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A Message from the Chair

Patricia Salkin

Wow. It is hard to believe that my term as Chair of the Municipal Law Section has come to an end. The time flew by in large part because of the high level of activity and engagement by Section members across the State. In reflecting on the last two years, I owe a debt of gratitude to many Section members and State Bar staff (especially our Section liaison, Linda Castilla) who made the journey to get here enjoyable, challenging and rewarding at the same time. I especially want to thank our active past chairs who were always ready, when called upon, to provide me with sage counsel and constant support.

A heartfelt thank you goes to all of the members of the Executive Committee who supported the concept of enlarging the Committee for purposes of recruiting a more diverse group of talented lawyers for leadership positions representing greater ethnic, cultural, gender and age diversity. We added to and strengthened our committee structure, making room for a new committee on green development, beginning to reinvigorate our technology committee and efforts, opening up committee meetings and information exchanges for greater participation through teleconferences (such as the recent meeting sponsored by the labor law committee) and creating a committee coordinator function to help support and sustain a new level of activity. A special task force helped us to develop and to provide timely comments on mandate relief to the Governor's Task Force, and we played a leadership role in our own State Bar Task Force on Government Ethics. One of the meeting highlights for me was our Washington, D.C. fall meeting where Section members from across the State were admitted to practice before the U.S. Supreme Court. Perhaps this was most memorable since I savor what is likely to be the only motion I will make before the Supreme Court (that was moving the admission of our members).

A few other things set in motion that will hopefully pay dividends in the future have been an effort to develop more avenues of information sharing as a benefit of membership. A book on local government ethics is likely to be published before the end of the calendar year, and a template for a blog

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on municipal law has been developed and hopefully this initiative will be fully launched in the fall. With our outreach efforts doubling and tripling thanks to incoming Chair Howard Protter, our membership numbers are certain to continue to increase. To help keep costs affordable for members to attend Section meetings, we have focused considerable energy on sponsorship support, an initiative that we continue to refine with success.

With my last official act as Chair complete (writing this column), I officially pass the gavel to Howard Protter of Jacobowitz and Gubits, LLP. For those of you who have not met Howard, I urge you to come to our fall joint meeting with the Environmental Law Section in October in Saratoga Springs. He leads by example and is ready to engage each and every Section member in meaningful participation to further enhance the vibrancy of this Section. If you have ever considered getting more involved, writing an article for the *Municipal Lawyer*, volunteering to work on a committee, authoring a blog post or delivering a CLE session—your contributions are wanted and welcome. Please contact any member of the Executive Committee listed in this publication and put more activity in your membership for a different kind of benefit. As for me, I look forward to representing the Section in the State Bar House of Delegates for the next year.

Patricia E. Salkin

Note: Patty Salkin's term of office ended on June 1. Howard Protter is the new Section Chair.

From the Editor

Municipal cooperation and shared services initiatives offer local government officials attractive means to deliver services more efficiently and at lower costs. State enabling authority is the touchstone of all intergovernmental cooperation efforts. In New York, potential sources of that authority are the State Constitution or State Statutes, both generally enabling municipal cooperation and authorizing specific vehicles for intergovernmental action, and municipal home rule powers.

Intergovernmental Relations Councils

Article 12-C of the General Municipal Law authorizes any number of municipalities to create an Intergovernmental Relations Council ("IRC") to "strengthen local governments and to promote efficient and economical provision of local governmental services within or by such participating municipalities."[1] An IRC is empowered to conduct surveys, studies and research programs and to disseminate the results to aid in the solution of local government problems; to consult and cooperate with state, municipal and public or private agencies in matters affecting local government; to devise and recommend practical ways and means to promote greater economy and efficiency in the planning and delivery of municipal services; and to provide a forum for local governments to explore and develop areas for intermunicipal cooperation.

Intermunicipal Agreements

Pursuant to Article IX, §1(c) of the New York State Constitution, the Legislature has empowered municipal corporations,[2] and certain county and town districts "to enter into agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint water, sewage or drainage project."[3] A joint service is broadly defined to mean "joint provision of any municipal facility, service, activity, project or undertaking or the joint performance or exercise of any function or power which each of the municipal corporations or districts has the power by any other general or special law to provide, perform or exercise, separately and, to effectuate the purposes of this article, shall include extension of appropriate territorial jurisdiction necessary therefore."[4]

An intermunicipal agreement[5] may contain provisions relating to:

- The equitable allocation of revenues and costs based upon full valuation of real property, the amount of services rendered, benefits received or conferred, "or on any other equitable basis, including the levying of taxes and assessments to pay such costs on the entire area of the corporation or district, or on a part thereof, which is benefited or which receives the service."
- Employment of personnel
- Responsibility for the establishment, maintenance and operation of the joint service or joint water, sewage or drainage project and the fixing and collecting of charges, rates, rents or fees
- Purchasing and making contracts
- Acquisition, ownership and maintenance of property
- Obtaining federal and state aid, and accepting gifts
- Adjudication of disputes
- Addition to or withdrawal from membership
- Other matters as reasonably necessary to effectuate and carry out the joint service or a joint water, sewage or drainage project

The duration of an IMA, unless otherwise provided by law, may extend up to a period of five (5) years. When issuance of indebtedness is involved in the agreement, the term of the agreement may extend up to a maximum period of time equal to the period of probable usefulness established by § 11.00 of the Local Finance Law for the object or purpose for which the indebtedness was issued. Agreements may be renewed upon conclusion of the terms established.[6]

Provision is also made for cities, towns and villages, among other entities, to construct and develop excess drainage facilities, and to incur indebtedness therefor, for the purpose of agreeing to convey and dispose of stormwaters and other surface and sub-surface waters collected by another public corporation or improvement district.[7] Alternatively, two or more municipalities may enter into agreements to provide for common drainage facilities, including joint acquisition, construction, operation and maintenance.[8] The acquisition and development of such facilities may involve the participating municipalities acting jointly or through one of the contracting municipalities acting for all of the participating municipalities.[9] Such joint contracts shall include provisions for the "acquisition and construction of the common facilities; the management and operation of the system; the method of fixing the proportionate share of each participating municipality and all other matters necessary to effectuate such an arrangement."[10]

Article VIII, § 1 of the New York State Constitution creates an exception from the general constitutional prohibition on the gift or loan of credit by permitting "two or more [local government] units [to] join together pursuant to law in providing [and financing] any municipal facility, service, activity or undertaking which each of such units has the power to provide separately." Each such local government unit, as authorized by the legislature and subject to constitutional tax and debt limits, may "contract joint or several indebtedness, pledge its or their faith and credit for the payment of such indebtedness for such joint undertaking and levy real estate or other authorized taxes or impose charges therefor" to finance such joint projects. The Legislature is further empowered to regulate the amount of such indebtedness, the manner in which it is incurred and the method for allocation and apportionment of such indebtedness among joint project participants. Under Local Finance Law § 15.10(c), joint indebtedness may be apportioned and allocated on the basis of "a ratio of full valuations of real property or on a basis of the amount of services rendered or to be rendered, or benefits received or conferred or to be received or conferred, or on any other equitable basis."

Additional authority to enter into intermuncipal agreements for the purpose of cooperatively undertaking comprehensive planning and land use regulation is set forth in Town Law § 284, Village Law § 7-741 and General City Law § 20-g. By the enactment of those sections, the legislature sought:

> to promote intergovernmental cooperation that could result in increased coordination and effectiveness of comprehensive planning and land use regulation, more efficient use of infrastructure and municipal revenues, as well as the enhanced protection of community resources, especially where such resources span municipal boundaries.

Under those statutes, cities, towns and villages may enter into agreements with each other to, among other things:

> (c) create a comprehensive plan and / or land use regulations which may be adopted independently by each participating municipality;
>
> (d) provide for a land use administration and enforcement program which may replace individual land use administration and enforcement programs, if any, the terms and conditions of which shall be set forth in such agreement; and
>
> (e) create an intermunicipal overlay district for the purpose of protecting, enhancing or developing community resources that encompass two or more municipalities.[11]

Joint agreements under these sections may contain such provisions as deemed appropriate by the parties, including provisions relating to the items delineated in General Municipal Law § 119-o as previously discussed. Local laws may be amended, as appropriate, to incorporate the provisions contained in such joint agreements.

In this Issue

In her message from the Chair, Patricia Salkin reflects on her term and introduces her successor, Howard Protter. Harvey Randall, a former Principal Attorney for the New York State Department of Civil Service, reviews the operation of provisions of the Civil Service Law pertaining to public employees who are unable to perform the duties of their positions because of an injury or disease or a mental or other disability.

Steven Leventhal, a member of the firm of Leventhal & Sliney in Roslyn, instructs government attorneys on how to recognize common-law conflicts of interest and recommends appropriate courses of conduct to ensure that municipal decision making is not tainted by those conflicts.

The scope of municipal immunity in negligence cases is examined by Lalit Loomba, of counsel to Wilson, Elser, Moskowitz, Edelman & Dicker, LLP in White Plains. In their quarterly land use review, Henry Hocherman and Noelle Crisalli Wolfson of Hocherman Tortorella & Wekstein, LLP in White Plains review recent cases addressing the required findings for the imposition of recreation fees, the duration of offers of dedication and the efficacy and enforceability of conditions on subdivision plats intended to restrict future development.

Endnotes

1. General Municipal Law §239-n.
2. Municipal corporation is defined as a county outside New York City, a city, town or village, fire district, school district or board of cooperative education services, General Municipal Law §119-n(a).
3. General Municipal Law §119-o.
4. General Municipal Law §119-n(c).
5. General Municipal Law §119-o.
6. General Municipal Law §119-o(2)(j).
7. General Municipal Law §119-c.
8. General Municipal Law §119-g.
9. General Municipal Law §119-h.
10. General Municipal Law §119-g.
11. Town Law §284(4); Village Law §7-714(4); General City Law §20-g(4).

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Governmental Immunity in Negligence Cases: Recent Developments

By Lalit K. Loomba

Introduction

Major developments in the area of municipal law do not occur often, but this may well be one of those times. In a recent decision, *McLean v. City of New York*,[1] the Court of Appeals significantly expanded the scope of municipal immunity in negligence cases. Six months later, the Chief Judge of the Court wrote a concurring opinion openly questioning *McLean*. And in the ensuing months, the Chief Judge's former court, the Appellate Division, First Department, has refused to follow *McLean*, and instead has introduced its own analysis on the issue of municipal immunity. Since municipal immunity is an important defense in negligence cases, a defense made all the more important by the fiscal struggles facing municipalities throughout the State, an understanding of this area of the law, and where it appears to be heading, will be of assistance to municipal officials and lawyers practicing in New York.

Background

At common law, municipalities were immune from liability in tort for the misfeasance of their officers and employees in conducting governmental, as opposed to proprietary, functions. In New York State, that general immunity was surrendered in 1929 with the enactment of former section 12-a, now section 8, of the Court of Claims Act.[2] But despite the general waiver of immunity set forth by statute, courts limit the scope of government liability in negligence cases. In *De Long v. County of Erie*,[3] a case involving the alleged failure to provide adequate police protection in response to a 911 emergency call, the Court of Appeals explained this in terms of separation of powers, declaring that the "proper allocation of public resources and available police services is a matter for the executive and legislative branches to decide."[4] In a later case, the Court of Appeals put it this way: "no government could possibly exist if [it] was made answerable in damages whenever it could have done better to protect someone from another person's conduct. Illustrations (and damages) would be infinite, varying only in the degree of harm."[5] In every case where governmental immunity for negligence is at issue, courts have to balance multiple competing tensions: the rights of injured parties; protection of individual municipal officials, including police officers, from the chilling effect of exposure to tort liability; and the societal interest in limiting government liability in tort.

In the context of police protection cases—*i.e.*, where the plaintiff alleges that a municipality negligently failed to provide police protection—the New York Court of Appeals has applied a relatively consistent rule. Municipalities are generally immune from liability in such cases because the government does not owe a duty of care to the public in general.[6] An exception lies, however, when the facts are sufficient to create a special duty (or special relationship) between the government and the plaintiff. When a special relationship exists, the defense of governmental immunity is not available.

Somewhat less consistent has been the approach to governmental immunity in non-police protection cases. These cases discuss the immunity issue in terms of the distinction between ministerial and discretionary acts. Earlier Court of Appeals decisions held that municipalities and municipal officials were always immune from allegations that a discretionary act was committed negligently, while, on the other hand, liability could attach to a ministerial act if otherwise tortious and not justified under a statutory command.[7] Later cases, however, narrowed the scope of immunity in the context of discretionary acts. Borrowing the "special relationship" exception developed in police protection cases, the Court of Appeals held, in 2004, that governmental immunity would not apply to a discretionary act if the plaintiff could establish the existence of a special relationship with the municipality.[8]

In 2009, however, the landscape of governmental tort immunity in New York seemed to shift back in favor of municipalities. In *McLean v. City of New York*,[9] the Court of Appeals re-affirmed its earlier decisions in non-police protection cases, holding that a municipality can never be liable for discretionary conduct, and further held that liability for ministerial acts can exist only where a special relationship can be established. Moreover, while *McLean* is not a police protection case, its holding, by its plain terms, applies to all cases in which the issue of governmental immunity is raised, including police protection cases. Since whether, and to what extent, a municipality should provide police

protection is almost always discretionary, *McLean* effectively eliminated the "special relationship" exception to governmental immunity in police protection cases in favor of a general rule of governmental immunity. Whether it has or not remains unclear as of this writing, however, since at least one appellate court, the Appellate Division, First Department, appears not to have followed *McLean*, and has, instead, introduced its own gloss upon the analysis of governmental immunity.

Key Decisions Leading up to *McLean*

A. Police Protection Cases: The Special Relationship Exception

In the police protection context, the Court of Appeals has generally applied the "rule that a municipality cannot be held liable for negligence in the performance of a governmental function, including police and fire protection, unless a special relationship existed between the municipality and the injured party."[10] In other words, the existence of a "special relationship" was seen as an exception to the general rule of municipal immunity in police protection cases.

In *De Long v. County of Erie*,[11] the plaintiff called for emergency help via a newly established 911 system. The 911 operator told plaintiff that help would be there "right away," but took down the wrong address. By the time police arrived at the plaintiff's home, less than two blocks from the police station, she had been killed by a home invader. The court found that a special relationship existed because: (i) the municipality decided to provide a 911 telephone service; (ii) the plaintiff's cries for help were not refused; (iii) the plaintiff was told that help would be there "right away"; and (iv) given the proximity of the plaintiff's home to the police station, it could not be said that being given that assurance played no role in the plaintiff's decision to stay inside, thus further exposing herself to the very danger that the police told her they would eliminate.

A special relationship, allowing for government liability, similarly was found in *Sorichetti v. City of New York*.[12] In *Sorichetti*, a young girl was stabbed and seriously injured by her father, who was exercising temporary custody. There was an order of protection against the father in favor of the mother (plaintiff). The mother complained to the police that she feared the father would injure the girl, but the police would not send a squad car or otherwise intervene, even after the father was late in returning the girl. The Court found that a special relationship between plaintiff and City of New York did exist, citing (i) the order of protection; (ii) the police department's actual knowledge of the father's violent history with the plaintiff; (iii) "its response to [the plaintiff's] pleas for assistance on the day of the assault; and (iv) [her] reasonable expectation of police protection."[13] The Court also stressed the direct contact between the plaintiff and the police officers in finding that a special relationship existed.

Two years later, in *Cuffy v. City of New York*,[14] the Court of Appeals summarized prior precedent to set forth a four-part test to determine when a "special relationship" between a municipality and an individual exists. To satisfy this test, a plaintiff must prove: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking."[15]

Cuffy involved a long-standing feud between landlords who owned a two-family home (the Cuffys), and their downstairs tenants (the Aitkins). There had been a history of confrontations between them, and the police had intervened on prior occasions. Mr. Cuffy asked for police protection following an incident between his wife and Mr. Aitkins, and was told that something would be done "first thing in the morning." The police did not come the next morning, or even early the next afternoon. Later that day, Mrs. Cuffy and the Cuffys college-age son were assaulted by Mr. and Mrs. Aitkins and seriously injured.

Applying the four-part test to these facts, the Court held that the son's claim was barred because of the absence of any direct contact between him and the police, and that Mr. and Mrs. Cuffy's claims were barred because their own "injuries cannot be deemed to have been the result of their justifiable reliance on the assurances of police protection that [Mr.] Cuffy had received."[16] The Court relied particularly on two facts in holding that justifiable reliance did not exist. First, Mrs. Cuffy periodically looked out the window, and by noon realized that the police had not, in fact, come "first thing in the morning" as promised. Second, Mrs. Cuffy had entertained relatives that day, and Mr. Cuffy had been in and out of the house twice, and had plans to go to dinner later that night. The court reasoned, therefore, that the Cuffys were not trapped or otherwise unable to take steps to protect themselves when they knew that the requested police assistance had not arrived.

The next police protection case reached the Court of Appeals in 1997. In *Mastroianni v. County of Suffolk*,[17] a husband killed his estranged wife. There was a history of violence between the two and the wife had obtained an order of protection. The wife called police claiming that the husband had violated the order of

protection. When the police responded, the husband was drinking at a neighbor's house. They did not arrest the husband, despite the wife's frantic pleas that she was in danger. Minutes after the police left, the husband killed her.

Applying the four-part test set forth in *Cuffy*, the court held that the first two elements of the test—(i) assumption of a duty by the municipality and (ii) knowledge that inaction could lead to harm—were satisfied by the issuance of the order of protection. The third test was easily met because of the direct communication between the wife and the police. Finally, the Court found the wife had justifiably relied on the police conduct, stating: "The direct contact between the wife and the officers coupled with the circumstances giving rise to the officers' own belief that the order of protection had been violated support the conclusion that the wife justifiably relied upon the officers' aid in securing the protection such order was intended to afford."[18]

In its case-law through 1997, the Court of Appeals clearly recognized an exception to the general rule of governmental immunity in police protection cases. The exception turned on whether the plaintiff could establish the existence of a special relationship with the government.

B. Non-Police Protection Cases

In the non-police protection context, governmental immunity case law developed on a different track. Here, the issue of governmental immunity turned on the nature of the governmental act in question. The court distinguished two broad categories: (i) discretionary acts, which "involve the exercise of reasoned judgment which could typically produce different acceptable results"; and (ii) ministerial acts, which involve "direct adherence to a governing rule or standard with a compulsory result." *Tango v. Tulevich.*[19] The Court of Appeals had developed the following rule: (i) when a municipal official performs a discretionary act, he "is not liable for the injurious consequences of that action even if resulting from negligence or malice"; but (ii) when an official performs a ministerial act, he can be liable if the conduct "is otherwise tortious and not justifiable pursuant to statutory command."[20] For example, in *Tango*, a father alleged that a probation officer negligently allowed his estranged wife to take custody of two minor children. The court found that the probation officer's decision was discretionary, not ministerial, and thus she and the other municipal defendants were "immune from common-law liability."

The same rule was applied in *Lauer v. City of New York.*[21] In *Lauer,* a father alleged that the New York City Medical Examiner negligently failed to forward exculpatory evidence to police, as a result of which the father faced criminal charges over his three-year-old son's death. The misconduct on the part of the medical examiner was deemed ministerial, not discretionary. This finding did not automatically subject the municipality to liability, but rather merely eliminated immunity as a defense. Examining the statute that created the Office of the Medical Examiner, the court held that no duty was owed to the father and his claim was dismissed. Interestingly, the court also discussed and applied the four-part special relationship test set forth in *Cuffy.* The court held that the plaintiff did not meet this test because of the lack of direct contact between him and the medical examiner and the absence of facts that could establish justifiable reliance.

From the perspective of *Tango* and *Lauer,* at least as of 2000, the Court of Appeals had developed and applied a rule in non-police protection cases under which the threshold issue was whether the challenged conduct was ministerial or discretionary. If the conduct was discretionary, then the municipality was immune from negligence liability; if ministerial, then liability depended on whether the conduct was tortious and upon existence of a special relationship.

In 2004, however, the Court of Appeals extended the special relationship test (*i.e.*, exception to governmental immunity) to discretionary acts as well. In *Pelaez v. Seide,*[22] the court decided two companion lead paint cases in which plaintiffs alleged governmental negligence in failing to comply with obligations created by the New York Lead Poisoning Prevention Act.[23] The court treated these obligations as discretionary, and citing *Lauer,* stated the general rule: "[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in [a] municipality's liability even when the conduct is negligent."[24] But the Court then mentioned the "narrow class of cases in which a duty is born of a special relationship between the plaintiff and the governmental entity," and held that "[w]hen such a relationship is shown…the government is under a duty to exercise reasonable care toward the plaintiff."[25] Hence, *Pelaez* appears to create a special-relationship exception to discretionary municipal immunity in the non-police protection context.

Indeed, the decision in *Pelaez* presents a lengthy and detailed discussion which lifted the special relationship exception from the limited context of police protection cases. The court in *Pelaez* specifically identified three ways to establish a special relationship: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from

that duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation."[26] Applying the facts of the cases before it, the court discussed each test in detail, and found that a special relationship did not exist.

The following year, the Court of Appeals decided two companion cases involving the question of governmental immunity, and following *Pelaez,* again applied the special relationship test to determine whether an exception to the general rule of municipal immunity should apply to discretionary governmental acts. *Kovit v. Estate of Hallums*.[27] The cases decided in *Kovit* involved police officers, but not the issue of police protection. In the first case, a police officer responded to a traffic accident, and directed one of the parties involved to clear his vehicle from the intersection. Instead of driving forward, the party backed up and struck the plaintiff, seriously injuring him. In the companion case, the plaintiff had pulled off of a highway suffering from chest pains and stopped on the shoulder. A police officer directed the plaintiff to drive forward and take the next exit. The plaintiff lost control of his car and was seriously injured. Applying the special relationship test in each case, the court held that the plaintiffs could not establish the existence of a special relationship with the municipalities, and hence the municipal and municipal employee defendants were protected by governmental immunity.

The Decision in *McLean*

Against this background, the Court of Appeals decided *McLean v. City of New York*.[28] In *McLean*, a young child was seriously injured when she fell off a bed at a family day care home. Plaintiff alleged that the City of New York had negligently failed to comply with its obligations under a statutory program which required registration of day care homes. The plaintiff argued that a special duty was created under the relevant provisions of Section 390 of the Social Services Law, and because the City voluntarily assumed a duty to plaintiff. The Court rejected these arguments, finding that no private right of action was created under Section 390, and that under *Cuffy*'s special relationship test, the plaintiff could point to no promise or action by which the City assumed a duty.

The plaintiff argued further that even if there was no special relationship, she could still prevail because the negligence was based on a ministerial, not a discretionary act. The Court rejected this argument in a lengthy discussion of the ministerial / discretionary distinction. Summarizing *Tango* and *Lauer,* the Court stated as follows: "discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found."[29] The Court then discussed the inconsistent language (and reasoning) in *Pelaez* and *Kovit*, which implied that the special relationship test exception could exist even when liability was premised on discretionary acts. Speaking in stark, almost blunt, language the Court stated as follows:

> If there is an inconsistency, we resolve it now: *Tango* and *Lauer* are right, and any contrary inference that may be drawn from…*Pelaez* and *Kovit* is wrong. Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.[30]

Turning to the facts in *McLean,* the Court assumed, in the plaintiffs' favor, that the alleged negligent conduct was ministerial in nature. But in the absence of facts demonstrating a special relationship, the plaintiff's negligence case was dismissed.

Implications of *McLean*

While *McLean* was not a police protection case, the bright-line language of its holding suggests that it covers police protection cases as well. Indeed, whether, and to what extent, to provide police protection is discretionary in nature, involving "the exercise of reasoned judgment which could typically produce different acceptable results."[31] Under *McLean,* there is no need to consider the special relationship exception when misconduct involves a discretionary act. Hence, under *McLean,* most negligence cases in which the plaintiff alleges misfeasance in the failure to provide police protection can be resolved quite simply—the municipality and municipal officials are always immune.

In fact, this view was expressed by Chief Judge Lippman in *Dinardo v. City of New York,*[32] a case decided six months after *McLean*. *Dinardo* involved a teacher who was attacked by a student. The teacher alleged that school officials negligently ignored her warnings that the student posed a danger. The City argued that the question of whether or not to take disciplinary action against the student was discretionary, and that under *McLean* it was therefore immune. The Court of Appeals did not specifically reach that argument. Instead, in a memorandum decision, it assumed that the decision was ministerial in nature, but held that there was no special relationship between the teacher and the City.

Concurring in the result, Judge Lippman took the opportunity to comment on *McLean*, the decision

in which he took no part. Judge Lippman saw no "convincing rationale" to effectively overrule *Kovit, Pelaez* and *Cuffy* on the basis of *Tango* and *Lauer*. In his view, *McLean* artificially elevated the ministerial / discretionary distinction to an importance that it never had. He concluded that "[b]ecause almost any governmental act may be characterized as discretionary, *McLean* too broadly insulates government agencies from being held accountable to injured parties."[33] With respect to police protection cases, Judge Lippman wrote: "Unfortunately, under the rule announced in *McLean*, a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment."[34]

Early Reaction to *McLean*

McLean has been followed without comment or significant deviation by the Second and Fourth Departments.[35] On the other hand, Judge Lippman's former court, the First Department, has refused to follow *McLean*, insisting that the threshold issue in governmental immunity cases is still whether a special relationship exists, notwithstanding *McLean's* clear language that the nature of the act (*i.e.*, discretionary vs. ministerial) is controlling.

In *Valdez v. City of New York*,[36] the plaintiff was shot and seriously injured by her former boyfriend. The assault occurred within 24 hours after a police officer, who knew that there was an order of protection against the boyfriend, told the plaintiff that the police would arrest him "immediately." At the suggestion of the police, the plaintiff returned to her apartment (instead of going to her grandmother's house) and stayed inside for 24 hours. She did not receive word from the police that her boyfriend had been arrested. When she opened the door of her apartment to take out the garbage, the boyfriend attacked her.

The First Department began its analysis with this: "As a threshold matter, we reject the notion that [*McLean*] and the Court's follow-up decision in [*Dinardo*] constrain our decision in this case."[37] Instead, noting the numerous citations to *Cuffy* in the *McLean* decision, the First Department concluded that the Court of Appeals "did not intend to eliminate the special duty exception."[38] "On the contrary," the court continued, "both *McLean* and *Dinardo* support the proposition that the starting point of any analysis as to governmental liability is whether a special relationship existed; and not whether the governmental action is ministerial or discretionary."[39] It seems puzzling that the First Department would rest its reasoning merely upon the frequency of citations to *Cuffy* without regard to the underlying substance of those references, but that appears to be the court's only rationale.

The *Valdez* court found it did not have to reach the discretionary / ministerial issue because the plaintiff failed to establish justifiable reliance, one of the component parts of the *Cuffy* four-step special relationship test. Applying this test, the First Department held that the plaintiff did not establish justifiable reliance because she could point to no factual evidence, apart from her own subjective belief, that the police were going to act.

The *Valdez* decision is striking in its willingness to disregard the plain language in *McLean* concerning the discretionary / ministerial issue. In *McLean*, the Court of Appeals' analysis starts with asking whether the governmental act in question is ministerial or discretionary. In *Valdez*, the First Department read *McLean* as requiring lower courts to first decide whether a special relationship exits. Nevertheless, *Valdez* does not appear to be an aberration. In *Albino v. The New York City Housing Auth.*,[40] a non-police protection case in which the Appellate Division, First Department, rejected a negligence claim against the City of New York because the facts did not support the existence of a special relationship, the court cited its own decision in *Valdez* for the proposition that "'both *McLean* and *Dinardo* support the position that the starting point of any analysis as to governmental liability is whether a special relationship existed, and not whether the governmental action is ministerial or discretionary.'"[41]

Conclusion

Cases involving municipal immunity from negligence claims are driven by their unique and often compelling facts, and courts must strike a balance between the competing tensions presented by these difficult cases. The approach by the Court of Appeals in these cases has not been entirely consistent, and the scope of governmental immunity has changed over time. Most recently, in *McLean*, the Court of Appeals has shifted its approach in favor of municipalities by adopting a broad rule of immunity in cases involving the exercise of discretion, and allowing liability in cases involving ministerial conduct only where the plaintiff can demonstrate the existence of a special relationship. Despite *McLean's* clear holding, the First Department has refused to follow it and has placed its own gloss on the analysis, focusing first on the existence of a special relationship. It remains to be seen whether the other Appellate Departments will follow the First Department's view, or whether the Court of Appeals will take advantage of a future opportunity to reinforce, or perhaps, clarify its holding in *McLean*.

Endnotes

1. 12 N.Y.3d 194 (2009).
2. N.Y. Court of Claims Act, §8(a) (McKinney's 1989); *Bernardine v. City of New York*, 294 N.Y. 361, 365 (1945).
3. 60 N.Y.2d 296, 469 N.Y.S.2d 611 (1983).
4. *Id.* at 305.
5. *Pelaez v. Seide* 2 N.Y.3d 186, 205-206, 778 N.Y.S.2d 111, 122 (2004).
6. *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987).
7. *Tango v. Tulevich*, 61 N.Y.2d 34, 417 N.Y.S.2d 73 (1983).
8. *Pelaez*, *supra*, 2 N.Y.3d at 198-99, 778 N.Y.S.2d at 117.
9. 12 N.Y.3d 194, 878 N.Y.S.2d 238 (2009).
10. *De Long v. County of Erie*, 60 N.Y.2d 296, 304, 469 N.Y.S.2d 611, 615 (1983).
11. *Id.*
12. 65 N.Y.2d 461, 492 N.Y.S.2d 591 (1985).
13. *Id.* at 468.
14. 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987).
15. *Id.* at 260, 513 N.Y.S.2d at 374.
16. *Id.* at 263, 513 N.Y.S.2d at 376-77.
17. 91 N.Y.2d 198, 668 N.Y.S.2d 542 (1997).
18. *Id.* at 205, 608 N.Y.S.2d at 545-46.
19. 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 78 (1983).
20. *Id.*
21. 95 N.Y.2d 95, 711 N.Y.S.2d 112 (2000).
22. 2 N.Y.3d 186, 778 N.Y.S.2d 111 (2004).
23. N.Y. Public Health Law §§1370-1376 (McKinney's).
24. *Pelaez*, 2 N.Y.3d at 198-99, 778 N.Y.S.2d at 116-17.
25. *Id.* at 117, 778 N.Y.S.2d at 198.
26. *Id.* at 199-200, 778 N.Y.S.2d at 199.
27. 4 N.Y.3d 499, 797 N.Y.S.2d 20 (2005).
28. 12 N.Y.3d 194, 878 N.Y.S.2d 238 (2009).
29. *Id.* at 202.
30. *Id.* at 203.
31. *Tango*, 61 N.Y.2d at 41.
32. 13 N.Y.3d 872, 893 N.Y.S.2d 818 (2009).
33. *Id.* at 877.
34. *Id.*
35. *See Reid v. City of New York*, __ A.D.3d __, 912 N.Y.S.2d 410 (2d Dep't 2010); *Carson v. Town of Oswego*, 77 A.D.3d 1321, 908 N.Y.S.2d 482 (4th Dep't 2010).
36. 74 A.D.3d 76, 901 N.Y.S.2d 166 (1st Dep't 2010).
37. *Id.* at 77, 901 N.Y.S.2d at 167.
38. *Id.* at 78.
39. *Id.*
40. __ A.D.3d __, 912 N.Y.S.2d 27 (1st Dep't 2010).
41. *Id.*, 912 N.Y.S.2d at 31, quoting *Valdez*, 74 A.D.3d at 78.

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How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest

By Steven G. Leventhal

In New York, most ethics problems can be analyzed by considering three questions: (1) does the conduct violate Article 18 of the New York General Municipal Law; (2) if not, does the conduct violate the local municipal code of ethics; and (3) if not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.[1] Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in most municipal contracts that he or she has the power to control individually or as a board member;[2] from accepting gifts or favors worth $75.00 or more where it might appear that the gift was intended to reward or influence an official action;[3] from disclosing confidential government information;[4] from receiving payment in connection with any matter before his or her own agency;[5] and from receiving a contingency fee in connection with a matter before any agency of the municipality.[6]

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.[7] A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.[8] Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the "revolving door" (post-employment contacts with the municipality), establishing rules for the wearing of "two hats" (the holding of two government positions, or moonlighting in the private sector)[9] and, in some cases, prohibiting "pay to play" practices and the political solicitation of subordinates, vendors and contractors.

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.[10]

In *Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo*,[11] decided by the Second Department in 1979, the Town Board voted to approve a major development project. The decisive vote was cast on the eve of a change in the composition of the Board by a trustee who was Vice President of a public relations firm under contract to the developer's parent company. The Court inferred that the Board's approval of the development project would likely result in the public relations firm obtaining all of the advertising contracts connected with the project. Despite the fact that the Board member's vote did not violate Article 18 of the New York General Municipal Law,[12] the Court annulled the Board's decision approving the development project.

The *Tuxedo* Court concluded that "while the anathema of the letter of the law may not apply to… [the trustee's] action, the spirit of the law was definitely violated. And since his vote decided the issue… [the Court] deemed it egregious error." The Court directed the Board member's attention to the

> soaring rhetoric of Chief Judge Cardozo… '[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.' Thus, [the Court concluded that] the question reduces itself into one of interest. Was… [the trustee's] vote prompted by the 'jingling of the guinea' or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar's wife, a public official must be above suspicion.

Reviewing decisions of the courts of other states, the *Tuxedo* Court concluded that "[a]n amalgam of those cases indicates that the test to be applied is not whether there is a conflict, but whether there might be…. It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."

Six years later, in *Matter of Zagoreos v. Conklin*,[13] the Second Department reaffirmed the principles announced in *Tuxedo*. There, a major, controversial development project was approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, the decisive votes were cast by two Board members who were employed by the applicant. At the Town Board, the decisive vote was cast by a trustee who was employed by the applicant. As in *Tuxedo*, the Court annulled the decisions of the ZBA and the Town Board approving the development project despite the fact that the respective board members' votes did not violate Article 18 of the New York General Municipal Law.[14]

The *Zagoreos* Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine "public confidence in the legitimacy of the proceedings and the integrity of the municipal government."

Further, the *Zagoreos* Court noted that the importance of the project to the applicant-employer was obvious, and that

> equally so are those subtle but powerful psychological pressures the mere knowledge of that importance must inevitably place on any employee of the… [applicant-employer] who is in a position to either effectuate or frustrate the project and who is concerned for his or her future with the… [applicant-employer]. Any attempt to disregard these realities would be senseless for the public is certainly aware of them.

The Court found that, even in the absence of any attempt by the applicant-employer to improperly influence the board member-employees, "human nature, being what it is… it is inconceivable that such considerations did not loom large in the minds of the three [board member-employees]. Under these circumstances, the likelihood that their employment by the… [applicant-employer] could have influenced their judgment is simply too great to ignore."[15]

In the years since *Tuxedo* and *Zagoreos* were decided, the appellate courts of this state have consistently reaffirmed the vitality of the principle that a prohibited conflict of interest may exist in the absence of a statutory prohibition, and that a common law conflict of interest may justify the judicial invalidation of a municipal action. Moreover, the application of this principle has not been limited to cases involving conflicts based on pecuniary interests or economic improprieties. A prohibited conflict of interest may exist, and that conflict may justify judicial invalidation of a municipal action, where the voting members of a municipal board have manifested bias or have prejudged an application.

In *Matter of Schweichler v. Village of Caledonia*,[16] three members of the Village Planning Board signed a petition in support of a developer's project and application for rezoning, and thus appeared to have impermissibly prejudged the application. In addition, the Planning Board's chairperson wrote a letter to the Mayor in support of the project and application for rezoning, stating that she "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free."

Despite the fact that the Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law,[17] the Fourth Department concluded in *Schweichler* that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.

A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.[18] In *Town of North Hempstead v. Village of North Hills*,[19] the Court of Appeals found that Village Board members were not disqualified from voting on an amendment to the Zoning Code that would allow cluster zoning of properties that they owned, where most land in the Village was similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters.[20]

In *Friedhaber v. Town Bd. of Town of Sheldon*,[21] the Fourth Department adopted the reasoning, and affirmed a decision by the Appellate Term, First Department, that distinguished between the "clear and obvious" conflict that would have arisen from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the zoning status of other properties in which they had no interest.[22]

The Appellate Term noted that there were a sufficient number of votes to approve the change in zoning status even if the Board members had

disqualified themselves. Indeed, all of the reported cases in New York that have invalidated municipal actions based on common law conflicts of interest involved decisive votes cast by conflicted members of voting bodies. However, it should be noted that recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.[23] The New York Attorney General has opined that:

> The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.
>
> Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.[24]

Accordingly, a municipal action that results from the influence or persuasion of a conflicted member of a voting body should also bear critical scrutiny and, where appropriate, judicial invalidation, even where the conflicted member refrained from voting.

Not every personal or private relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.[25] In *Ahearn v. Zoning Bd. of Appeals*,[26] the Third Department concluded that:

> …petitioner has shown nothing more than that, as active members of their community, the Board members have a variety of political, social and financial interests which, through innuendo and speculation, could be viewed as creating an opportunity for improper influence. For example, petitioner perceives a conflict of interest in the fact that the wife of one of the Board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. Petitioner also contends that since the applicant is a long-term member of the Board, other junior Board members might have viewed him as their leader and might have been influenced even though the applicant disqualified himself from any Board consideration of the application. Petitioner sees a similar conflict in the applicant's involvement in local politics, and in the fact that one of the Board members purchased homeowners' and automobile insurance from the applicant. Petitioner also contends that one of the Board members was improperly influenced since his mother-in-law voiced her criticism of opponents to the applicant's project. We are of the view that these claims, and others advanced by petitioner, do not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.

Nor will every financial relationship between a board member and parties interested in a matter before the board give rise to a disqualifying conflict of interest. In *Parker v. Town of Gardiner Planning Bd.*,[27] the Third Department observed that:

> Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act (citation omitted; emphasis added).

In *Parker*, the Board Chairman was President of a local steel fabrication and supply company that sold products to a local construction firm owned by one

of the applicant's principals. During the previous three years, the construction firm purchased between $400.00 and $3,000.00 in steel products from the Chairman's steel company. During the same period, the Chairman's steel company had annual gross sales of approximately $2,000,000.00 to $3,000,000.00.

Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the Chairman was required to recuse himself in the matter. However, the Town Board of Ethics reached a contrary conclusion, reasoning that the amount paid to the Chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest.

The *Parker* Court concluded that the determination of the Town Board of Ethics was rational and entitled to considerable weight, and found that "[u]nder these circumstances,…the likelihood that such a *de minimis* interest would or did in fact influence…[the Chairman's] judgment and/or impair the discharge of his official duties…[was] little more than speculative" (citations omitted).

In summary, courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearances are speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices, and should recuse themselves only when the circumstances actually merit recusal.[28] Such restraint should be exercised by the members of voting bodies, and in particular by legislators, because recusal and abstention by a member of a voting body has the same effect as a "nay" vote,[29] and, in the case of an elected legislator, also has the effect of disenfranchising voters.

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. These standards are derived from Article 18 of the New York General Municipal Law, local municipal codes of ethics, and from the application of common law principles.

Endnotes

1. For a helpful summary of Gen. Mun. Law Article 18, *see* Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC Municipal Lawyer, Summer 2005, Vol. 19. No. 3, pp. 10-12.
2. *See* Gen. Mun. Law §§800-805.
3. *See* Gen. Mun. Law §805-a.
4. *Id. N.B.* The phrase "confidential information" is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. *See* Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.
5. *Supra*, note 4.
6. *Id.*
7. *See* Gen. Mun. Law §806.
8. *See* Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.
9. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible, such as those of chief financial officer and auditor. *See People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); s*ee also*, 1997 Op. Atty. Gen. 14.
10. *See e.g., Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dept. 1985); *Matter of Tuxedo Conservation & Taxpayer Assn. v. Town Board of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).
11. 69 A.D.2d 320 (2d Dept. 1979).
12. The vote did not violate section 801 of the New York General Municipal Law (conflicts of interest prohibited) because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract but, in *Tuxedo*, there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because that section only requires the disclosure of any interest of an officer or employee in a land use applicant—it does not mandate recusal by the interested officer or employee.
13. 109 A.D.2d 281 (2d Dept. 1985).
14. As in *Tuxedo*, *supra*, the vote did not violate section 801 of the New York General Municipal Law (conflicts of interest

prohibited) because there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because that section only requires disclosure of any interest of an officer or employee in a land use applicant.

15. *See also Conrad v. Hinman*, 122 Misc.2d 531 (Onondaga Co. 1984) (Trial court annulled a change from residential to commercial use granted by a Village Board of Trustees based on an "…inference of [an] actual or apparent economic impropriety…" where the decisive vote was cast by a Village Trustee who was co-owner of the subject property and was also an employee of the intended purchaser).

16. 45 A.D.3d 1281 (4th Dept. 2007), *app. den.*, 10 N.Y.3d 703 (2008).

17. As in *Tuxedo* and *Zagoreos*, *supra*, the vote did not violate section 801 of the New York General Municipal Law (conflicts of interest prohibited) because there was no contract with the Village; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because the Planning Board members did not have an interest in the applicant as defined in that section. Further, section 809 of the New York General Municipal Law only requires disclosure of any interest of an officer or employee in a land use applicant.

18. *See e.g., Tuxedo*, *supra*.

19. 38 N.Y.2d 334 (1975).

20. *See also Byer v. Town of Poestenkill*, 232 A.D.2d 851 (3d Dept. 1996) (Town Board member not disqualified from voting on changes to zoning code that affected all property owners equally); *Segalla v. Planning Board of the Town of Amenia*, 204 A.D.2d 332 (2d Dept. 1992) (Planning Board member not disqualified from voting to approve master plan that affected nearly every property in the Town equally).

21. 16 Misc.3d 1140A (App. Term 1st Dept. 2007), *aff'd*, 59 A.D.3d 1006 (4th Dept. 2009).

22. *See also Peterson v. Corbin*, 275 A.D.2d 35 (2d Dept. 2000) (noting that "…in both *Tuxedo* and *Zagoreos*, the conflicts of interest on the part of the public officials were clear and obvious.").

23. 1995 Op. Atty. Gen 2; *see also Cahn v. Planning Bd. of the Town of Gardiner*, 157 A.D.2d 252 (3d Dept. 1990) (Planning Board members "…not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions….").

24. 1995 Op. Atty. Gen. 2.

25. *See Karedes v. Vil. of Endicott*, 297 A.D.2d 413 (3d Dept. 2002); *see also Matter of Lucas v. Board of Appeals of Vil. of Mamaroneck*, 14 Misc.3d 1214A (Westchester Co. 2007), *aff'd*, 57 A.D.2d 784 (2d Dept. 2008) (applying the "arbitrary and capricious" standard for proceeding under NY CPLR Article 78).

26. 158 A.D.2d 801 (3d Dept. 1990), *lv. den.*, 76 N.Y.2d 706 (1990).

27. 184 A.D.2d 937 (3d Dept. 1992), *lv. den.*, 80 N.Y.2d 761 (1992).

28. For a helpful discussion of the principles applicable to recusal and abstention, *see* Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA / MLRC Municipal Lawyer, Winter 2008, Vol. 22. No. 1, pp. 17-19.

29. *See* Gen. Const. Law §41.

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Leaves of Absences for Disability Pursuant to Civil Service Law Sections 71 and 72

By Harvey Randall

The New York State Civil Service Law, and other laws, rules and regulations, address the resolution of situations involving employees in the service of New York State as an employer, or employees of a political subdivision of the State, a BOCES or a school district, unable to perform the duties of their position because of an injury or a disease or a mental or other disability.

Civil Service Law §71 provides for leaves of absences and separations flowing from an occupational injury or disease (Workers' Compensation Leave) while Civil Service Law §72 provides for leaves of absence based on a finding that the individual is unable to satisfactorily perform the duties of the position because of a physical or mental disability that is not "job-related." Section 73 authorizes the termination of an individual following an absence or a leave pursuant to §72 for one year or longer.[1]

Typically a §71 leave is "automatic" in that it is triggered by the employee being unable to perform the duties of his or her position as a result of a work-related injury or disease within the meaning of the Workers' Compensation Law.

In most instances, the individual is absent from his or her position because he or she cannot, or does not, report to work because of the work-related incident. The employee is entitled to §71 leave by operation of law provided that his or her occupational injury or disease is not determined to be a permanent disability[2] insofar as his or her eventually resuming the duties of the position is concerned.

In contrast, §72 of the Civil Service Law authorizes an appointing authority to place an employee on leave of absence "involuntarily" if the employee is certified by qualified medical personnel as not physically or mentally fit to perform the duties of the position by reason of an illness or disability that is not job-related.[3]

In some instances a collective bargaining agreement negotiated pursuant to the Taylor Law[4] will set out procedures for the processing of §71 and, or, §72 leaves and terminations therefrom as well as the procedures to be followed in the event the employee seeks to return to his or her former position following the abatement of his or her disability to the extent that he or she can, once again, satisfactorily perform the duties of his or her position.

Although §71 leave and §72 leave are leaves without pay, the employee may elect to use some or all of his or her accumulated leave credits in order to remain on the payroll until they are exhausted. In some cases, the employee may be eligible for sick leave at one-half pay, be granted "advanced" sick leave or be awarded and use leave credits from a "sick leave bank" or similar "donated leave credit pool" to remain on the payroll before being placed on leave without pay status during his or her period of absence.[5]

Sections 71 Leaves of Absence

In the typical §71 situation the employee absents himself or herself from work following an occupational injury in contrast to the employer's unilaterally placing the individual on such leave.

Placing an employee on §71 leave does not excuse the filing of all required reports and claim forms for workers' compensation benefits that are required by the Workers' Compensation Law.

Litigation may arise should the employee's claim of having suffered an injury on the job be controverted by the employer or the employer's insurance carrier,[6] or the claim for workers' compensation benefits denied by the Workers' Compensation Appeals Board. In one such controverted claim case, *In re Klikocki*,[7] the Appellate Division sustained an arbitration award that resulted in the employee's dismissal after being found guilty of filing for workers' compensation benefits claiming a work-related injury when, in fact, the injury was not work-related.[8]

Other issues frequently before the court in §71 leave situations involve an individual who (1) has not been permitted to return to work notwithstanding his or her claim that he or she is physically or mentally able to do so or (2) objects to his or her being terminated by the appointing authority while on such leave.

An individual may be terminated while on §71 Workers' Compensation leave at the discretion of the appointing authority once the employee has been on

such leave for the minimum period set out by statute. Section 71 currently provides for a one-year minimum period for such leave except that in the event the individual suffered a non-permanent disability as the result of an assault sustained in the course of his or her employment, the minimum period for such leave is two years.

Although there is no requirement that §71 leave be limited to one year or two years, as the case may be, in *Duncan v. NYS Developmental Center*,[9] the Court of Appeals indicated that "termination" from such leave is authorized by the statute.[10]

Further, in *Russell v. Dunston*,[11] the United States Court of Appeals for the Second Circuit ruled that an appointing authority's failure to provide the employee with a pretermination notice of the expiration of his or her §71 leave and, or, a pretermination notice of the statutory period for filing an application for accidental disability retirement does not deny the employee due process.

In the event an employee has been terminated while on §71 leave, he or she may ask to be restored to his or her former position by submitting a request for reinstatement to the State Department of Civil Service, if an employee of a State department or agency, or to the municipal commission having jurisdiction over the position last held by such employee. Typically arrangements are made for a medical examination to be conducted by a medical officer selected by the Department of Civil Service or the responsible commission. Such a request, however, must be submitted to the appropriate central personnel agency, and not the employer, within one year of the abatement or termination of the employee's disability.[12]

If the medical officer certifies that the individual is physically and mentally fit to perform the duties of his or her former position, he or she is to be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or transferred to a vacant position for which he or she is eligible to be so transferred. If no appropriate vacancy is available, the individual's name is placed on a preferred list and he or she is eligible for reinstatement from the preferred list for a period of four years.[13]

In the event the medical officer determines that the individual is not then physically and, or, mentally fit to return to work, the employee may reapply for reinstatement at a later date. Absent a determination that the employee is "permanently disabled" there appears to be no bar to the employee's periodically reapplying for reinstatement to his or her former position.

Section 72 Leave of Absence

An individual rarely asks to be placed on §72 leave as a result of his or her suffering an injury or disease that is not job-related. Typically the process of placing an employee on such leave is initiated by the appointing authority based on its deciding that the employee is unable to perform his or her duties satisfactorily because of some injury or disease that is not work-related. Litigation may be initiated by the employee challenging the appointing authority's:

1. Electing to place the employee on §72 leave against his or her wishes; or
2. Rejecting the request made by an individual placed on §72 leave to be reinstated to his or her former position.

Except where the appointing authority determines that the individual's continued presence at the job site constitutes a danger to the individual or to his or her coworkers or to agency clients within the meaning of §72.5 of the Civil Service Law, the employee may not be placed on §72 leave until the procedural requirements, set out by Judge Haight of the U.S. District Court, Southern District of New York in *Laurido v. Simon*,[14] have been satisfied.

Judge Haight, after holding that a State employee was not provided the required due process in connection with his being placed on leave pursuant to §72 involuntarily, set out the following guidelines[15] for processing §72 leaves:

1. The employee must be given written notice why the appointing authority believes the employee is not mentally or physically fit to perform the duties of the position and then direct the employee to report for a medical or psychiatric examination.
2. The employee must be given written notice of the results of the examination.
3. If the appointing authority then places the individual on leave pursuant to §72, the individual must be advised of his or her right to appeal the appointing authority's determination and the appeal procedure to be followed.
4. An adversarial type hearing must be held before an impartial hearing officer. The employee is entitled to be represented by counsel and may present evidence on his or her own behalf at the hearing. If requested, the employee is to be given copies of his or her medical records and related data before the hearing.
5. The employee must be given written notice of the hearing decision, together with a statement

of the reasons and facts relied upon in support thereof.

Judge Haight noted that there might be compelling circumstances that would require the immediate removal of an employee from the work site for the safety of the employee, the employee's co-workers or the public, or for the proper conduct of business. Section 72.5 of the Civil Service Law permits the appointing authority to place an individual on leave pursuant to §72 without first holding the required medical examination and hearing if the appointing authority makes an affirmative determination that the worker's continued presence on the job is a danger to persons or property or would severely interfere with the operation of the agency.

The court also indicated that should the employee successfully challenge his or her being placed on leave pursuant to §72.5, reinstatement with back pay and benefits, together with the restitution of leave credits where appropriate, is to be provided to the individual as redress.

Section 72 also sets out the time limits that the appointing officer or the hearing officer must meet in considering an appeal from a determination to place an employee believed to be mentally or physically unable to perform the duties of his or her position on involuntary leave pursuant to §72:

1. A hearing must be scheduled within thirty days of the employee's request for a hearing;
2. The appointing authority must make its decision within 10 working days of the receipt of the hearing officer's determination; and
3. The entire procedure must be completed within 75 calendar days of the receipt of the employee's request for a review.[16]

What is the impact if either the appointing authority or the hearing officer fails to meet any of these deadlines?

In *Berberena v. Scully*,[17] a case involving a disciplinary action taken against a prison inmate, the court held that not deciding an appeal in a timely manner when the Rules of the Correction Commissioner provided that a determination was to be made within 60 days of the receipt of the appeal constituted a denial of due process. The court then granted the inmate's petition to set aside the decision issued resulting from the "Superintendent's (disciplinary) Hearing." If this decision is applied to hearing procedures being conducted pursuant to §72, probably the only valid basis for not meeting a statutory or regulatory deadline is that the employee involved asked for, and was granted, an extension or postponement of his or her hearing.[18]

In most instances the appointing authority's final determination is made following a hearing conducted by an independent hearing officer agreed to by both the appointing authority and the employee.[19] If the appointing authority's final determination is to place the employee on §72 leave, it may do so but the employee has the right to appeal that determination to the civil service commission having jurisdiction. The appointing authority must advise the employee of his or her right to appeal to the responsible civil service commission.[20]

Termination from Section 72 Leave Pursuant to Section 73

In *Prue v. Hunt*,[21] the Court of Appeals held that the requirements of due process announced in *Cleveland Board of Education v. Loudermill*,[22] "mandate that public employees discharged [pursuant to] Civil Service Law §73 be given pretermination notice and some minimal opportunity to be heard" before being so terminated.[23]

The appointing authority, said the court, could satisfy due process requirements "[i]n the context of §73 discharges" by providing the individual with an opportunity to (1) challenge the appointing authority's finding that he or she had been continuously absent for one year or more or (2) demonstrate that he or she was able to return to her position, "sufficient to serve 'as an initial check against mistaken decisions' and it 'need not definitively resolve the propriety of the termination.'" The Court of Appeals said that although due process did not require "a formal hearing prior to discharge" pursuant to §73, the terminated employee was entitled to a "full post-termination hearing" to resolve such issues.

Once terminated pursuant to §73, if the appointing authority declines to reinstate the individual when he or she asks to be reemployed, the individual must submit a formal request for reinstatement to the civil service agency having jurisdiction. This procedural requirement—the application must be made to the civil service agency and not the employer—was the key element considered by the court in *Armetta v. Town of Bethel*.[24]

There, Armetta advised the town that he was able to return to work and asked about the procedure to be followed to resume his employment. He was told to contact the Sullivan County Personnel Department. Claiming he had been wrongfully terminated, instead of contacting the Personnel Department, Armetta sued the town seeking a court order to compel it to give him a medical examination.

The Appellate Division ruled that the procedure to be followed in such cases is simple—§71 clearly

indicates the individual is to contact the responsible civil service department or commission, rather than his or her employer, to schedule the medical examination. Since Armetta had not done yet done this, the court dismissed his petition.

Section 73 contains similar language whereby "an employee may, within one year after the termination of the underlying disability, make application to the civil service department or municipal commission… for a medical examination." Presumably the courts would apply the *Armetta* rationale in deciding a challenge to the appointing authority's refusal to reinstate the individual absent his or her certification for reemployment by the civil service department or commission having jurisdiction.[25]

Section 72 of the Civil Service Law as an Alternative to Disciplinary Action

Clearly, §72 of the Civil Service Law permits an appointing authority to take steps to place an employee on an involuntary leave of absence without pay[26] if the individual is not performing the duties of the position satisfactorily and the appointing officer believes that the unsatisfactory performance is due to the employee having a physical or mental disability. This provision of law is being used with increasing frequency in lieu of initiating disciplinary action against an employee who is not performing satisfactorily because of alleged "incompetence" where a "disability defense" is advanced by the employee. However, the fact that an individual has a disability may not be sufficient to convert a disciplinary action into a "disability leave" situation.

In a disciplinary action in which an employee was charged with sleeping on duty, absence without leave, excessive lateness, and being discourteous to a supervisor, the employee's attorney moved to dismiss the disciplinary charges and convert the matter to a disability leave proceeding, claiming his client suffered from a disability. New York City Office of Administrative Tribunals and Hearings Administrative Law Judge Ingrid Addison denied the motion, ruling that an employer's duty to accommodate an employee's disability is triggered by the employee's request for an accommodation and is limited to disabilities known to the employer. Here, said Judge Addison, the employee never told the agency he suffered from a disability for which he needed an accommodation. Nor, said the judge, did the evidence establish that the employee's misconduct was caused by a disability.[27] The ALJ held that the disciplinary charges were proven in the course of the disciplinary hearing and recommended that the individual be terminated from his position.

Another example of an attempt to plead a "disability defense" to allegations of misconduct and, or, incompetence is found in *In re Considine v. Pirro*.[28] Here, the employee was charged, among other things, with "excessive absence" from her position. Considine contended that §72 barred the disciplinary action "because her absenteeism was caused by her physical incapacity." The Appellate Division held that her argument "was without merit." The court explained that placing an individual on leave pursuant to §72 required a finding that the employee is medically incapable to perform his or her job functions. However there was no such finding of unfitness in this instance. Accordingly, said the court, "the statute is not applicable," citing *In re Abdalla v. Fulton County*.[29]

In *Abdalla* the issue was "whether [the employee's] unreliability and its disruptive and burdensome effect on the employer rendered [the employee] incompetent to continue his [or her] employment." The Appellate Division held that disciplinary action pursuant to Civil Service Law was appropriate to adjudicate the incompetency charges based on Considine's excessive absences.

In *Dusanek v. Hannon*,[30] a decision that might affect the application of §72 in certain situations, a U.S. Circuit Court of Appeals held that a "state tenure system which permitted the discontinuation of the services of physically or mentally incapacitated employees is not unconstitutional." The Court said requiring an employee to defend himself in a dismissal proceeding, or to voluntarily accept a job change following a medical examination which found the employee unable to perform the duties of the position, was lawful.

Termination of Section 71 or Section 72 Leaves

Employees on leave pursuant to §71 or §72 may be terminated at the discretion of the appointing authority.

In a §71, Workers' Compensation leave situation, the employee may be terminated after being absent for a cumulative period of one year [two years in the event the absence results from an assault sustained in the course of his or her employment] or longer. For example, should an individual return from a §71 leave after an absence of six weeks, serve for six weeks and then absent himself of herself for three weeks because of a relapse attributed to the earlier injury and then again return to work, the cumulative period of absence is nine weeks.

If, however, the subsequent "three week absence" was due to a new occupational injury, a new §71 leave period is triggered and the cumulative period of absence for the first §71 leave is but six weeks and the second §71 leave's cumulative period of absence

is three weeks. In other words, §71 absences due to different triggering events are not "fungible."

In the case of an individual absent on leave pursuant to §72, the employee may be terminated at the appointing authority's discretion pursuant to §73 after being absent for a **consecutive period** of one year or longer. In contrast to a §71 situation, if the employee placed on leave pursuant to §72 is absent for six weeks and then is reinstated, only to again be placed on such leave by the appointing authority for the same reason, the employee is entitled to a new "consecutive period of absence" of one year or more commencing with his or her subsequent placement on §72 leave before he or she may be terminated pursuant to §73.

Again, as indicated earlier, an individual discontinued from service pursuant to either §71 or §73 is not terminated in the pejorative sense as the individual remains eligible for reinstatement to his or her former position once he or she has sufficiently recovered from the disability to be able to satisfactorily perform the duties of the position.

Another element to keep in mind: the Americans with Disabilities Act[31] mandates that the appointing authority provide a reasonable accommodation of the individual's disability before placing an employee on §72 leave or declining to reinstate an employee who wishes to return from such leave.

One of the issues considered by the Appellate Division in *In re Mair-Headley v. County of Westchester*[32] addressed "reasonable accommodation." Veronica Mair-Headley contended that her termination pursuant to §73 was in violation of New York State's Humans Rights Law. Rejecting her contention that Westchester's action violated the Human Right Law, the court said that the State's law was "in congruity with the Americans with Disabilities Act whereby the requirement that the employer make reasonable accommodations of an individual's disability does not entail any obligation to create a new light-duty position or a permanent light-duty position."

The court said that substantial evidence in the record supported the conclusion that the County would have had to undertake creating such a light-duty position in order to accommodate Mair-Headley's disability. Thus, the Commissioner's determination to terminate her employment pursuant to §73 did not violate the Human Rights Law.

Reemployment Rights

As to reemployment rights, it is well to remember that both §§71 and 73 provide that an individual who has been terminated may apply for reinstatement to his or her former position within one year of the abatement of his or her disability sufficient to allow the individual to once again satisfactorily perform the duties of his or her former position.

The event that triggers the individual's right to reinstatement is the date of the "termination" or "abatement" of the disability, rather than the effective date of his or her "termination" from §71 or §72 leave.

If found qualified for reinstatement by the appropriate medical authority, the individual would be reinstated to his or her former position, if vacant, or to a vacant similar position, a position to which he or she is eligible for the purposes of transfer pursuant to §70 of the Civil Service Law, or to a lower grade position. If no suitable position is available, the individual's name would be placed on a preferred list.

As a coda to leaves resulting from the application of §§71 and 72, it should be noted that the courts have considered situations where such provisions of law are not the genesis of the leave but rather the return of an individual who has absented himself or herself on "ordinary" sick leave and is denied reinstatement to his or her former position.

In *In re Sheeran v. New York State Dept. of Transportation*,[33] the Appellate Division held that unlike Civil Service Law §72 situations, which may require a medical examination before an employee is placed on a leave of absence, the relevant Rule of the New York State Civil Service Commission, 4 NYCRR 21.3(e),[34] specifically applies to employees of the State as an employer "who [have] been absent because of personal illness," and authorizes the employer to require a medical examination "prior to and as a condition of his [or her] return to duty."

The Appellate Division explained:

> While we agree with [Sheeran's] contention that an employee's leave status effectively becomes involuntary where the employee is already on sick leave and is prevented from returning to work by the employer's [physician's] determination of unfitness, as well as where an active employee is required to commence a leave of absence, this does not compel the conclusion that Civil Service Law §72 applies to both situations. Rather, based upon the plain language of that statute—especially when read in juxtaposition to the language of the provisions of 4 NYCRR 21.3 and article 30 of the CBA—we conclude that the former is intended to apply to active employees, whereas the latter applies

to employees already on voluntary sick leave.[35]

If the employer's physician declares the employee unfit to return to work, 4 NYCRR 21.3 does not provide for a hearing on the issue of an employee's fitness to return to work. In contrast, should the employer's physician find the individual fit to return to duty, the appointing authority must so reinstate the individual. If the appointing authority believes that the individual remains unfit to perform the duties of the position, it must reinstate the individual to his or her former position and then initiate the procedural steps required to place the employee on leave pursuant to §72 or determine that placing the individual on leave pursuant to §72.5 is justified under the circumstances.

Under the Rules of the State Civil Service Commission with respect to employees of the State as an employer and as earlier noted, those local commissions that have adopted similar rules, or where a Taylor Law agreement so provides, the employer has the right to insist that an employee who has been absent because of illness or a disability be examined by the employer's physician before it will permit the employee to return to work. If the employee is not found "qualified" to perform his or her duties, the employer typically refuses to permit the employee to return to work.

In the alternative, if the individual is permitted to return to work solely on the basis of the statement of the employee's personal physician that he or she is fit to return to full duty and the appointing authority subsequently determines that the individual is unable to satisfactorily perform the duties of the position, the appointing authority will be required to consider making a reasonable accommodation within the meaning of State and federal civil rights laws such as assigning the employee to perform light or modified duties. If, however, such a "reasonable accommodation" is not practical and the employee insists on remaining at work, the appointing authority will be required to initiate the steps required to place the individual on leave pursuant to §72.

As can be seen from the foregoing, the proper application of the relevant law, rules and regulations are critical in terms of providing the employee administrative due process. The failure to do so, inadvertently or otherwise, could result in litigation where the remedy directed by the court would typically require the appointing authority to reinstate the individual to his or her former position with back pay and the benefits that he or she would have otherwise received but for his or her being placed on such leave or terminated absent the required administrative due process.

Clearly, the only general rule with respect to placing an employee on leave pursuant to §71 or §72 is that there is no general rule. Each employee's situation must be evaluated on the basis of the relevant facts on a case-by-case basis and the appointing authority must apply the appropriate law, rule or collective bargaining provision required to satisfy administrative due process.

Endnotes

1. For the purposes of Section 71, an employee may be terminated at the discretion of the appointing authority after being absent on workers' compensation leave for a **cumulative period** of one year except that in the event the disability results from an assault sustained in the course of his or her employment, the individual is entitled to such leave for a **cumulative period** of two years or longer. In contrast, an employee who has been absent on leave pursuant to Section 72 may be terminated at the appointing authority's discretion pursuant to Section 73 after being absent for a **consecutive period** of one year or longer.
2. The Retirement and Social Security Law, among others such as §511 of the Education Law and §§207-a and 207-c of the General Municipal Law, permit an appointing authority to file an application for disability retirement on behalf of an individual deemed permanently disabled and unable to perform the duties of his or her position because of the disability, work-related or not work-related.
3. Alcoholism and substance abuse are defined as mental disabilities in the State's Mental Hygiene Law and Human Rights agencies have viewed such conditions as a "disability."
4. Civil Service Law Article 14.
5. *See*, for example, 4 NYCRR 28.3, which authorizes absence with pay for illness of certain "managerial or confidential" employees [of the State as an employer] to be charged to donated leave credits by other "managerial or confidential" employees and available to such persons for absences due to an illness or disability that did not arise as a result of the individual's employment.
6. Typically the claim is controverted based on a belief that the injury or disability suffered by the employee did not result from the employee performing his or her official duties. *See* §25.2(b), Workers' Compensation Law.
7. 216 A.D.2d 808, 628 N.Y.S.2d 876 (3d Dept. 1995).
8. Although the employee claimed that he broke his elbow in a fall while at work, his former girlfriend testified that he "had injured his arm the previous day when he fell while playing Frisbee in a park."
9. 63 N.Y.2d 128 (1984).
10. "Termination" of the individual on §71 or §72 leave vacates the position and permits the appointing authority to make a permanent appointment to the resulting vacancy.
11. 896 F.2d 664 (2d Cir. 1990), *cert. den'd*, 498 U.S. 813 (1990).
12. **N.B.** The statute of limitations for applying for reinstatement commences to run upon the termination of the disability and not the employee's termination from §71 leave.
13. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, the individual's name is placed on the preferred eligible list for his or her former position or any similar position in his or her former department or agency.
14. 489 F. Supp. 1169 (S.D.N.Y. 1980).

15. These were incorporated into the current statute when it was amended in 1983. At the same time, §72 was amended to cover both physical and mental disability situations. *See* Chapter 561 of the Laws of 1983.

16. **N.B**. Imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority.

17. 132 Misc.2d 901, 505 N.Y.S.2d 510 (Sup. Ct. Dutchess Co. 1986).

18. Where such an extension or postponement is requested, it is suggested that the appointing authority require the employee to stipulate "in writing" that any time limits or deadlines involved are to be extended for a period equal in length to that granted for the extension or postponement requested.

19. In the event the parties are unable to agree upon a hearing officer, the hearing officer is to be selected from a list of hearing officers maintained by the New York State Department of Civil Service. In New York City the hearing officer may be one employed by the City's Office of Administrative Trials and Hearings.

20. In *Carroll v. County of Putnam*, 271 A.D.2d 443, 706 N.Y.S.2d 888 (2d Dept. 2000), the Appellate Division sustained the employee's placement on an involuntary leave following a hearing during which it was determined that he was not physically or mentally fit to perform his duties, finding that the action was supported by substantial evidence. No reference to "exhaustion of administrative remedies" is referenced in the decision.

21. 78 N.Y.2d 364, 369, 575 N.Y.S.2d 806 (1991).

22. 470 U.S. 532 (1985).

23. *See, also, Hurwitz v. Perales*, 81 N.Y.2d 182 (1993).

24. 265 A.D.2d 789, 697 N.Y.S.2d 389 (3d Dept. 1999). **N.B.** The *Armetta* case involved an individual terminated from a §71 leave; the same result would probably obtain in a §73 situation.

25. In some jurisdictions, the procedures to be followed in cases involving the application or administration of §§71, 72 and 73 of the Civil Service Law, and other provisions of law such as §§207-a and 207-c of the General Municipal Law, have been incorporated in a collective bargaining agreement negotiated pursuant to the Taylor Law [Article 14 of the Civil Service Law]. Presumably such provisions would control if they comport with due process consistent with the rationale of the court in *In re Antinore v. State of New York*, 40 N.Y.2d 921 (1976).

26. An employee placed on §72 leave may use all available leave credits and may be eligible for other benefits such as sick leave at half pay, etc., if permitted by rule or negotiated agreement.

27. *NYC Human Resources Administration v. Krisilas*, OATH Index #931/1.

28. 38 A.D.3d 773, 833 N.Y.S.2d 135 (2d Dept. 2007).

29. 208 A.D.2d 1168, 617 N.Y.S.2d 587 (3d Dept. 1999), *leave to appeal denied*, 85 N.Y.2d 804 (1995).

30. 677 F.2d 538 (7th Cir. 1982), *cert den'd*, 459 U.S. 1017(1982). Among the questions presented to the Supreme Court for consideration was "may a tenured public school teacher be forced to take illness leave for failing to meet medical standards of the employer without being told any reason for the failure to meet such standard?"

31. 42 U.S.C. §§12131 *et. seq.*

32. 41 A.D.3d 600, 837 N.Y.S.2d 347 (2d Dept. 2007).

33. 68 A.D.3d 1199, 891 N.Y.S.2d 167 (3d Dept. 2009), *leave to appeal granted*, 14 N.Y.3d 707, 900 N.Y.S.2d 244 (2010).

34. 4 NYCRR 21.3(e) applies to employees of the State as an employer in a designated or recognized collective bargaining unit. 4 NYCRR 28-2.1(f) addresses such leave with respect to individuals designated managerial or confidential or excluded from representation within the meaning of the Taylor Law [Civil Service Law Article 14]. Municipal commissions may have similar rules in effect. It provides that "The appointing authority may require an employee who has been absent because of personal illness, prior to and as a condition of his return to duty, to be examined, at the expense of the department or agency, by a physician designated by the appointing authority, to establish that he is not disabled from the performance of his normal duties and that his return to duty will not jeopardize the health of other employees."

35. 68 A.D.3d at 1203. Presumably, the courts would apply the same rationale in 4 NYCRR 28.2(f) situations.

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Land Use Law Case Law Update

By Henry M. Hocherman and Noelle Crisalli Wolfson

Although it appears that the drought in genuinely significant cases continues unabated, this quarter brings a few small, but nonetheless interesting, cases which, although they break no new ground, serve as reminders that old ground cannot be ignored.

Two Second Department cases, *Dobbs Ferry Development Associates v. Board of Trustees of the Village of Dobbs Ferry*[1] and *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*,[2] decided within three months of each other, while neither making nor broadening existing law, remind us that the requirements of *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*[3] continue in force, and are not to be blithely ignored. If nothing else, these two cases serve as appropriate reminders that the recreation fee permitted by Town Law Section 274-a[6] (as well as Village Law Section 7-725-1(6)) is not (as many municipalities view it) a tax on development to be imposed at will, but rather can be applied only in proper cases, when specific criteria exist, and upon individualized findings grounded in a proper record.

Fuentes v. Planning Board of the Village of Woodbury[4] teaches us that when a Planning Board approves a subdivision plat with the intention that open space portions of that plat not be further developed, that intention must be stated clearly and explicitly, and that such clear and explicit restriction must be endorsed on the plat itself or otherwise expressed in a document that will appear in a purchaser's chain of title; a statement in the minutes of a planning board meeting (such minutes not constituting a recorded document which will appear in a title search) is insufficient.

Underhill Avenue Corp. v. Village of Croton-on-Hudson[5] restates the well-established rule that an offer of dedication of land in a subdivision to the public, as manifested by designation of such land on a subdivision plat, is perpetual and does not expire merely by virtue of the passage of time and inactivity on the part of the municipality. Finally, an interesting bit of dictum in *Town of Huntington v. Beechwood Carmen Building Corp.*[6] reminds us that by their nature (and pursuant to the relevant state enabling statutes) zoning ordinances tell us what we can and cannot do; they don't tell us what we must do.

I. Recreation Fees

Dobbs Ferry Development Associates v. Board of Trustees of the Village of Dobbs Ferry[7] and *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*[8] turn on very similar facts. In *Dobbs Ferry Development Associates*, Dobbs Ferry Development Associates ("Associates") sought and obtained site plan approval for the construction of one single-family residence. The Village Board of Trustees[9] conditioned such approval upon, among other things, Associates paying a recreation fee pursuant to Village Law Section 7-725-a(6)(b), (c).[10] Associates brought an Article 78 proceeding challenging the imposition of the recreation fee as a condition of approval. The lower court declared the imposition of the fee invalid, and ordered the Village Board of Trustees to issue site plan approval to Associates without payment of a recreation fee.[11]

The Village Board and the Planning Board appealed, and in a very brief decision the Second Department found that although municipalities clearly have the authority to impose a recreation fee as a condition of site plan approval, an irreducible prerequisite to such imposition is the making of findings by the town body imposing the recreation fee, as required by *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*;[12] namely, that the construction of a single-family home on Associates' land will add to (or create) unmet recreational needs in the community at large, and that such needs cannot be met on the land itself.[13] Citing *Twin Lakes Development Corp. v. Town of Monroe*,[14] the Court noted that "individualized consideration" was required of the facts at hand, and that no such consideration had been given, nor had specific findings been made.[15]

Although the Appellate Division declared the imposition of the recreation fee invalid on the record before it, it reversed so much of the lower court's decision as required the Village Board to grant site plan approval with the recreation fee condition removed. Rather, the Court held that the proper remedy in such cases is a remand to the village body which imposed the condition, in effect giving it the opportunity to make the requisite findings if the requisite conditions in fact exist.[16]

Pulte Homes of New York, LLC is essentially the same case except that it implicates the Town Law rather than the Village Law. There, the Town of Carmel Planning Board imposed a recreation fee as a condition of site plan approval for a senior citizen housing development. In this case, the lower court dismissed the petition and upheld the fee, notwithstanding that the requisite findings had not been made and that the Dobbs Ferry case had been decided just three weeks before.[17] The Second Department reversed the lower court's decision on the grounds that the Planning Board failed to make the "individualized consideration" required before a recreation fee can be imposed, and remanded the matter to the Planning Board for further proceedings to determine whether and to what extent a fee should be imposed.[18]

II. Restrictions on Future Development

In *Fuentes v. Planning Board of Village of Woodbury*,[19] petitioner-respondent Fuentes was the purchaser of two undeveloped lots in a tax sale. After acquiring title, Fuentes learned that the subdivision plat which had created the two lots designated each lot as an "open area" subject to a notation on the filed map that such lots were "not approved for building lots."[20] Taking the plain language of the notation at its word, Fuentes applied to the Village of Woodbury Planning Board for an amendment of the map to permit construction of residences on each of the two lots. The Planning Board denied his application, interpreting the map note as an outright prohibition on the further development of the two lots. The lower court annulled the Planning Board's determination, and the Planning Board appealed.[21]

After reiterating the well-established rule that a reviewing court may not disturb the decision of a municipal body charged with determining land use questions unless that body's decision is arbitrary and capricious, lacks a rational basis, or is an abuse of discretion, the Appellate Division upheld the lower court's determination annulling the Board's determination. The Planning Board had, *inter alia,* relied on the fact that the underlying subdivision had been characterized on the filed map as a "cluster plan." The court held that in approving the subdivision the Planning Board had not acted in conformity with Town Law Section 278, with the consequence that in fact the subdivision was not a conservation subdivision under that section, and that accordingly the Planning Board's conclusion that development of the lots was prohibited due to their inclusion as open space in a cluster subdivision lacked a rational basis.[22]

Presumably, had the subdivision plat actually been a Section 278 conservation subdivision, the inclusion of open space on the subdivision plat would have been reflected in additional density elsewhere on the plat, in which case ultimate development of the open space parcels would constitute a "double dip" in violation of Section 278. The logic of the court's decision in this case appears to be that where the requirements of Section 278 are not met, the presumption that the density attributable to the open space parcels has been utilized elsewhere in the subdivision does not exist, and accordingly the mere designation of a parcel as "open space" does not *ipso facto* disqualify it from future development. Further, the court relied (as had Fuentes) on the plain language of the plat restriction itself, determining that the phrase "not approved for building lots" does not explicitly restrict future development of the lots in question.[23]

Finally (and perhaps most importantly), in response to an argument by the Planning Board that the intention of the Planning Board to restrict future development was clearly set forth in the minutes of its meeting approving the subdivision plat, the court found that inclusion in the minutes is insufficient since the ultimate purchaser of a parcel of property will not thereby be put on notice of the restriction. The court held that the Planning Board "failed to make this restriction clear on any document which became part of Fuentes's chain of title."[24] The correctness of that holding is inescapable. Were it to be otherwise, every purchaser of a parcel of land would be in peril of falling afoul of a condition of which he or she had no notice.

III. Perpetual Is Forever

In *Underhill Avenue Corp. v. Village of Croton-on-Hudson*,[25] plaintiff sought a determination that a lot (Lot 14) on a subdivision plat that was filed in 1954 is not subject to an open offer of dedication as a playground area, apparently relying on the fact that more than half a century had passed without the Village taking up the offer of dedication. It appears that Lot 14 had been explicitly offered for dedication to the Village of Croton-on-Hudson as a playground area when the plat was approved. It is undisputed that the offer was noted on the subdivision plat, and that the Village never accepted the offer of dedication.[26]

The plaintiff purchased Lot 14 in 2007, and sought and was denied a building permit by the Village on the basis that the lot was to remain a "playground area" and was still subject to the offer of dedication.[27] Plaintiff brought a declaratory judgment action and sought summary judgment against the Village, which was then the sole defendant. The court dismissed plaintiff's motion without prejudice, ordering that plaintiff serve all homeowners within the affected subdivision with the pleadings and motion papers in the case. The decision does not indicate that there existed a homeowners' association with a right to enforce a restriction on the use of Lot 14, or that

the other homeowners in the subdivision had any direct property interest in Lot 14. Four homeowners intervened in the case. The lower court then denied plaintiff's motion for summary judgment, searched the record, and granted summary judgment in favor of the defendants.[28]

The plaintiff argued that the Village had, by virtue of the passage of time, implicitly rejected the offer of dedication.[29]

The Second Department, citing cases, held that although an offer of dedication may be rejected by a municipality, such rejection must be explicit, and the passage of time does not extinguish the offer which may be accepted at any time prior to a valid revocation by all interested parties.[30] Although the case articulates no new law, it is interesting to note that implicit in the court's requirement that all homeowners in the subdivision be served is inclusion in the class "all interested parties" of the other owners in the subdivision notwithstanding that (so far as appears from the decision) the other owners in the subdivision did not enjoy an easement of any kind over the playground parcel, nor, presumably, would they have enjoyed rights different from those of other members of the general public to use that parcel as dedicated to the Village. Nonetheless, it would appear that the unanimous consent of all such owners, as well as the Village and the owner of Lot 14, would be required to revoke the offer of dedication.

IV. Zoning's Limitations

Town of Huntington v. Beechwood Carmen Building Corp.[31] would be a case of little interest were it not for a bit of *dictum* which the court throws out in the penultimate paragraph of the decision. *Huntington* is a proceeding brought by the town in order to compel a developer to construct a pool and community center on a parcel of real property designated as a separate lot (Lot 73) in a residential development known as Country Pointe at Dix Hills.[32] The case involves a number of defendants. S.B.J. Associates, LLC ("SBJ") was the original purchaser and developer of the property. SBJ sold the property to a number of affiliated parties (the "Beechwood Defendants") including Beechwood Carmen Building Corp. The lower court dismissed the complaint against all defendants and the town appealed.[33]

SBJ acquired an approximately 382-acre parcel of real property in the Town of Huntington which, at the time of its acquisition, was zoned "R-80," a two-acre single-family residence district. Thereafter, SBJ proposed to construct a senior (presumably multi-family) residential project on a portion of the property, and single-family homes on the balance of the property, and accordingly sought an amendment of the Town Code to create a residential planned-unit development and to change the zoning of the entire property from R-80 to "R-PUD." In due course, the Town Board created the "R-PUD" District providing, among other things, that buildings within the single-family portion of the district were to be used only for detached single-family dwellings together with accessory uses and activities, and for a community building not to exceed 5,000 square feet. The Huntington Town Code (Section 198-21.2) also specifically permitted the construction of swimming pools in the single-family dwelling portion of the district. A final Generic EIS ("FGEIS") adopted by the Town Board at the time of the PUD's creation indicated that the developer had proposed a recreation area including a community center and swimming pool for inclusion in the single-family portion of the subdivision.[34]

As the application wended its way through the development process, SBJ proposed that Lot 73, as designated on the subdivision plat, would instead be used as a recreational facility including such facilities as tennis courts and a children's playground, but did not provide for construction of a swimming pool or community center. Ultimately, the Beechwood Defendants purchased the vacant land from SBJ and developed a community recreation area consisting of a playground, a tennis court and a gazebo, but no swimming pool.[35]

In 2006 the town commenced an action against SBJ and the Beechwood Defendants, which included allegations that the FGEIS and Town Code Section 198-21.2 (which on its face *permits* the swimming pools in the single-family residence district) *required* the construction of the swimming pool and community center.[36] In June of 2008 the town stipulated to discontinue the action with prejudice against defendant SBJ, but the cause of action relating to the construction of the swimming pool was separated and continued with respect to the Beechwood Defendants.[37] In 2008 the town commenced an action against the Beechwood Defendants to compel construction of the swimming pool; in January of 2010 all defendants moved for summary judgment, which the lower court granted.[38]

The Appellate Division upheld the lower court's decision as respects defendant SBJ on grounds of *res judicata.* In upholding the lower court's decision with respect to the Beechwood Defendants, the court relied upon the language of the FGEIS, holding that it did not explicitly require construction of a swimming pool and community center, and upon the plain language of Town Code Section 198-21.2 which permitted, but did not require, construction of a community center and swimming pool on Lot 73 or anywhere else in the

subdivision in question. The court held that both the FGEIS and the Town Code Section merely permitted but did not mandate construction of those facilities.[39]

Having disposed of the case, however, the court saw fit to add a paragraph holding that "Even if, as the Town contends, Town Code §198-21.2 requires that development of Lot 73 to include a swimming pool and community center not to exceed 5,000 square feet, such a provision would be *ultra virus* and void as a matter of law."[40] The court reasoned that a town does not have the inherent power to enact zoning or land use regulations, but derives that power wholly from the State, and that while Article 16 of the Town Law confers a "'wide variety of powers to zone the town into districts to regulate its growth and development,'"[41] it does not go so far as to confer authority on a town to enact a zoning ordinance which "mandates the construction of a specific kind of building or amenity [citing cases]."[42] Accordingly, the Beechwood Defendants were entitled to summary judgment in that the town failed to raise a triable issue of fact. Insofar as the court clearly has sufficient grounds to render its decision based upon its *res judicata* and interpretational determinations, this last paragraph is dictum, but is nonetheless instructive in that it reminds us, quite properly, of the limits of a municipality's zoning powers under Article 16 of the Town Law.

Endnotes

1. *Dobbs Ferry Development Associates v. Board of Trustees of Village of Dobbs Ferry*, 81 A.D.3d 945 (2d Dep't 2011).
2. *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*, 2011 WL 1733931 (2d Dep't May 3, 2011).
3. *Bayswater Realty & Capital Corp. v. Planning Board of Town of Lewisboro*, 76 N.Y.2d 460 (1990).
4. *Fuentes v. Planning Board of Village of Woodbury*, 918 N.Y.S.2d 213 (2d Dep't 2011).
5. *Underhill Ave. Corp. v. Village of Croton-on-Hudson*, 919 N.Y.S.2d 67 (2d Dep't 2011).
6. *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d 198 (2d Dep't 2011).
7. *Dobbs Ferry Development Associates v. Board of Trustees of Village of Dobbs Ferry*, 81 A.D.3d 945 (2d Dep't 2011).
8. *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*, 2011 WL 1733931 (2d Dep't May 3, 2011).
9. Pursuant to Section 300-69 of the Dobbs Ferry Code in effect at the time the subject approval was granted, the Village Board of Trustees was the body which had the authority to grant site plan approval in the Village of Dobbs Ferry, subject to the recommendation of the Planning Board.
10. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945.
11. *Id.*
12. *Bayswater Realty & Capital Corp. v. Planning Board of Town of Lewisboro*, 76 N.Y.2d 460 (1990).
13. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945-946.
14. *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98 (2003).
15. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945-946.
16. *Id.* at 946.
17. *Pulte Homes of New York*, 2011 WL 1733931.
18. *Id.*
19. *Fuentes v. Planning Board of Village of Woodbury*, 918 N.Y.S.2d 213 (2d Dep't 2011).
20. *Id.* at 214.
21. *Id.*
22. *Id.* at 215.
23. *Id.* at 215-216.
24. *Fuentes*, 918 N.Y.S.2d at 215.
25. *Underhill Ave. Corp. v. Village of Croton-on-Hudson*, 919 N.Y.S.2d 67 (2d Dep't 2011).
26. *Id.* at 68-69.
27. *Id.*
28. *Id.* at 69.
29. *Id.*
30. *Underhill Ave. Corp.*, 919 N.Y.S.2d at 69-70.
31. *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d 198 (2d Dep't 2011).
32. *Id.* at 199.
33. *Id.* at 199-200.
34. *Id.* at 199.
35. *Id.* at 199-200.
36. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 200.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 200-201.
41. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 201(*quoting Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385 (1983)).
42. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 201.

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