.g., County of Orange*, 12 PERB ¶ 3114 (1979), *aff'd*, 76 A.D.2d 878, 428 N.Y.S.2d 724 (2d Dep't 1980); *see also Ass'n of Surrogates & Supreme Court Reporters (City of New York) v. State of New York*, 79 N.Y.2d 39 (1992) (State statute imposing a lag payroll held to violate the U.S. Constitution's contract clause).

63. *See, e.g., Cobleskill Cent. Sch. Dist.*, 16 PERB ¶ 4501, *aff'd*, 16 PERB ¶ 3057 (1983), *aff'd*, 105 A.D.2d 564, 481 N.Y.S.2d 795 (3d Dep't 1984), *appeal denied*, 64 N.Y.2d 1071 (1985).

64. *See, e.g., County of Broome*, 22 PERB ¶ 3019 (1989).

65. *See, e.g., Spring Valley PBA v. Vill. of Spring Valley*, 80 A.D.2d 910, 437 N.Y.S.2d 400 (2d Dep't 1981).

66. *See, e.g., City of Newburgh*, 16 PERB ¶ 3030 (1983).

67. *See, e.g., County of Nassau*, 32 PERB ¶ 3034 (1999).

68. *See, e.g., County of Nassau*, 25 PERB ¶ 4555 (1992).

69. *See, e.g., NYC Trans. Auth.*, 24 PERB ¶ 3013 (1991).

70. *See, e.g., Windsor Ass'n of Office Personnel & Sch. Aides*, 17 PERB ¶ 3062 (1984).

71. *City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971).

Richard K. Zuckerman is a partner in Lamb & Barnosky, LLP in Melville and a member of the Executive Committees of the Municipal and Labor and Employment Law Sections of the New York State Bar Association. This article is adapted from his presentation to the New York State Bar Association, Municipal Law Section's Annual Meeting in January 2009.

Needed: A New Statewide Ethics Code for Municipalities

By Steven G. Leventhal

Article 18 of the General Municipal Law establishes minimum standards of conduct for the officers and employees of all municipalities within the state other than the City of New York.[1] It was adopted in 1964 with the following declaration of policy and purpose:[2]

> As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers.… In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.
>
> … [T]he discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.
>
> There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.…

Article 18 has not accomplished these lofty purposes. For nearly 20 years, leading commentators, bar associations, and public interest groups have criticized Article 18, and called for a new statewide ethics code for local municipalities.[3] As Professor Mark Davies wrote in the first of his trilogy of articles entitled "Enacting a Local Ethics Law"[4] published in the *Municipal Lawyer,*

> Article 18 contains huge gaps, makes no sense, provides little guidance to municipal officials or their attorneys, imposes a financial disclosure system that is charitably described as asinine, and, in the one area it does regulate—namely, the prohibition on municipal officials having an interest in certain contracts with his or her municipality—overregulates to such an extent that it turns honest officials into crooks.

Unfortunately, the calls for an overhaul of Article 18 have not been heeded. To help keep up the drumbeat, this article will revisit some of the statute's deficiencies.

A municipal ethics code should provide clear guidance to municipal officers and employees, and assist them in avoiding ethical missteps before they occur.

Clarity is particularly important where the rules of conduct for municipal officers and employees differ from those prevalent in the private sector. Yet in these very areas, Article 18 of the New York General Municipal Law often falls short.

The Vague Prohibition Against Gifts and Favors

One obvious example of a standard of conduct applicable in the public sector that differs markedly from the practices prevalent in the private sector is the rule restricting the solicitation or acceptance of gifts or favors by municipal officers or employees. In the private sector, gifts are freely exchanged. The practice is so widely accepted that the Internal Revenue Service recognizes business entertainment as an ordinary and necessary business expense.[5] However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.[6]

In a bribery prosecution, the People must prove beyond a reasonable doubt that there was a corrupt purpose in making the offer or in conferring the benefit.[7] But, even in the absence of a corrupt purpose, a defendant may be convicted of the misdemeanor of giving or receiving unlawful gratuities where a benefit

is offered to, or conferred upon, an official for having engaged in official conduct that he or she was required or authorized to perform, and for which the official was not entitled to any additional compensation.[8]

Nevertheless, an unwary public officer or employee may be insensitive to the different standards that govern conduct in the public sector, particularly where the officer or employee is accustomed to the standards of the private sector. On December 2, 2003, *Newsday* reported that:

> A combative Nassau University Medical Center president testified at a state ethics hearing yesterday that he didn't know it was improper to accept a hockey ticket, an expensive dinner and a trip to Missouri from companies bidding on a $24 million contract… [the president] also testified that he didn't realize that working for the public benefit corporation classified him as a state employee…[he said] his $45 rack-of-lamb dinner at Carltun-on-the-Park in Eisenhower Park and his trip to Missouri helped him negotiate a better price from the contractors who were picking up the tab.

The investigation by the State Ethics Commission resulted in an assessment against the public official equal to three times the benefit that he received.

In an informal advisory letter cited with approval by the New York State Ethics Commission in Advisory Opinion No. 94-16 (interpreting the gift regulations imposed on State employees by the Public Officers Law), the Federal Office of Government Ethics wrote:

> We frequently hear government employees claiming that they cannot be bought with lunch and that to prohibit them from accepting an occasional meal from a person doing business with them impugns their integrity. We are also told that the private sector conducts business at such occasions and that government employees must participate in the same kinds of activities in order to get the government's position disseminated and understood. We sincerely hope and expect that government employees cannot be bought for lunch; we do not agree that for the government to have such a restriction impugns the integrity of its employees nor that the entertainment standards for businesses dealing with one another is the standard that should be adopted by a government. The standards involved in public service are based on different considerations and include a concept of avoiding situations where an employee's integrity can be made an issue.[9]

Nevertheless, the gifts and favors come, particularly at holiday time, when the intentions of the donor and recipient may reflect the generous spirit of the season, and may be unrelated to any improper purpose.

Thus, in this difficult area, where generally accepted private sector behavior abounds as a misleading example to unwary municipal officers and employees, direction and guidance in the form of clear standards of conduct is vitally needed. Yet, Article 18 fails to provide that guidance.

General Municipal Law ("GML") § 805-a provides, in pertinent part, that no municipal officer or employee shall:

> directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.

This statute requires a municipal officer or employee to puzzle through two levels of abstraction, and to divine what one reasonable person could infer about another person's intention in order to determine whether he or she may accept a gift having a value of $75 or more. As a result, in a 1975 decision, a Fulton County trial court declared that the statute was unconstitutionally vague because it did not contain any "standard or guidelines" by which a determination could be made, and dismissed an indictment charging the defendant with its violation.[10] However, in that same year, the Third Department upheld a disciplinary action imposed on a town employee for violating a similar local law without addressing the constitutional issue.[11] Nevertheless, constitutional or not, so vague a standard of conduct gives inadequate guidance to well-meaning municipal officers and employees and thus fails as an ethics regulation.

A different approach to regulating gifts was recommended by Professor Mark Davies in his 1993 Model Code of Ethics.[12] The Model Code would prohibit the

solicitation of gifts from any person who has received or sought a municipal benefit within the previous 24 months, and would prohibit the *acceptance* of gifts from any person who a municipal officer or employee knows or has reason to know has sought or received a municipal benefit within the previous 24 months.

A hybrid approach was taken in the Lobbying Act, which regulates gift giving.[13] The Lobbying Act begins with a familiar sounding prohibition against gifts to a public official, or to the official's spouse or unemancipated child, unless it is not reasonable to infer that the gift was intended to influence the public official. The Act further prohibits any gift from certain "disqualified sources," such as a person who is regulated by the official's agency, negotiates with the agency, does business with the agency, seeks to contract with the agency or has contracts with the agency.[14] The Lobbying Act excludes gifts that fall within a list of exceptions, such as complimentary attendance, including food and beverages, at charitable, political or ceremonial events; awards, honorary degrees, promotional items of nominal value, goods and services available to the public on the same basis, gifts from family and friends, campaign contributions, certain travel expenses; and meals and refreshments while attending professional or educational programs.[15]

It is high time that GML Article 18 be revised, and that the standards of conduct related to the solicitation or acceptance of gifts be clarified. Until this happens, local municipalities should exercise the authority granted to them by GML § 806 to adopt their own clear standards of conduct in the form of a local ethics code.[16]

The Undefined Term: Confidential Information

Another area of distinct difference between the culture of the private and public sectors is in the extent to which information may be withheld as "confidential."

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. But, in the post-Watergate era, we have come to view openness and transparency in government as a fundamental public policy, essential to keep government accountable, and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law,[17] which makes most government records available for public inspection and copying, and the Open Meetings Law,[18] which makes most government meetings open to the public.

GML § 805-a provides, in pertinent part, that no municipal officer or employee shall disclose confidential information acquired by him or her in the course of his official duties or use such information to further his or her personal interests. However, the term "confidential information" is neither defined in the General Municipal Law, nor in a similar provision of the Public Officer's Law applicable to state employees.[19] Moreover, there appears to be no consensus as to the meaning of "confidential information" as that term is used by Article 18.

In 2000, the Attorney General was asked whether a municipality has statutory authority under GML § 806 to adopt a code of ethics that prohibits members of the legislative body from disclosing matters discussed in executive session, and whether such a prohibition would be consistent with the Open Meetings Law and the Freedom of Information Law. The Attorney General opined that a local municipality has the statutory authority to prohibit members of its legislative body from disclosing matters discussed in executive session, and that such a prohibition would be consistent with the Freedom of Information Law and the Open Meetings Law.[20] The Attorney General noted that "any such restriction on speech would, of course, be subject to further state and federal constitutional requirements."

The Attorney General reasoned that the purpose of an executive session is to permit members of public bodies to discuss sensitive matters in private, and that the matters that are permitted to be discussed in executive session are matters which, if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety.[21] The Attorney General cited a 1997 decision of the Third Department,[22] finding that disclosure of matters discussed in executive session would defeat the parallel legislative purposes of the Open Meetings Law and the Freedom of Information Law, and effectively applying the statutory grounds for meeting in executive session as exceptions to disclosure under the Freedom of Information Law. The Attorney General concluded that the GML § 806(1)(a) authorization to adopt municipal codes of ethics that prohibit disclosure of information is consistent with and reinforces the fact that records of discussions properly taking place in executive session may be withheld from public disclosure.

In a series of staff advisory opinions, the Executive Director of the Department of State Committee on Open Government reached a different conclusion. In response to a 2007 inquiry from a local school board member who received a memo from the school district citing GML § 805-a and Board Policy to prohibit the disclosure of information acquired in executive session, the Executive Director opined that:

> …[I]n most instances, even when records may be withheld under the Freedom of Information Law or when

> a public body… may conduct an executive session, there is no obligation to do so. The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to disclose records or to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."[23]

Citing a 1986 decision by the New York Court of Appeals,[24] the Executive Director observed that the characterization of records as "confidential" must be based on statutory language that specifically confers or requires confidentiality; and that to confer or require confidentiality, a statute must leave no discretion to an agency (i.e. the agency *must* withhold the records). Because the exemptions from mandatory disclosure set forth in the Freedom of Information Law are permissive (i.e., the agency *may* withhold the records), the Executive Director concluded that the only situations in which an agency must withhold records would involve instances in which a statute other than the Freedom of Information Law prohibits disclosure. The Executive Director concluded that "[s]ince a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not 'confidential.'"

Under this view, each request for disclosure must be made by a municipal information officer on a case-by-case basis, with each discretionary denial of access subject to Article 78 review, and with the burden upon the municipality to establish that its discretion has not been abused.[25]

While there appears to be no consensus as to the meaning of "confidential information" as that term is used by Article 18 in regulating the conduct of municipal officers and employees, government information is presumptively subject to public disclosure.[26]

The Appellate Divisions of the New York Supreme Court recently promulgated joint Rules of Professional Conduct[27] in which they adopted a definition of "confidential government information" for the purpose of regulating the professional conduct of current and former government attorneys.[28] Unlike the meaning given to the term "confidential information" by the Executive Director for purposes of the Freedom of Information Law, the newly promulgated Rules of Professional Conduct require current and former government attorneys to refrain from disclosing government information that a municipality "may" withhold from public disclosure unless it is otherwise available to the public.

Rule 1.11 of the Rules of Professional Conduct applicable to current and former government attorneys defines "confidential government information" as "information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." It should be noted that the obligation of confidentiality applicable to current and former government attorneys is different from that corresponding obligation owed by private sector attorneys.[29]

Rigid Regulation

In a section of Article 18 notable for its clarity, the statute prohibits municipal officers and employees from having prohibited interests in municipal contracts. Subject to certain statutory exceptions,[30] GML § 801 is violated if three elements are established: (1) the existence of a contract with the municipality, (2) a benefit accruing to an officer or employee of the municipality as a result of the contract, and (3) the power or duty of the officer or employee, either individually or as a member of a board, whether exercised or not, to (a) negotiate, prepare, authorize or approve the contract, (b) authorize or approve payment under the contract, or audit bills or claims under the contract, or (c) appoint an officer or employee to perform any of these functions. The term "contract" is broadly defined by Article 18.[31] A contract willfully made in violation of this section is void.[32] A willful and knowing violation of the section is a misdemeanor.[33]

This prohibition against self-dealing has the salutary effect of promoting the reality and appearance of integrity in government. However, logic and experience indicate that it may sometimes further the public interest for a municipality to make a contract with an interested municipal officer or employee. This may be the case where the contract is justified by an actual emergency or is awarded to the lowest of sealed competitive bids received after public notice. But Article 18 prohibits such contracts notwithstanding the existence of an emergency or the use of competitive bidding, even where the interested officer or employee recuses himself or herself from the discussions, deliberations and vote on the matter and from negotiating, preparing, authorizing or approving the contract, authorizing or approving payment under the contract, auditing bills or claims under the contract, or appointing an officer or employee to perform any of these functions.

Gaps in Coverage

Despite the expansive coverage of GML § 801, courts have, in some cases, been compelled to look beyond Article 18 to find common law ethics viola-

tions, and to nullify municipal actions, even where no statutory violations were found.[34] In these cases, the courts nullified municipal actions that were based on votes cast by officials who had private interests in the matters. The matters did not involve contracts with the municipalities and, therefore, no violation of GML § 801 occurred. Nevertheless, the courts nullified the actions based on the perceived conflicts of interest.[35] Quoting the "soaring rhetoric" of Chief Judge Cardozo, the Second Department stated that "a trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[36] A new statewide ethics law could expand the coverage of GML § 801 to require that municipal officers and employees recuse themselves in all matters involving the private interest of themselves, their family members, or those with whom they have business or financial relationships.

Among the activities not regulated by Article 18 are post-employment activities, dual office holding and outside employment.

Many municipalities have utilized the authority granted by GML § 806 to enact local ethics codes that include "revolving door" restrictions on post-employment activities by former municipal officers and employees. Typically, municipalities that choose to regulate post-employment activities impose a permanent ban on handling matters on behalf of a private sector employer that the officer or employee handled in any substantial way in his or her official capacity, and a temporary ban (usually of one or two year duration) on appearances by retired officers or employees before their former agencies, departments or boards or, in some cases, before any agency, department or board of the municipality. This latter ban is designed to avoid the perception that a retired officer or employee will receive preferential treatment from his or her former colleagues. A new state municipal ethics law could establish a uniform baseline for the regulation of post-employment activities.

Among the most common requests for ethics advice to be received by local boards of ethics are inquiries from members of the municipal workforce as to whether they may accept offers of outside employment. Similarly, local ethics boards often receive inquiries from municipal officials who wish to hold more than one public office. Article 18 provides no guidance in these "two hat" cases. Rather, the controlling legal principle was announced by the New York Court of Appeals in 1874.[37] Generally, in the absence of a constitutional or statutory prohibition, an individual may hold two public offices, and a public employee may hold a position of outside employment, provided the two positions are not inherently incompatible.[38] To determine whether two positions are inherently incompatible, it is necessary to compare their duties. The classic example of incompatible positions is those of chief financial officer and auditor. Stated differently, you cannot be your own boss.

Even where a municipal officer or employee holds two positions that are compatible, the officer or employee may still be confronted from time to time by conflicts of interest. Of course, in such cases the officer or employee should disclose the conflicts (and in the case of a contract or agreement with the municipality, must disclose his or her interest in the contract pursuant to Article 18) [39] and, by common law, must recuse himself or herself.[40] A new state municipal ethics law could codify the common law principles regulating dual office holding and outside employment.

Onerous Annual Disclosure Requirement

The New York State Ethics in Government Act of 1987 (the "Ethics Act") codified as GML §§ 810-813, imposed annual financial reporting requirements on municipalities having populations of 50,000 or more, and established a Temporary State Commission on Local Government Ethics (the "Commission") to interpret and administer the annual financial reporting requirements. The Ethics Act specified the form and content of the annual financial disclosure form that municipalities would be required to use if they did not adopt their own consistent financial disclosure laws by January 1, 1991.

In a 1991 article, the former Executive Director of the Commission, Professor Mark Davies, criticized the form of financial disclosure set forth in the Ethics Act: "The financial disclosure form set out in the [Ethics Act] is in many instances virtually unintelligible and is far too invasive of the rights of officials in most municipalities. In some municipalities that form may indeed chill the willingness of good people to serve in local government."[41]

The Ethics Act gave local municipalities the option of adopting their own financial disclosure laws to be administered locally, rather than submitting to regulation by the State under Article 18. However, it did not specify what different form of annual disclosure by local officers and employees, if any, would meet the requirements of the State Act. In enacting their own financial disclosure laws, many municipalities adopted the form of financial disclosure set forth in the Ethics Act.

The Commission reviewed an alternate form of annual disclosure submitted by a local municipality, concluded that it would meet the minimum requirements of the Ethics Act if the form were amended in certain respects, and approved the alternate form as amended.[42]

Ideally, municipal officers and employees should only be required to disclose information that could reveal a potential significant violation of their obligations under Article 18 or their respective local codes of ethics.[43] The onerous, invasive form of annual disclosure set forth in Article 18 is widely and justifiably disdained.

Ineffective Administration

Other than authorizing local municipalities to establish boards of ethics, Article 18 provides no framework for the effective administration of a government ethics program. Worse yet, Article 18 undermines the independence of a local ethics board by providing that a majority of its members (rather than all of them) shall not otherwise be officers or employees of the municipality, and by providing that board members shall serve at the pleasure of the appointing authority.[44] Local municipalities should exercise the authority granted to them under Article 2 of the Municipal Home Rule Law to establish ethics boards consisting entirely of persons who are not officers or employees of the municipality, and who serve for fixed staggered terms.

A new state ethics law could promote the effectiveness of local government ethics programs by providing for the establishment of independent local boards of ethics. It could foster confidence in government by requiring that local ethics boards be bi-partisan in their membership. A new state ethics law could make real the promise of "known standards of ethical conduct as a guide for public officers"[45] by establishing a baseline requirement of annual ethics training for all municipal officers and employees.[46]

Local legislators face great challenges, and often great resistance, when attempting to enact ethics legislation. A new statewide ethics law is sorely needed.

Endnotes

1. *See* N.Y. Gen. Mun. Law § 800(4).
2. *See* N.Y. L. 1964, c. 946, § 1.
3. *See* Mark Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, *Municipal Lawyer*, Summer 2007, Vol. 21, No. 3, n. 3.
4. *See* Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, pp. 4-8.
5. *See* 26 U.S.C. § 274 (Disallowance of certain entertainment, etc., expenses).
6. *See* N.Y. Penal Law, art. 200 (Bribery involving public servants and related offenses), *et seq*.
7. *Id*.
8. *Id*.
9. *See* O.G.E. Inf. Adv. Op. 87 x 13 (Oct. 23, 1987).
10. *See People v. Moore*, 85 Misc.2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975).
11. *See Merrin v. Twn. Bd. of Kirkwood*, 48 A.D.2d 992, 369 N.Y.S.2d 878 (3d Dep't 1975).
12. *See* Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 Fordham Urb. L. R. 61-126 (1993).
13. *See* N.Y. Legis. Law § 1-m (prohibition of gifts).
14. *See* Comm. on Public Integrity Adv. Op. No. 08-01: "'Disqualified source' is any individual who, on his or her own behalf or on behalf of non-governmental entity, or a non-governmental entity on its own behalf which: (1) is regulated by, or regularly negotiates with, appears before other than in ministerial matter, does business with, seeks to contract with or has contracts with state agency with which state officer or employee is employed or affiliated; or (2) is required to be listed on statement of registration as required by Legislative Law, or is spouse or unemancipated minor child of individual who is required to be listed on statement of registration; or (3) is not required to be listed on statement of registration as required by Legislative Law, and lobbies or attempts to influence action or positions on legislation or rules, regulation or rate-making before state agency with which state officer or employee is employed or affiliated; or (4) is involved in litigation, adverse to state, with state agency with which state officer or employee is employed or affiliated, and no final order has been issued; or (5) has received or applied for funds from state agency with which state officer or employee is employed or affiliated, including participation in bid on pending contract award, at any time during previous year up to and including date of proposed or actual receipt of gift; or (6) seeks to contract with or has contracts with state agency other than agency with which state officer or employee is employed or affiliated when officer or employee's agency is to receive benefits of contract.… [I]f individual or entity lobbies a State agency, the individual or entity is a disqualified source, without regard to the amount the individual or entity expends, receives or incurs."
15. *See* N.Y. Legis. Law § 1-c (definitions).
16. N.Y. Gen. Mun. Law § 806-1(a) provides, in pertinent part, that "the governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them.… Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited.…"
17. *See* N.Y. Pub. Off. Law, art. 6 (Freedom of Information Law).
18. *See* N.Y. Pub. Off. Law, art. 7 (Open Meetings Law).
19. *See* N.Y. Pub. Off. Law § 74 (Code of Ethics).
20. *See* 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
21. *See* Pub. Off. Law § 105 (Conduct of executive sessions).
22. *See Wm. J. Kline & Sons v. County of Hamilton*, 235 A.D.2d 44, 663 N.Y.S.2d 339 (3d Dep't 1997).
23. *See* N.Y. Dept. of State, Comm. Open Gov't, FOIL-AO-16799 (Sept. 20, 2007).
24. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986).
25. *See Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557 (1984).
26. *Id*.
27. *See* 22 N.Y.C.R.R. Part 1200 (Rules of Professional Conduct), *et seq*.
28. *See* N.Y. Rules of Prof'l Conduct R. 1.11 (2009).
29. *See* N.Y. Rules of Prof'l Conduct R. 1.6 (2009); for private sector attorneys, "confidential information" means

"information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

30. *See* N.Y. Gen. Mun. Law §§ 801, 802.
31. N.Y. Gen. Mun. Law § 800(2) states that the term "'contract' means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper… for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law."
32. *See* N.Y. Gen. Mun. Law § 804.
33. *See* N.Y. Gen. Mun. Law § 805.
34. *See Tuxedo Conservation & Taxpayers Assn. v. Town Bd.*, 69 A.D.2d 320, 418 N.Y.S. 2d 638 (2d Dep't 1979); *Zagoreos et al. v. Conklin*, 109 A.D.2d 281, 491 N.Y.S2d 358 (2d Dep't 1985).
35. *Id*.
36. *See, e.g., Tuxedo,* 69 A.D.2d at 324.
37. *See People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874).
38. *Id*. *See also* 2006 N.Y. Op. (Inf.) Att'y Gen. 5.
39. N.Y. Gen. Mun. Law § 803(1) states that "[a]ny municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body."
40. *See Tuxedo* and *Zagoreos*, *supra* note 34.
41. *See* Mark Davies, *Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 263 (1991).
42. The alternate form of annual disclosure approved by the Temporary State Commission can be found at Davies, *Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, pp. 269-272.
43. *See* Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, p. 8.
44. *See* N.Y. Gen. Mun. Law § 808.
45. *See* N.Y. L. 1964, c. 946, § 1.
46. Effective 2007, the members of local zoning and planning Boards are required to complete a training requirement in order to more effectively carry out their duties. Members who fail to comply are ineligible for reappointment to their respective boards. *See* N.Y. Town Law §§ 267, 271; N.Y. Village Law §§ 7-712, 7-718.

Steven G. Leventhal is an attorney and certified public accountant. He is a partner in the Roslyn law firm of Leventhal and Sliney, LLP. Steve is the former chair of the Nassau County Board of Ethics. He currently serves as Village Attorney for the Village of Muttontown, and as counsel to several municipal boards. SLeventhal@ls-llp.com.

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

Reflecting, perhaps, a somewhat somnolent economy, things remain relatively quiet in the world of land use litigation. That said, however, a number of cases were decided in the third quarter of 2009 which shed light on issues of interest.

Our lead case, *Caspian Realty, Inc. v. Zoning Board of Appeals of Town of Greenburgh,*[1] is a lesson (especially timely in these days of Swine Flu) in the importance of approaching a zoning board of appeals with clean hands. *Village of Canajoharie v. Planning Board of the Town of Florida*[2] addresses a municipality's standing to mount a SEQRA challenge against another municipality when the latter, in cooperation with its county industrial development agency and with funding from the State through the Empire State Development Corporation, may have lured a business away from the challenger.

Lamar Central Outdoor, LLC v. State of New York[3] speaks to the interrelationship between billboard restrictions contained in the Federal Highway Beautification Act and local zoning, and in doing so addresses the very interesting question of how much deference is to be accorded to a determination of a state agency, in this case the Department of Transportation, when that agency is interpreting and enforcing a federal regulation.

This quarter brings us not one but two cases involving police departments, although neither qualifies as a *Law and Order* episode. *Port Washington Police District v. Town of North Hempstead*[4] applies the balancing of public interests test to determine whether a radio tower proposed to be built by a police district was subject to the Town of North Hempstead's Wireless Communication Facilities Law. *Chatham Towers, Inc. v. New York City Police Department*[5] addresses a favorite subject of one of your authors, namely the "replacement in kind" provision of SEQRA, which is little written about, but which holds a certain fascination for those seeking to narrow the sometimes burdensome scope of SEQRA review.

I. Application of the Statutory Area Variance Standard

In *Caspian Realty, Inc. v. Zoning Board of Appeals of the Town of Greenburgh*,[6] the Second Department held

that a zoning board of appeals may take into account an applicant's deceitful representations when evaluating an area variance application provided that such actions are analyzed in the context of Town Law § 267-b(3)'s area variance standard.

In *Caspian Realty, Inc.*, the petitioner-respondent applied to the Town of Greenburgh Planning Board for site plan approval to establish a furniture store on a parcel of property in the Town. The plans for the store showed a 6,208-square-foot main-floor showroom, and a cellar. Caspian represented to the Planning Board that the cellar would be used for storage and mechanicals. Based on this plan and all subsequent plans submitted to the Planning Board, the proposed floor area ratio ("FAR") and number of parking spaces for the proposed use complied with the dimensional requirements of the Town's Code.[7] In August of 2003, before a certificate of occupancy was issued for the store, the Building Inspector observed finishing work in the cellar (i.e., carpet, moldings, partitions) and instructed Caspian to submit updated plans. In September of 2003 Caspian submitted plans to the Building Department showing the cellar as storage. Caspian also barricaded the stairway leading from the cellar to the showroom. Temporary and final certificates of occupancy were issued for the store in October and November of 2003, respectively, and thereafter the store opened for business.[8]

In May of 2004 the Building Department issued a zoning violation to Caspian on the grounds that it was using the cellar as a showroom in violation of its certificate of occupancy. Caspian subsequently applied to the respondent-appellant Town of Greenburgh Zoning Board of Appeals for area variances from the FAR requirements and parking requirements of the Town Code to permit it to continue using both the main level and the cellar of the building as a furniture showroom.[9] Caspian required an approximately 100 percent variance from the Town's FAR requirements and an approximately 50 percent variance from the parking requirements in order to use the cellar as a showroom. The Zoning Board of Appeals held a public hearing on the application which lasted for six sessions.[10]

At the public hearing, Caspian argued that it was not aware that it was not permitted to use the cellar

as a showroom and that if it were allowed to use the main floor and the cellar as a showroom, its showroom would be of a comparable size to its competitors in the area.[11] In support of its application, Caspian, among other things, submitted a report and testimony from Nathaniel J. Parish, P.E., which concluded that the use of the cellar as a showroom created no adverse parking or traffic impacts. Mr. Parish's conclusions were also adopted by the Zoning Board of Appeals' traffic consultant.[12] Neighboring property owners appeared at the public hearing in opposition to Caspian's application and complained that conditions of the approved site plan pertaining to, among other things, landscaping, noise, and overnight parking, had not been satisfied. They also complained that the size and configuration of the site made delivery truck movements entering the site difficult and that such truck traffic negatively impacted traffic in the surrounding area.[13]

In November of 2006 the Zoning Board of Appeals denied Caspian's application on the grounds, among others, that the benefit to the applicant was outweighed by the detriment to the Town because granting the variances would, in light of Caspian's prior deceptive practices, diminish respect for the Town's planning, building, and tax laws. The Board further found that the retail use of the cellar negatively impacted the community in terms of noise, truck movements, and traffic, that the variances requested were substantial, and that Caspian's need for the variance was self-created and due to its deceptive conduct.[14] Caspian brought the instant Article 78 proceeding asking the Court to annul the Board's denial and grant the variances on the grounds that the application of the statutory area variance standard balanced in its favor.[15]

The Supreme Court determined that Caspian deceived the Town regarding its intended use and purpose of the cellar. However, the Supreme Court held that deception is not one of the enumerated factors of the statutory area variance standard and that the Board's focus on this aspect of Caspian's application prevented it from properly applying the statutory area variance standard. Thus, the Supreme Court annulled the denial and remanded the matter to the Zoning Board of Appeals.[16] The Zoning Board of Appeals appealed and the Second Department reversed.[17]

With regard to the consideration of the applicant's deceitful conduct, the Second Department found that Caspian had, in fact, acted in a deceitful manner regarding its use of the cellar based on the evidence in the record.[18] Thus, the issue became what role, if any, that finding was permitted to play in the overall determination of Caspian's application for area variances. The Zoning Board of Appeals, citing case law that pre-dates the codification of the area variance standard,[19] argued that a board may deny an application for an area variance based on deliberate misrepresentations by an applicant.[20] Caspian argued that Town Law § 267-b(3) preempts the field of area variance review and that the Board must apply that standard when considering an area variance application. It further argued that since a variance runs with the land, the deceitful conduct of the present applicant should not be considered.[21]

The Court held that Town Law § 267-b(3) preempts the field of area variance review and that when reviewing an application for an area variance a zoning board of appeals must apply the standard set forth in that section.[22] However, the Court held that an applicant's deceptive conduct can play a role in the application of the statutory area variance standard, stating that

> while an applicant's deceit toward municipal boards with respect to prior or current applications may not, standing alone, warrant the denial of an area variance under Town Law §267-b(3), that factor can be considered significant and compelling to the extent it inextricably relates to certain of the enumerated statutory factors, such as whether the benefit of a requested variance is outweighed by the adverse impact which may inure to the Town and its ability to enforce the law in future cases if it were to grant an area variance to an applicant who had misled municipal authorities throughout the application process.[23]

A close look at the Board's and the Court's application of the statutory area variance standard to the facts of this case demonstrates that both bodies considered Caspian's deceptive conduct to be significant and compelling, and, in this case, it may have been outcome determinative. In applying the statutory area variance standard, the Board found against the applicant on all five factors. It also found that the applicant's deceptive conduct caused harm to the Town in the form of undermining its planning, building, and tax laws; a harm not specifically recognized by any one of the five factors.[24]

The Court upheld the Board's finding that: (1) The benefit to the applicant was outweighed by the detriment to the Town that would result from the perceived success of an effort to mislead the Town's planning, building, and tax authorities; (2) the requested variances were substantial in that the applicant required a 100 percent variance from the FAR requirement and a 50 percent variance from the parking requirement; and (3) the applicant's need for the variance was self-created based on its conduct in turning the basement into showroom space contrary to the Planning Board's

approval.[25] With regard to the self-created hardship factor, although an area variance may not be denied solely on the grounds that a hardship is self-created, here the Board gave this factor particular weight based on the applicant's conduct.[26]

However, the Court rejected the Board's determination that Caspian's application, if granted, would have a negative impact on the character of the neighborhood and the physical and environmental conditions of the neighborhood. The Court reasoned that such findings were not supported by the record since they were based on the generalized, unsubstantiated complaints of the neighbors and were contrary to the expert evidence in the record. In further support of such findings, the Court held that the Board impermissibly relied on impacts that did not flow from the grant of the variances, but rather were impacts incident to the operation of the property which would exist whether the variances were granted or denied. With regard to the availability of feasible alternatives, the Court found that the Board considered this factor, but that its application here was ambiguous in light of the evidence in the record.[27]

Thus, balancing the five factors, it seems that the Court found in favor of a denial on two factors (substantiality and self-created hardship), in favor of granting the variance on two factors (impact on the character of the neighborhood and the physical and environmental conditions of the neighborhood), and found that one factor (the availability of feasible alternatives) was neutral. However, the Court also upheld the Board's determination that the applicant's deceptive conduct caused harm to the Town in the form of undermining its planning, zoning, and tax laws, a determination that does not fall squarely into any one of the five statutory area variance factors, leading the Court to uphold the Board's denial as reasonable.[28] The lesson from this case is that even though an area variance cannot be turned down for the sole reason that the applicant engaged in deceptive conduct, deceptive conduct will carry considerable weight in the application of the statutory area variance standard and, in the context of the application of that standard, could cause an application that may have otherwise been granted to be denied, even if no physical harm will result from the grant of the variance.

In addition to this central holding, this case reinforces several well-established rules pertaining to applications for area variances. They are as follows: (1) In considering an application for an area variance, a zoning board of appeals must *consider* each of the five factors of the statutory area variance standard, but it "is not required to justify its determinations with supporting evidence as to each of the five factors, so long as its determination balances the relevant considerations in a way that is rational"[29]; (2) "generalized or unsubstantiated complaints from neighbors, unsupported by empirical or expert evidence are generally insufficient for a zoning board to base its decision[,]"[30] particularly in cases, such as this case, where there was expert evidence in the record; and (3) a zoning board of appeals may not base its denial of a variance on impacts that do not flow directly from the grant of the variance and which will exist regardless of whether the variance is granted or denied. Finally, the case demonstrates that courts will go to great lengths to punish deceitful practices. One wonders whether, on the same facts but without the petitioner's prior deceit, the outcome would have been the same.

II. Municipal Standing Under SEQRA

In *Village of Canajoharie v. Planning Board of the Town of Florida*[31] the Third Department considered a municipality's standing to challenge, on SEQRA grounds, the actions of another municipality which facilitated the closing of a manufacturing plant in the challenging Village. In 2007 Beech-Nut Corporation, as part of a consolidation of its facilities, made the determination to abandon its manufacturing facility in the Village of Canajoharie, Montgomery County, which it had operated for 115 years, and to move its operations to a business park owned by the Montgomery County Industrial Development Agency ("IDA") located in the Town of Florida, also in Montgomery County, some 20 miles away.[32] Beech-Nut obtained funding for the project from the Empire State Development Corporation ("Empire State") and applied to the IDA for its cooperation in facilitating the move to, and the lease of, IDA-owned property in the Town of Florida.[33] At the same time, Beech-Nut applied to the Town of Florida Planning Board for subdivision and site plan approval as and to the extent required under local zoning. The Planning Board declared itself lead agency for SEQRA review of the project in the Town of Florida, and ultimately made SEQRA findings and granted subdivision and site plan approval for the project.[34]

The Village of Canajoharie commenced a combined declaratory judgment action and Article 78 proceeding alleging violations of SEQRA and the General Municipal Law.[35] In an amended petition, Canajoharie alleged specifically that the Florida Planning Board had violated SEQRA by segmenting the abandonment of the Canajoharie plant from the relocation of the project, by failing to consider an alternative of renovating the Canajoharie plant, and generally by failing to consider measures to mitigate harm to Canajoharie.[36] In addition to the Planning Board of the Town of Florida and Beech-Nut, the Village named the IDA and Empire State as respondents. In addition to seeking to invalidate the Planning Board's actions, the Village sought a declaratory judgment that certain IDA PILOT and lease agreements, and financing assistance from Empire State, were invalid. The Supreme Court dismissed on

various grounds. The Third Department affirmed, finding that all of the Village's claims based on SEQRA violations were properly dismissed on standing grounds.[37]

In reaching its decision, the Appellate Division relied upon the general requirement that a SEQRA challenger must show that it "has sustained an injury in fact different from that of the public at large and one that falls within the zone of interests protected by SEQRA[.]"[38] Going further, the Court held that "[a] municipality, such as petitioner 'must demonstrate how its personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large.'"[39] Finally, the Third Department held that, with respect to SEQRA claims in particular, a challenger "must demonstrate that it will suffer an injury that is environmental and not solely economic in nature[.]"[40]

In determining that the Village lacked standing, the Third Department found that "the amended petition contains nothing more than allegations of potential economic harm, ranging from the *loss of employment, commercial activity and sales tax revenue*, to *negative impacts on population, housing values and resources, to increased tax burdens for all remaining property owners[,]*"[41] which allegations sound very much like allegations squarely addressing socioeconomic impacts which clearly fall within the ambit of SEQRA.[42] One is hard-pressed to understand why petitioner's allegations, which, among other things, included allegations of job losses and loss of population resulting from Beech-Nut's move from Canajoharie to Florida, failed to rise above merely "economic harm" to a degree sufficient, as a threshold matter, to establish standing.

A clue to the Court's thinking emerges in its finding that: "To this end, even the allegations of economic harm did not arise from the proposed project itself but, rather, from Beech-Nut's business decision to transfer all manufacturing and corporate operations to Florida, including operations in Canajoharie. Since 'economic injury [alone] does not confer standing to sue under SEQRA petitioner lacks standing to challenge the accuracy of the SEQRA process concerning the proposed project in Florida.'"[43] If one is to find logic in the Court's rejection of Canajoharie's standing, that logic appears to be rooted in the fact that the alleged impacts were caused by Beech-Nut in making its determination to leave Canajoharie, and not by the Planning Board or the other respondents in enabling Beech-Nut to do so. The Court in effect found that the impacts on Canajoharie result from Beech-Nut's *leaving*, not its *moving*, and that the action reviewed by the Planning Board legitimately excluded the former. Further, the Appellate Division treats the Village of Canajoharie as it would any private petitioner, and although prior case law tends to support the holding that the same standards should apply, one could argue that the application of those standards to a municipal petitioner will confer standing on a municipality when it alleges loss of employment and diminution of housing values—allegations that clearly constitute socioeconomic impacts under SEQRA and that the municipality asserts both "personally and in a representative capacity" on behalf of its citizens.

Perhaps the more interesting question emerging from this case is whether the outcome should have been different as respects respondents IDA and Empire State, or would have been different had the IDA or Empire State been the lead agency instead of the Florida Planning Board. The Planning Board's action, while perhaps indirectly facilitating Beech-Nut's move, was not directly implicated in it.

The IDA and Empire State stood, however, in an entirely different posture, vis-à-vis Canajoharie, from that of the Florida Planning Board. Empire State's funding directly facilitated the move and Empire State could just as easily have funded the rehabilitation of the Canajoharie plant. The same may be said of the IDA PILOT and lease, since Canajoharie is in the same county as Florida. A good argument can be made that those two agencies were required, in making their respective determinations to fund and provide tax incentives and land for the new facility, to assess the potential adverse environmental impact on the Village of Canajoharie, which fell within their jurisdictions, as and to the same extent as did the Town of Florida. To that extent it would appear that Canajoharie's allegations were at least sufficient to confer standing against the IDA and Empire State.

The case is food for thought in that it raises the question whether the outcome of a SEQRA challenge can (or should) be different with respect to different agencies involved in the same action.

III. Conflicting Governmental Interests: Wireless Telecommunication Facilities

In *Port Washington Police District v. Town of North Hempstead*,[44] the Supreme Court, Nassau County held that the *In re County of Monroe*[45] balancing of public interests test applied to determine whether the plaintiff-Police District was subject to the permitting requirements of the Town's Wireless Telecommunications Facilities Law and that the interests balanced in favor of the Police District and it was therefore exempt from such law.

The facts in this case were undisputed. The Police District provides police services to its district in Port

Washington, which is located entirely within the Town of North Hempstead. At present, there is an antenna on the police station which is used exclusively by the Police District to, among other things, communicate with officers in the field. The current antenna is not adequate to meet the Police District's needs and therefore the Police District sought to have it replaced with a new, 70-foot antenna.[46]

The Town's Code includes as Chapter 75 a Wireless Telecommunications Facilities ordinance ("Chapter 75"). Chapter 75, among other things, sets forth the approval process that an applicant must follow if it wishes to install a telecommunications antenna on its property. It also provides a list of entities that are exempt from the requirements of the Chapter. The Police District is not an exempt entity.[47]

The Police District sought to install the antenna on its building and the Town took the position that a permit was required under Chapter 75. The Police District brought the instant action challenging the Town's position on the grounds that it is immune from local zoning laws under the *County of Monroe* balancing of public interest test and therefore is not subject to the requirements of Chapter 75.[48] Pursuant to the *County of Monroe* balancing of public interest test, a court must consider various factors, which are set forth below, to determine whether one governmental entity is immune from the zoning and land use regulations imposed by a separate governmental entity.[49] The Town argued that the Police District is subject to the permitting requirements of Chapter 75 because it is not one of the entities listed as being exempt from the requirements of that Chapter. The Town further argued that since Chapter 75 is not a zoning ordinance, the *County of Monroe* balancing of public interests test is not applicable.[50] Thus, the issue before the Court was whether the *County of Monroe* balancing of public interests test was applicable, and, if so, whether the Police District was exempt from the requirements of Chapter 75. It answered both questions in the affirmative.[51]

The Court held that the *County of Monroe* balancing of public interests test was applicable, notwithstanding the fact that Chapter 75 was not called a zoning law, since Chapter 75 is a law through which the Town seeks to control how property is used.[52] In applying the *County of Monroe* balancing of public interest test, a court must consider the following factors: "'the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests.'"[53]

Applying this standard, the Court found that the Police District should be immune from Chapter 75 because there is a safety need for the Police District to replace the antenna to ensure adequate coverage and communications with officers throughout the District. It reasoned that although the Town offered to expedite the review process, the review process could nevertheless be long and complicated and during that time the communication needs of the Police District would be unmet.[54] Further, the Court reasoned that the installation of the larger antenna on the Police District building would not have a negative aesthetic impact on the surrounding area due to the character of the surrounding area. Finally, the Court reasoned that exempting the Police District from the regulations would not be detrimental to the Town's authority to regulate other wireless telecommunication facilities within the Town.[55]

IV. State Agency Enforcement of Federal Regulations

In *Lamar Central Outdoor, LLC v. State*,[56] petitioner, Lamar Central Outdoor, LLC, was engaged in the business of constructing, selling and leasing outdoor advertising billboards. The Ninth Ward Memorial and Service League, an affiliate of the American Legion (hereinafter the "American Legion"), owns an approximately 3/10-acre parcel in a one- and two-family medium density residence district of the City of Albany. The property lies within 660 feet of an interstate highway and within a "billboard zone" created by the City of Albany in 2003 as part of its comprehensive zoning plan. The American Legion operates an American Legion Post on the property which is, under the Albany Code, a commercial use which is maintained on the property as a prior nonconforming use, having been established before the residential zoning of the district in which it lies.[57]

In 2006, as part of the settlement of a litigation (which is not described in the opinion), the City of Albany issued a building permit to Lamar for the construction of a billboard on the American Legion property. Lamar entered into a lease with the American Legion and applied to the DOT for a permit to construct the billboard. The DOT denied the permit application on the ground that the property is located in a residential district and not in a commercial or industrial zone as required by Highway Law § 88 and the regulations promulgated pursuant thereto at 17 N.Y.C.R.R. § 150.5(b)(1).

In June of 2007 the city rezoned the American Legion property (and only that property) from the R2B (the two-family residence district), to C-1, a commercial district. Lamar submitted a new permit application to the DOT with a copy of the ordinance, and the DOT again denied the application, refusing to recognize the zone change for purposes of outdoor advertising control, on the ground that, since the properties surround-

ing the property continued to be zoned R2A and R2B, Albany's rezoning did not constitute part of a comprehensive zoning plan, but had been adopted solely for the purpose of permitting the billboard.[58]

Petitioner commenced an Article 78 proceeding challenging the DOT's denial of its permit application; Supreme Court granted the petition, the DOT moved for leave to reargue or renew, and the Court denied its motions.[59] On the DOT's appeal, the Third Department reversed.[60]

The Federal Highway Beautification Act ("FHBA"), 23 U.S.C. § 131, controls the placement of billboards along interstate highways and requires states to effectively control such billboards or suffer the penalty of losing ten percent of their federal highway funds. In general, FHBA allows billboards to be constructed within 660 feet of an interstate highway, but only on properties which lie within commercial or industrial zones. Highway Law § 88 was enacted in compliance with FHBA and authorizes the DOT to regulate the placement of billboards along highways pursuant to national standards promulgated by the United States Secretary of Transportation. The Commissioner of Transportation promulgated state regulations controlling the erection of billboards including 17 N.Y.C.R.R. §150.5(b)(1) (hereinafter the "State Regulations") which in effect incorporate the standards of the FHBA and the regulations promulgated pursuant thereto (the "Federal Regulations").[61]

The Federal Regulations, at 23 C.F.R. § 750.708(b), include a provision clearly intended to prevent municipalities from spot-zoning properties solely for the purpose of doing an end-run around the prohibition of billboards in other than commercial and industrial districts. Specifically, 23 C.F.R. § 750.708(b) provides that "Action which is not part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes."[62] The DOT relied on the Federal Regulations (as incorporated in the State Regulations) in denying a permit to Lamar.[63]

The lower court, in nullifying the DOT's action, made a determination that it did not owe deference to the DOT's interpretation of 23 C.F.R. § 750.708(b) because the DOT, in turn, had not followed the federal interpretation of that regulation, as set forth in a legal opinion issued by chief counsel of the Federal Highway Administration which stated that the purpose of the regulation was to avoid "sham zoning" and that rezoning will be considered a "sham" if the action "'is primarily to allow billboards in areas that have none of the attributes of a commercial or industrial area.'"[64] The Supreme Court found that, given the long-standing commercial use of the American Legion property, such rezoning did not provide a valid basis for the DOT's refusal to grant the permit as, arguably, the rezoning merely reflected the actual nature of use and character of the American Legion property which did, therefore, have commercial attributes.[65]

The case raises a question as to the limits of a state agency's prerogatives when it is interpreting and enforcing a federal regulation. At the root of the Appellate Division's decision is an examination of what degree of deference an agency's determination is to be accorded when the state agency is in fact enforcing a regulation not of its making, particularly when that interpretation arguably conflicts with the interpretation of that same provision by the federal agency that promulgated it. Lamar had argued in the lower court that the DOT lacked authority to enforce the regulation because the limitations it imposed on the acceptability of local zoning for purposes of billboard control contradicted the language of the Federal Highway Beautification Act.

The Third Department, in a fairly learned analysis, looked at the question in two stages. First, it viewed 23 C.F.R. § 750.708(b) just as it would any regulation that the DOT is empowered to enforce, and accordingly applied the rule that "'the construction given statutes and regulations by the agency responsible for their administration will, if not irrational or unreasonable, be upheld.'"[66] The court found that the DOT's interpretation of FHBA and the Federal Regulations was, given all of the facts, not unreasonable and accordingly should be upheld. Having done that, and recognizing that its conclusion that the DOT's interpretation and application of 23 C.F.R. § 750.708(b) was not irrational "leaves unresolved the underlying question of the regulation's validity," the court, exercising its authority pursuant to CPLR 103(c), partially converted the proceeding to one for declaratory judgment on this issue.[67]

Notwithstanding language in the FHBA recognizing the "full authority" of the state to zone property for commercial purposes and providing that such action will be "accepted" for purposes of the FHBA, the court examined the legislative history of the FHBA and determined that Congress did not intend that broad language to strip the Secretary of Transportation of regulatory authority sufficient to prevent states from taking zoning actions intended solely to permit billboards along interstate highways and upheld the validity of the Regulation.[68]

V. Replacements in Kind

Chatham Towers, Inc. v. New York City Police Department[69] is a lower court case which merits inclusion in this quarterly update only because it addresses a subject near and dear to the heart of one of your authors, namely, the provision in the SEQRA Regulations that the "replacement, rehabilitation or reconstruction of

a structure or facility, in kind, on the same site . . ." is a Type II Action, and is thus exempt from SEQRA review. 6 N.Y.C.R.R. § 617.5(c)(2).

What appears to be the straightforward language of the Regulation in fact leaves many questions unanswered. This case recognizes and addresses the question, inherent in the phrase "in kind," of what is to be taken as the existing condition when the use of the property has ceased, entirely or in part, for a period of time. In other words, whether the existing condition is the disused parcel (in which case no actual use can be "in kind") or whether the phrase "in kind" can be taken to encompass a return to a prior use. New York County Supreme Court, at least, answers the question in the only rational way – finding that an intervening fallow period does not disqualify the property from being treated "in kind" with a use that had existed in the recent past.

Briefly summarized, the case involved a challenge by neighborhood property owners to a proposal by the New York City Police Department to establish a so-called joint operations command (JOC) inside an existing building adjacent to One Police Plaza in New York City. The building in question had formerly housed a 911 call center, the use of which had been discontinued in the year 2000. The action at issue was the proposed renovation (not the demolition and replacement) of the existing building.[70] Respondents argued that the proposed renovation of the building is a Type II Action because the replacement of the 911 call center that previously existed on the site with the JOC was in fact a replacement in kind.[71] Petitioners argued that "the most previous use of the building is as a vacant structure." The court found that "this argument is untenable. A period of inactivity is not a 'use,' and, in any event, the subject building is still being used, on its lower levels for parking and storage."[72]

The court cited with approval *New York City Coalition for Preservation of Gardens v. Giuliani*.[73] In that case the City proposed building separate row houses on lots which had once contained low-rise tenements but which in intervening years had been used as community gardens. In that case, the court found that since the property had housed buildings "not very long ago," buildings of a different but similar type now constituted a replacement in kind.[74]

The language still leaves open the question of how long ago is too long ago. Hardly earth-shaking, but interesting nonetheless.

Endnotes

1. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820 (2d Dep't September 29, 2009).
2. *Village of Canajoharie v. Planning Board of the Town of Florida*, 63 A.D.3d 1498, 882 N.Y.S.2d 526 (3d Dep't 2009).
3. *Lamar Central Outdoor, LLC v. State*, 64 A.D.3d 944, 882 N.Y.S.2d 743 (3d Dep't 2009).
4. *Port Washington Police District v. Town of North Hempstead*, 2009 WL 2477633 (Sup. Ct., Nassau Co. August 12, 2009).
5. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045 (Sup. Ct., N.Y. Co. 2009).
6. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820 (2d Dep't September 29, 2009).
7. *Id.* at 1.
8. *Id.* at 1–2.
9. *Id.* at 2.
10. *Id.*
11. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 2 (2d Dep't September 29, 2009).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 3.
16. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 3 (2d Dep't September 29, 2009); *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 17 Misc.3d 694, 842 N.Y.S.2d 887 (Sup. Ct., Westchester Co. 2007).
17. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 3 (2d Dep't 2009).
18. *Id.* at 4.
19. *See Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 5-6 (2d Dep't September 29, 2009) (discussing *Ostroff v. Sacks*, 64 A.D.2d 708, 407 N.Y.S.2d 546 (2d Dep't 1978); *Holy Spirit Ass'n for Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 458 N.Y.S.2d 920 (2d Dep't 1983)).
20. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 5 (2d Dep't September 29, 2009).
21. *Id.*
22. *Id.* at 6–7.
23. *Id.* at 12.
24. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 2 (2d Dep't September 29, 2009).
25. *Id.* at 8–9.
26. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 9 (2d Dep't September 29, 2009).
27. *Id.* at 11.
28. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 8-12 (2d Dep't September 29, 2009).
29. *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 2009 WL 3135820, 8 (2d Dep't September 29, 2009).
30. *Id.* at 10.
31. *Village of Canajoharie v. Planning Board of the Town of Florida*, 63 A.D.3d 1498, 882 N.Y.S.2d 526 (3d Dep't 2009).
32. *Id.* at 1499.
33. *Id.* at 1499–1500.
34. *Id.* at 1500 (the court notes that it was not entirely clear from the Planning Board's minutes whether site plan approval was granted for the project. However, since it was undisputed that all of the agencies involved treated the project as fully approved, the court apparently accepted that site plan approval was in fact granted).

35. *Village of Canajoharie*, 63 A.D.3d at 1500.
36. *Id.* at 1500–1501.
37. *Id.* at 1500.
38. *Id.* at 1501(citing, among other things, *Society of Plastics Industries v. County of Suffolk*, 77 N.Y.2d 761 (1991)).
39. *Village of Canajoharie*, 63 A.D.3d at 1501 (quoting *Saratoga Lake Protection and Improvement Dist v. Department of Pub. Works of the City of Saratoga Springs*, 46 A.D.3d 979 (2007)).
40. *Village of Canajoharie*, 63 A.D.3d at 1501 (quoting *Mobil Oil Corp. v. Syracuse Industrial Development Agency*, 76 N.Y.2d 428 (1990)).
41. *Village of Canajoharie*, 63 A.D.3d at 1501 (emphasis added, citations omitted).
42. *See, e.g.*, *Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359, 365-366 ("It is clear from the express terms of the statute and the regulations that environment is broadly defined…and expressly includes as physical conditions such considerations as 'existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.' Thus, the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment.").
43. *Village of Canajoharie*, 63 A.D.3d at 1501-1502 (internal citations omitted).
44. *Port Washington Police District v. Town of North Hempstead*, 2009 WL 2477633 (Sup. Ct., Nassau Co. August 12, 2009).
45. *In re County of Monroe*, 72 N.Y.2d 338, 340 (1988).
46. *Port Washington Police District v. Town of North Hempstead*, 2009 WL 2477633, 1 (Sup. Ct., Nassau Co. August 12, 2009).
47. *Id.* at 3.
48. *Id.* at 2.
49. *In re County of Monroe*, *supra.*
50. *Id.* at 3.
51. *Id.* at 3–5.
52. *Port Washington Police District v. Town of North Hempstead*, 2009 WL 2477633, 4 (Sup. Ct., Nassau Co. August 12, 2009).
53. *Id.* (quoting *Town of Hempstead v. State*, 42 A.D.3d 527, 529, 840 N.Y.S.2d 123, 125 (2d Dep't 2007) (quoting *In re County of Monroe*, *supra*)).
54. *Port Washington Police District v. Town of North Hempstead*, 2009 WL 2477633, 4 (Sup. Ct., Nassau Co. August 12, 2009).
55. *Id.* at 5.
56. *Lamar Central Outdoor, LLC v. State*, 64 A.D.3d 944, 882 N.Y.S.2d 743 (3d Dep't 2009).
57. *Id.* at 945.
58. *Id.* at 945–946.
59. *Id.* at 946.
60. *Id.* at 951.
61. *Lamar Central Outdoor, LLC*, 64 A.D.3d at 946.
62. *Id.* (quoting 23 C.F.R. § 750.508(b)).
63. *Lamar Central Outdoor, LLC*, 64 A.D.3d at 946.
64. *Id.* at 947.
65. *Id.*
66. *Id.* at 946 (citations omitted).
67. *Id.* at 948–949.
68. *Lamar Central Outdoor, LLC*, 64 A.D.3d at 949–951.
69. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045 (Sup. Ct., N.Y. Co. 2009).
70. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045, 1 (Sup. Ct., N.Y. Co. 2009).
71. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045, 2-3 (Sup. Ct., N.Y. Co. 2009).
72. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045, 5 (Sup. Ct., N.Y. Co. 2009).
73. *New York City Coalition for Preservation of Gardens v. Giuliani*, 175 Misc.2d 644, 670 N.Y.S.2d 654 (Sup. Ct., N.Y. Co. 1997), *aff'd on other grounds*, 246 A.D.2d 399, 666 N.Y.S.2d 918 (1st Dep't 1998).
74. *Chatham Towers, Inc. v. New York City Police Department*, 24 Misc.3d 1238(A), 2009 WL 2517045, 5 (Sup. Ct., N.Y. Co. 2009).

Henry M. Hocherman is Secretary of the Executive Committee of the Municipal Law Section of the New York State Bar Association and Chair of that Section's Land Use Committee. He is a partner in the law firm Hocherman Tortorella & Wekstein, LLP of White Plains, New York. Mr. Hocherman is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.

Noelle V. Crisalli is a member of the Land Use Committee of the Municipal Law Section of the New York State Bar Association and is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the *Pace Environmental Law Review* and an Honors Fellow with the Land Use Law Center.

The Clear Recovery Zone Concept: Does a Municipality Have a Duty to Remove Fixed Objects from the Roadside?

By Karen M. Richards

In New York State, a municipality owes a non-delegable duty to adequately design, construct, and maintain its roadways in a reasonably safe condition.[1] Generally, this duty is limited to those paved portions of the road intended for vehicular use because "travel beyond those limits on unimproved land adjacent to the roadway is generally not contemplated or foreseeable, and, therefore, the municipality is under no duty to maintain it."[2] Many courts have held that a municipality is not liable for injuries sustained by a plaintiff in a collision with a fixed object placed within the right-of-way but outside the travel portion of the highway.[3] The courts recognize that certain risks are unavoidable, especially in rural areas where utility poles, drainage ditches, culverts, trees, and shrubbery are often located close to the traveled portion of the highway.[4] "But for the careful driver, the placement of these items near the pavement creates no unreasonable danger. Often they simply enhance the beauty of the highway, prevent the flooding of roadways and serve the needs of the area residents."[5] Thus, the courts have been reluctant "to impose a duty upon [a municipality] which transcends that imposed by reasonable care and foresight resulting in conversion of the [municipality] into an insurer of the safety of its highways."[6]

There may be instances, however, where a municipality has a duty to maintain a "clear recovery zone" outside the paved portions of the road. A clear recovery zone "is an area without fixed objects that is adjacent to a highway and intended to provide safe passage and a recovery area for vehicles that veer off the roadway."[7] It is designed to give motorists enough time to safely recover their vehicles which have veered off the paved portion of the roadway. The idea of a "clear recovery zone" or "forgiving roadside" has been evolving within the engineering community since the mid-1960s.[8] The American Association of State Highway and Transportation Officials ("AASHTO") has been spearheading the concept of a forgiving roadside, and it has been issuing recommendations regarding a clear recovery zone since 1967.[9] While AASHTO recognizes that not all objects can be removed from the roadside, it recommends providing an area off the roadway that is free of physical obstruction, thus eliminating objects such as trees, drainage structures, utility poles, and other fixed objects from the roadside.[10]

The clear recovery zone concept was argued by the plaintiff in *Cave v. Town of Galen*.[11] The plaintiff was traveling about 50 miles per hour on a rural road when, as she crested a hill, she saw a horse-drawn buggy traveling in the opposite direction. Believing the buggy was going to turn in front of her, she hit her brakes, lost control of her car, and traveled some 16 feet off the side of the road before spinning and striking a wooden hitching post embedded in concrete. The force of the impact dislodged the post from the ground.

The plaintiff alleged that, due to the presence of the post on the side of the road, the town was negligent in failing to maintain a clear recovery zone. The court rejected this argument and noted that:

> Where New York courts have recognized viable claims for municipal liability for roadside accidents in this State, they have not done so by creating a general duty of care to ameliorate all roadside conditions potentially hazardous to an errant motorist, as the clear recovery zone concept would suggest. Rather, our courts have focused on those situations where the municipality has created or could reasonably foresee a risk of roadside injury greater than the inherent risk that at any time and at any point for a variety of reasons a motorist may drive of[f] the road. To impose a liability based simply upon failure to abate this inherent risk would effectively make a municipality, under the 'pain of civil liability,' the 'insurer of the safety of its highways,' something our courts have declined to do (citation omitted). Undoubtedly, it would be desirable for municipalities to design highways and adjacent areas so that no accidents would ever occur. The clear recovery zone guidelines devolving from the forgiving roadside concept are certainly salutary in this respect, but aspirational and not alone a basis to define or measure the legal duty of a municipality to the motoring public.[12]

Thus, as a general rule, courts have found that a municipality "is not required to undertake expensive reconstruction of highways simply because the design standards for highways have been upgraded since the time of the original construction (citation omitted)."[13] There are, however, exceptions to this general rule which may require the use of new design standards.[14]

For example, a municipality may be required to comply with design standards adopted after the highway was constructed if the municipality undertakes "significant repair or reconstruction" that would allow it to integrate the new design standards.[15] Merely repaving a road is not a significant repair or reconstruction which would trigger requiring a municipality to maintain a clear recovery zone.[16]

In *Hay v. State of New York,*[17] the claimant was injured when her vehicle collided with a roadside tree stump. When a deer crossed into the roadway in front of her vehicle, she swerved and braked, causing her car to leave the roadway and sideswipe some trees located 10-15 feet off the pavement. Her car continued traveling about 30 feet until it collided head-on with a tree stump located about three feet from the edge of the pavement, causing the claimant's injuries. She brought an action against the State, alleging that the State was negligent in failing to remove the stump and in failing to provide a 30-foot clear zone along the side of the roadway. The claimant contended that the State had a duty to conform to clear recovery zone standards because it had engaged in reconstruction of the highway. The only work done by the State, however, was to overlay the existing roadway. The State did not rip out, rebuild, or reconfigure the roadway, and the area outside the shoulders of the road had not been changed at all. The court found that repaving the road "did not give rise to an obligation to comply with modern safety standards inasmuch as there was no significant repair, modernization or correction of the road itself (citation omitted)."[18]

In *Ryan v. State of New York*, [19] the driver was fatally injured in 1999 when her car left the highway and proceeded down into an adjoining drainage ditch and continued a short distance until it struck a concrete headwall. The highway was an old highway, which was last reconstructed in 1931–1932 with some unspecified activities occurring in the 1950s. In 1993, the State undertook a bridge reconstruction project which also included some redesign and rebuilding of the adjoining highway approaches. The claimants contended that the bridge reconstruction project was a significant repair or reconstruction that triggered a duty to establish a clear recovery zone at the accident site. The judge disagreed. Even though the accident site was located within the contract limits of the reconstruction of the bridge and approaches, under the contract, the concrete headwall was not within the approach area designated for reconstruction, and the existing road near the headwall was only being milled and retopped. Those limits on the scope of the project did not require compliance with guidelines for clear recovery zones.[20]

A history of prior accidents may also require a municipality to modify its original highway design plan. A history of prior accidents may put the municipality on notice that the object presented a specific dangerous condition. However, in order to utilize evidence of prior accidents as providing the municipality with notice, it must be established "that the prior accidents were, in their relevant details and circumstances, substantially similar to the subject accident (citation omitted)."[21]

In *Rittenhouse v. State of New York*,[22] the decedent was fatally injured in a one-car accident when the vehicle she was driving left the highway and struck a tree some 20 feet from the edge of the pavement. The executor of the decedent's estate claimed that the prior accident record of the section of the road where the accident occurred, the evidence of frequent need to replace knocked-down guideposts, and the scarring of trees put the State on notice that the tree struck by the decedent's car was a hazard requiring its removal. The court disagreed because there was no evidence that the prior accidents involved vehicles leaving the highway and colliding with trees or that there were any other pertinent circumstances in the prior accidents similar to the accident involving the decedent.

In conclusion, without a pointed accident history or a significant repair or reconstruction of the roadway, current case law demonstrates that the clear recovery zone concept does not create a retroactive standard of care.

Endnotes

1. *Friedman v. State of New York*, 67 N.Y.2d 271 (1986).
2. *Stiuso v. City of New York*, 87 N.Y.2d 889 (1995); *see Tomassi v. Town of Union*, 46 N.Y.2d 91 (1978).
3. *Tomass*i, 46 N.Y.2d 91; *Clark v. City of Lockport*, 280 A.D.2d 901, 720 N.Y.S.2d 687 (4th Dep't 2001), *lv. to appeal denied*, 96 N.Y.2d 932 (2001); *Kinne v. State of New York*, 8 A.D.2d 903 (3d Dep't 1959), *aff'd,* 8 N.Y.2d 1068 (1960); *Hill v. Town of Reading*, 18 A.D.3d 913, 915, 795 N.Y.S.2d 126,128 (3d Dep't 2005).
4. Tomassi, 46 N.Y.2d at 97–98.
5. *Id.*
6. *Id.* There are exceptions, such as where the municipality has negligently designed, installed, or maintained roadside improvements, where the highway was defectively designed or maintained, or where certain types of roadside hazards are so inherently dangerous that the municipality has a duty to prevent vehicles from leaving the road or to eliminate the danger if the vehicles do leave the road. *Cave v. Town of Galen*, 2004 WL 2169393 at *8-13 (Sup. Ct., Wayne Co. 2004), *aff'd*, 23 A.D.3d 1108, 804 N.Y.S. 2d 219 (4th Dep't 2005).

7. *Guan v. State of New York*, 55 A.D.3d 782, 783, 866 N.Y.S.2d 697, 698 (2d Dep't. 2008).
8. *Cave*, 2004 WL 2169393 at *2.
9. *Id.* at *3.
10. *Id.* at *3 fn.4.
11. 2004 WL 2169393 at *8-13 (Sup. Ct., Wayne Co. 2004), *aff'd*, 23 A.D.3d 1108, 804 N.Y.S. 2d 219 (4th Dep't 2005).
12. *Id.* at *8.
13. *Vizzini v. State of New York*, 278 A.D.2d 562, 563, 717 N.Y.S.2d 415, 417 (3d Dep't 2000); *accord Hay v. State of New York*, 60 A.D.3d 1190, 1192, 875 N.Y.S.2d 313, 315 (3d Dep't 2009).
14. *Guan v. State of New York*, 2007 WL 1789428 at *3 (Ct. Cl. 2007).
15. *Cave*, 23 A.D.3d at 1108, 804 N.Y.S. 2d at 220.
16. *Madden v. Town of Greene*, 64 A.D.3d 1117, 883 N.Y.S. 2d 392 (3d Dep't 2009).
17. 60 A.D.3d 1190; *see also Guan*, 2007 WL 1789428.
18. *Hay*, 60 A.D.3d at 1192, 875 N.Y.S.2d at 315.
19. 2005 WL 1215966 (Ct. Cl. 2005).
20. In the area of design, a municipality is entitled to the defense of qualified immunity if its study of a traffic condition was adequate or there was a reasonable basis for its plan. *Id.* at *8. The court in *Ryan* found that while in hindsight it appeared "tragically arbitrary that the shoulder and drainage reconstruction on the 1993 bridge project would have terminated just to the north of the area of the accident," given the absence of an accident history and the funding limitations, the determination to defer ditch replacement work represented a matter of judgment which entitled the State to the defense of qualified immunity. *Id.* at *9. If, however, a municipality studied a dangerous condition which resulted in the formulation of a remedial plan, "an unjustifiable delay in implementing the plan constitutes a breach of the municipality's duty to the public just as surely as if it had totally failed to study the known condition in the first instance." *Friedman v. State of New York*, 67 N.Y.2d 271, 286 (1986). However, the defense of qualified immunity may still apply if the municipality undertook a project, but because of its nature was phased in over a long period of time and the motorist went off the unfinished portion of the road. *Guan*, 2007 WL 1789428 at *4.
21. *White v. Timberjack, Inc.*, 209 A.D.2d 968, 630 N.Y.S.2d 1005 (4th Dep't 1994); *accord Vega v. Jacobs*, 84 A.D.2d 813, 444 N.Y.S.2d 132 (2d Dep't 1981).
22. 134 A.D.2d 774, 521 N.Y.S.2d 824 (3d Dep't 1987).

Ms. Richards is an Associate Counsel, Office of University Counsel, the State University of New York. The views expressed are her own and do not necessarily represent the views of the State University of New York or any other institution with which she is or has been affiliated. Ms. Richards represented the town in *Cave v. Town of Galen.*

Municipal Law Section
Annual Meeting

WEDNESDAY, JANUARY 27, 2010 Hilton New York 1335 Avenue of the Americas, New York City	THURSDAY, JANUARY 28, 2010 Hilton New York 1335 Avenue of the Americas, New York City
Executive Committee Meeting **3:00 p.m. - 5:00 p.m.** New York Suite, 4th Floor	**Morning Program, 9:00 a.m.** Sutton Parlor North, 2nd Floor **Committees Luncheon, 12:15 p.m.** Madison Suite, 2nd Floor **Afternoon Program, 1:45 p.m.** Sutton Parlor North, 2nd Floor

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of up to 6 credit hours, consisting of four credit hours in areas of professional practice, one hour of skills and one credit hour in ethics. The four credit hours in professional practice will not qualify for credit for newly admitted attorneys because it this is not a basic practical skills program. However, the one credit hour in skills and one credit hour in ethics will qualify as credit for newly admitted attorneys.

Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. ***This discount applies to the educational portion of the program only.*** Under that policy, any member of our Association or non-member who has a genuine basis of his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact Linda Castilla at New York State Bar Association, One Elk Street, Albany, New York 12207.

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For overnight room accommodations, please call the Hilton New York at 1-800-445-8667 and identify yourself as a member of the New York State Bar Association. Room rates are $239.00 for single/double occupancy. Reservations must be made by Wednesday, December 23, 2009. You can also reserve your overnight room on the web at www.nysba.org/10accommo. Rates are subject to applicable taxes.

For questions about this specific program, please contact Linda Castilla at 518-487-5562. **For registration questions only, please call 518-487-5621.**

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9:00 - 9:05 a.m. **Welcoming Remarks and Business Meeting**
Professor Patricia E. Salkin
Section Chair

9:05 - 9:10 a.m. **Presentation by The New York Bar Foundation**

9:10 - 9:15 a.m. **The New Municipal Law Formbook - Presentation by Herbert Cline**

9:15 - 10:05 a.m. ***Emergency Preparedness - From Swine Flu to Floods***

Discussion of health emergencies as well as natural disasters and terrorism; use of emergency powers including quarantine and a review of powers and limitations of different levels of government.

Panelists: **Lai Sun Yee, Esq.**
Former Naval Postgraduate School Center for Homeland Defense and Security
Distinguished Fellow/Former Assistant Deputy Secretary for Homeland Security for New York

Martha Mann Alfaro, Esq.
Deputy Chief-Division of Legal Counsel, New York City Law Department

10:05 - 10:55 a.m. ***When a Lawyer Speaks, Does Anyone Listen?***

Actor/Attorney Matthew Arkin, Esq. will present a skills program for attorneys on improving their public presentation and speaking skills. Learn to connect with your audience so you can be heard and understood.

Speaker: **Matthew Arkin, Esq.**
New York City

10:55 - 11:15 a.m. **Coffee Break**

11:15 - 12:15 p.m. ***Labor Issues for 2010***

Discussion of pressing labor issues from the management and union perspective, including: workforce reduction and how to avoid litigation when accomplishing workforce reduction, alternatives to workforce reduction (ie: other cost cutting measures), contract and collective bargaining issues as well as age discrimination.

Panel Chair: **Sharon N. Berlin, Esq.**
Lamb & Barnosky, LLP, Melville

Panelists: **Lorna B. Goodman, Esq.**
Nassau County Attorney, Mineola

Seth H. Greenberg, Esq.
Greenberg Burzichelli Greenberg P.C., Lake Success

12:15 - 1:45 p.m. **Committees' Luncheon -** Madison Suite, 2nd Floor
For those not involved in the committee meetings, lunch will be on your own.
If you are interested in joining a committee, please attend.
Advance registration is required. Please email your reply to lcastilla@nysba.org.
Responses must be received on or before Thursday, January 21, 2010.

AFTERNOON PROGRAM - Sutton Parlor North, 2nd Floor

1:45 - 2:45 p.m. ***Hot Topics***

Focus on topics of current interest to municipal attorneys: Internal Investigation of a Municipal Department; RLUIPA and Objections to Municipal Code Enforcement by Religious Communities; and Adopting Green Ordinances.

Panelists: **Philip Zisman, Esq.**
Inspector General, City of Yonkers

Amy M. Lavine, Esq.
Government Law Center, Albany Law School, Albany

Professor Patricia E. Salkin
Government Law Center, Albany Law School, Albany

2:45 - 3:35 p.m. ***Consolidation of Municipalities: It May Be Coming Your Way***

A look at the new state laws relative to consolidations, how they operate and the role of the municipal attorney in consolidations driven by municipal leaders and those driven by citizen efforts.

Panel Chair: **Darrin B. Derosia, Esq.**
New York State Department of State, Albany

Panelists: **J. Wade Beltramo, Esq.**
General Counsel, New York State Conference of Mayors, Albany

Representative of the New York State Attorney General's Office (Invited)

3:35 - 3:50 p.m. **Coffee Break**

3:50 - 4:40 p.m. ***Is It Time for a New Ethics Code for Municipalities?***

Presentation focusing on the issues which indicate the need for a new ethics code to govern conduct at the municipal level.

Speaker: **Steven G. Leventhal, Esq.**
Leventhal and Sliney, LLP, Roslyn

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.

Bylaws
Owen B. Walsh
PO Box 448
Madison, CT 06443-0448
obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Mark Davies
NYC Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
mldavies@aol.com

Steven G. Leventhal
Leventhal & Sliney, LLP
15 Remsen Ave
Roslyn, NY 11576-2102
Sleventhal@ls-llp.com

Green Development
Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
dspitzer@hodgsonruss.com

Legislation
A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

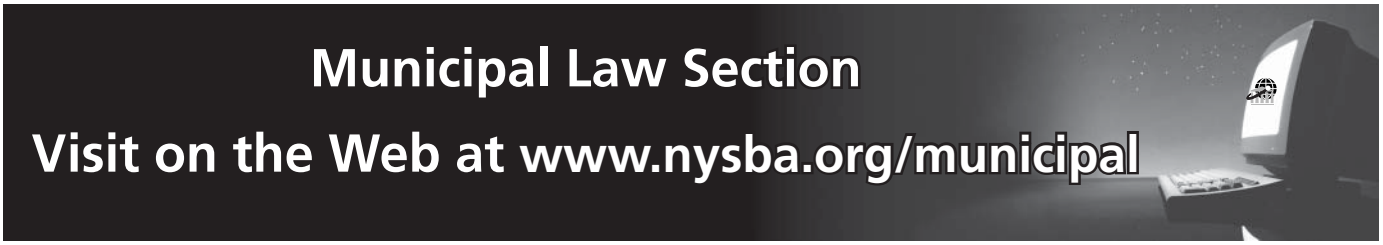
Darrin B. Derosia
New York State Department of State
One Commerce Plaza, Suite 1120
99 Washington Avenue
Albany, NY 12231-0001
darrin.derosia@dos.state.ny.us

Land Use and Environmental
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, Suite 701
White Plains, NY 10601
h.hocherman@htwlegal.com

Membership
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue—Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atlevin@nysbar.com

Municipal Finance & Economic Development
Kenneth W. Bond
Squire Sanders & Dempsey LLP
30 Rockefeller Plaza, 23rd Floor
New York, NY 10112
kbond@ssd.com

Technology
Howard Protter
Jacobowitz and Gubits LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586-2029
hp@jacobowitz.com



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Lester D. Steinman
Editor-in-Chief

MUNICIPAL LAWYER

Editor-in-Chief
Lester D. Steinman
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, NY 10606
Lsteinman@pace.edu

Executive Editor
Ralph W. Bandel

Assistant Editor
Jeane S. Kanes

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