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Municipal Lawyer

A publication of the Municipal Law Section
of the New York State Bar Association

A Message from the Chair

Howard Protter

I am pleased to recount the success of the Section's fall meeting held in Saratoga Springs, New York in collaboration with the Environmental Law Section. Many Municipal Law Section members are also members of that Section so that there are great opportunities for collaboration, dialogue and education.

Our program chairs for the event, Ken Bond, Lisa Cobb and Lester Steinman, worked with their counterparts in the Environmental Law Section to create a comprehensive and substantive program. On Saturday, both Sections met in a joint session to focus on SEQR and getting ready for the new EAFs being promulgated by DEC; an overview of the newest revisions to the Rules of Professional Conduct (June 2011) and issues regarding attorney disqualification motions; a Green Buildings law update, an examination of recent trends in land use law and an overview of the Marcellus Shale regulatory issues. Sunday featured programs on the new endangered species regulations, using administrative boards to settle land-use claims, an "eggsciting" program on regulating urban chickens and an analysis of Town and Village Law provisions controlling access to buildings that are not on mapped streets. Our employment law component featured a panel discussion of harassment and retaliation claims from both the plaintiff and municipal defense perspective. The program concluded with an overture to revising local government finance laws.

This is a challenging time to be practicing Municipal Law and I encourage you to make the time to get involved with our Section. Not only do Section programs keep you up to date on the latest developments in municipal law, they provide great professional development opportunities—you'll meet leading colleagues in the field of municipal law and share with

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them common problems and solutions you face in your daily practice. The networking, the intellectual stimulation and the ability to make a difference in the practice of municipal law are all invaluable rewards.

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

Please contact me at hp@jacobowitz.com with your suggestions or ideas for improving our Section. I look forward to meeting with you at an upcoming program.

Howard Protter

From the Editor

This will be my last issue as Editor-in-Chief of the *Municipal Lawyer*. For twenty-seven years publishing the *Municipal Lawyer* has been my labor of love. The time is now right for transition and new leadership.

In 1979, the Edwin G. Michaelian Municipal Law Resource Center of Pace University ("MLRC") began publishing a monthly four-page newsletter entitled the *Municipal Lawyer* for its members. Upon becoming the Director of the MLRC in 1984, I assumed responsibility for the publication and the expansion of its circulation.

In 1986, the MLRC and the New York State Bar Association agreed to jointly publish the *Municipal Lawyer* in a bi-monthly four-page newsletter format. The *Municipal Lawyer* became the official publication of the Municipal Law Section, circulated statewide to the Section membership.

From 1986 to 2002, the *Municipal Lawyer* continued to explore every aspect of municipal practice and to update members on significant new cases and legislation. Space constraints, however, limited the scope and depth of the coverage.

Accordingly, in May of 2002, then Municipal Law Section Chair, Linda S. Kingsley, established a subcommittee on publications. Chaired by the incoming Section Chair, Hon. Renee Minarik, the subcommittee, working with Pace University and Bar Association staff, recommended that the *Municipal Lawyer* be converted into a journal, published quarterly, with expanded and enhanced content and features. The Spring 2003 issue of the *Municipal Lawyer* marked the debut of the new format which continues to date.

In March 2011, Pace University, for financial reasons, closed the MLRC and ended its joint publication of the *Municipal Lawyer*. Beginning with the Winter 2011 edition, the New York State Bar Association assumed responsibility for the publication and my editorial responsibilities remained unchanged. However, demands of full-time private practice and the loss of Pace law student and staff editorial assistance convinced me that I had neither the time nor the resources necessary to maintain the level of excellence that the publication and Section members deserve.

Fortunately, immediate Past Section Chair Patricia Salkin, Associate Dean, Raymond and Ella Smith Distinguished Professor of Law and Director of the Government Law Center at Albany Law School, has agreed to assume the reins as Editor-in-Chief of the *Municipal Lawyer*. The publication could not be in better hands. New leadership will bring new ideas and innovations that will further enhance the reputation of the *Municipal Lawyer*. I wish Patty great success in this new endeavor.

The goal of the *Municipal Lawyer* has always been to update Section members on case law, legislative and administrative developments and to explore cutting edge issues that affect their practice. I would like to thank all my colleagues who have so graciously volunteered their time, experience and expertise to write articles for the *Municipal Lawyer*. Mark Davies, Henry Hocherman, and Noelle Crisalli Wolfson deserve special mention for their outstanding continuing series of columns on ethics and land use law, respectively. Special thanks also to my former Pace staff and law student interns, Executive Editor Ralph Bandel, and Lyn Curtis and Wendy Harbour of the State Bar Association for their invaluable editorial and production assistance.

Finally, to the Section officers and membership, both past and present, thank you for your support over these many years. It was always my privilege and my pleasure to serve you.

In this issue of the *Municipal Lawyer*, Chair Howard Protter recounts the recently completed and highly successful Fall meeting with the Environmental Law Section in Saratoga Springs. To share the content of that meeting with those Section members unable to attend, a number of the articles in this issue are based upon presentations made at that event.

Michael Zarin, of Zarin & Steinmetz in White Plains, examines ethical problems routinely encountered in the practice of municipal and environmental law. Adam Wekstein of Hocherman, Tortella & Wekstein, LLP in White Plains addresses municipal use of administrative tribunals to adjudicate land use violations. Kenneth S. Kamlet of Hinman, Howard & Kattell, LLP in Binghamton, examines the 2% tax cap, explores the need for tax increment financing legislation and analyzes the recently enacted land bank legislation intended to facilitate the return of vacant, abandoned and delinquent properties to productive use. Lisa Cobb of Vergilis, Stenger, Roberts, Davis & Diamond, LLP writes about drafting municipal legislation to regulate the keeping of chickens in residential zones.

The ethics column, written by Asaf Naymark, a law student intern at the New York City Conflicts of Interest Board, advocates for the application of government conflicts of interest laws to officers and employees of not-for-profit organizations receiving municipal funds. The Fall 2011 Land Use Case Law update by Henry Hocherman and Noelle Crisalli Wolfson of Hocherman, Tortella & Wekstein in White Plains examines, among other things, when a substantial change in the build year of a project requires a Supplemental Environmental Impact Statement and the permissible breadth and scope of conditions that may be attached to site plan approvals and variances. In a new feature, Amy Lavine, Senior Staff Attorney at the Government Law Center at Albany Law School, summarizes recent court decisions adjudicating a broad range of state and local government law issues.

Lester D. Steinman

Ethical Problems in Everyday Environmental and Municipal Practice

By Michael D. Zarin

> "In civilized life, law floats in a sea of ethics."
>
> —Earl Warren[1]

There are many ethical scenarios that present themselves daily to the environmental and municipal lawyer. For many of us, our benchmark consists of facing the mirror at the end of the day, and inquiring whether I reasonably balanced my obligation of competent client advocacy and not compromising myself or the integrity of our profession. This article discusses a sampling of ethical quandaries that a municipal or environmental lawyer may face in their everyday practice. In the end, not unfamiliar to many, the article raises more questions than answers.

Maintaining Confidentiality

A thought-provoking example of the intersection of environmental/municipal law and ethical concerns arises when a lawyer's obligation to maintain confidentiality potentially conflicts with a statutory or regulatory environmental reporting requirement.[2] New York's Rule of Professional Conduct ("Rule") 1.6(a) obligates a lawyer to maintain confidential information,[3] stating that a "lawyer shall not knowingly reveal confidential information…or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person."[4] Rule 1.6(a) creates several general exceptions which permit a lawyer to divulge confidential information, including, most notably, where "disclosure is permitted by Rule 1.6(b)."[5]

One of Rule 1.6(b)'s exceptions pertains to situations where "[a] lawyer *may* reveal or use confidential information *to the extent that the lawyer believes is reasonably necessary…when permitted or required under these Rules or to comply with other law or court order*."[6] Within the universe of environmental law, certain statutes and regulations arguably obligate lawyers to report confidential client information. New York's regulation regarding the "Handling and Storage of Petroleum,"[7] states, *inter alia*, that "*[a]ny person with knowledge* of a spill, leak or discharge of petroleum *must report* the incident to the department within two [2] hours of discovery." This regulation, and those with similar reporting requirements, could trigger Rule 1.6(b).[8] While the circumstances of *Vantage Petroleum* do not involve the Professional Rules, the decision is significant for its reference to the regulatory requirement's "mandatory" "obligation" to report, an affirmative obligation that may warrant the invocation of the exception listed in the Rules.

Not unlike most of the ethical scenarios presented herein, Commentary provided by the New York State Bar Association's Committee on Professional Ethics[9] defers resolution of what legal requirements might require a lawyer to divulge confidential information to the informed discretion of the subject lawyer, stating, that "whether…a law supersedes [the Confidentiality Rule] is a question of law beyond the scope of these Rules."[10] Moreover, the Commentary highlights a lawyer's obligation to consult with a client under all circumstances unless:

> such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures *as are necessary to comply with the law*.[11]

Rule 1.6(b) provides for other circumstances that may allow a lawyer to divulge confidential information when there is no law or regulation that would arguably compel a lawyer to breach its confidentiality. If in your due diligence involving a client, for example, it reveals improper hazardous waste storage or defective conditions on site, a "lawyer *may* reveal or use confidential information to the extent that the lawyer believes is reasonably necessary…to prevent reasonably certain death or substantial bodily harm [or] to prevent the client from committing a crime."[12] The threshold involving the potential for committing a "crime" is particularly sensitive for the environmental or municipal lawyer as many violations under New York State environmental law are considered criminal in nature, even though many are resolved or arise from administrative or regulatory matters.[13]

The Commentary goes further and sets out six factors for a lawyer to consider in determining whether to disclose the information:

(i) the seriousness of the potential injury to others if the prospective harm or crime occurs,

(ii) the likelihood that it will occur and its imminence,

(iii) the apparent absence of any other feasible way to prevent the potential injury,

(iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime,

(v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and

(vi) any other aggravating or extenuating circumstances.[14]

The Commentary notes that these factors should be given "great weight," but in reality, the mirror and the lawyer's practical and subjective judgment become the final arbiter.[15]

If, after balancing the aforementioned criteria, a lawyer believes that there are circumstances potentially warranting disclosure of confidential information, a lawyer's initial duty, where practicable, is to remonstrate the client.[16] The Commentary guides the lawyer to "where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. *In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose*."[17] The Rule and Commentary make clear that if the lawyer feels ethically compelled to make a disclosure, such disclosure must be carefully circumscribed to those matters the lawyer reasonably believes are necessary for corrective action. Thus, in a matter where the lawyer believes that there might be a threat to the health and safety of a community due to a possible regulatory violation or the potential for the committing of a crime due to such violation, for example, the question is whether the lawyer (i) limits himself or herself to verbally contacting the relevant governmental agency, (ii) contacting the potential involved watchdog citizen group, or perhaps (iii) going to the press. Not an easy or prescribed decision.

Withdrawing Representation

Instead of disclosing potential confidential information, a lawyer may withdraw from a representation if his or her client insists on engaging in potentially unethical or unlawful acts. This scenario presents itself to environmental and municipal practitioners, for example, if a client refuses to divulge a hazardous or toxic condition discovered on its property to the appropriate governmental entity, or a situation where, for example, the lawyer may know of a violation of a regulatory requirement, yet there is no immediate threat to the public's health and safety.

Rule 1.16(b) mandates that "a lawyer *shall withdraw* from the representation of a client" under circumstances including when "the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law."[18] The interesting qualifier here is that if the lawyer is not being asked to undertake any activity in furtherance of the subject violation or potential violation, then it would appear not to fall under the "representation" threshold required to trigger mandatory withdrawal. Query, does a lawyer's omission or failure to remedy a known or potential violation constitute an affirmative "representation" mandating withdrawal under Rule 1.16(b)?

Alternatively, pursuant to Rule 1.16(c), an attorney *may* withdraw under circumstances, including when:

- "[T]he client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- [T]he client has used the lawyer's services to perpetuate a crime or fraud; or
- [T]he client insists upon taking action with which the lawyer has a fundamental disagreement."[19]

In an attempt to clarify which circumstances warrant withdrawal, the New York State Bar Association under the analogous Disciplinary Rules[20] spelled out the process a lawyer should go through if he or she believes that the client's conduct is illegal. The New York State Bar Association opined that "[i]f, in the lawyer's professional opinion, it appears that the client's proposed conduct is illegal, the lawyer should explain the serious potential consequences of engaging in improper conduct, urge him not to engage in it, and withdraw from the retainer if the client rejects the lawyer's advice."[21]

Rule 1.16(e) also enumerates how a lawyer must take affirmative steps to ensure that a client is not harmed by the lawyer's potential withdrawal. Rule 1.16(e) demands that a client, even though his or her lawyer rightfully withdrew, be protected from undue harm caused by the lawyer's withdrawal. Rule 1.16(e) states that "[e]ven when withdrawal is otherwise permitted or required…a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client."[22] These "steps" include,

> giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.[23]

Thus, by insisting that a lawyer perform these actions, the Rules aim to ensure that no former clients are placed in a worse position than they were in when the former lawyer's representation commenced.

If the lawyer, however, would like to distance himself or herself from the client's actions, and safeguard its reputation, the lawyer may make a "noisy

withdrawal." After a lawyer has gone through the aforementioned steps above, the lawyer may publicly withdraw from the representation, including notifying the Court or applicable governmental agency that he or she is resigning from the retainer, as well as withdrawing a particular representation or statement that he or she might have made to such entities on behalf of the client. The New York State Bar Association's comment to Rule 1.6(b) allows but does not mandate that the lawyer may

> withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime of fraud.[24]

The "noisy withdrawal" is an option for a lawyer who seeks to maintain client confidences under Rule 1.6, but at the same time would like to disaffirm a statement relied upon by a third party. A "noisy withdrawal" can also provide a "heads-up" for an unsuspecting third party/tribunal that something may be wrong, and further investigation should be sought.

Municipal Conflicts: Retention as Special Land Use Counsel and Concurrent Representation of a Private Client

Another area of conflict may arise when a lawyer is retained as special land use counsel for a municipality, and that lawyer or someone in the firm seeks to represent a private client before another municipal board or agency in the same municipality. Rule 1.7 establishes that "[a] lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- the representation will involve the lawyer in representing *differing interests*; or
- there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."[25]

Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[26] But what constitutes an inconsistent or diverse interest that may adversely affect a lawyer's loyalty or judgment? The New York State Bar Association posited under the Rule 1.7 analog under the Disciplinary Rules that special counsel retained by a municipality in connection with a "particular subject matter, proceeding, or litigation" may represent clients before Planning Boards or Zoning Boards of the same municipality.[27] The New York State Bar Association's opinion emphasized that "a different rule would apply if the attorney frequently represented the town as special counsel, or if the extent of the current representation was such that special counsel was functionally equivalent to a part-time member of the town attorney's staff."[28] The New York State Bar Association focused on the multitude of circumstances in play when a lawyer represents both a municipality and a private client. The New York State Bar Association stated that:

> the duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the "special sensitivity" required of lawyers for the public to "take particular care not to…accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system," would preclude representation of private clients before agencies whose legal representation is under the umbrella of the town attorney's office.[29]

The New York State Bar Association, once again, keyed in on specific oft-cited factors that are implicated in concurrent representations. The preservation of the integrity of the legal system, avoiding the perception of an improper relationship, and the necessity of sustaining zealous advocacy to all clients should all be in the forefront of a lawyer's mind when entering into such representations. Ultimately the New York State Bar Association stated in this specific instance that the "[f]act that a zoning board traditionally hears appeals from adverse determinations of a town official…does not necessarily mean that the interests of the applicant are adverse to those of the town," and that "[t]here is nothing in the statutory scheme to suggest that an application to a planning board for a particular approval involves interests that are necessarily conflicting, diverse or inconsistent with those of the town."[30] The question presented, once again, to the everyday practitioner is whether he or she will be willing to zealously represent a private client when it might put him or her in conflict with the municipality he or she is also representing as special counsel on another matter. The other question is whether the lawyer will have unfair access to municipal officials on behalf of the private client, thereby potentially compromising the public perception of the subject approval process?

The New York State Bar Association noted in Opinion 630, however, that "once litigation is anticipated, and perhaps before, the conflict would be palpable" and that "before undertaking the representation, special counsel should advise the prospective private cli-

ent that extra expense and delay may flow from his inability to handle and future litigation."[31]

Concurrent conflicts may also present a challenge to an environmental or municipal lawyer. Rule 1.7 states that a lawyer may represent a client notwithstanding a concurrent conflict if:

- "[T]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- [T]he representation is not prohibited by law;
- [T]he representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*
- [E]ach affected client gives *informed consent, confirmed in writing*."[32]

"Informed consent" is defined by Rule 1.0(j) as

> the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.[33]

The New York State Bar Association's Commentary elucidating the practical requirements of "informed consent" notes that there are proactive measures that are necessary to meet the requirements of "informed consent."

> [Informed consent] will require communication that includes a disclosure of the facts and the circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options or alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek advice of other counsel.[34]

The hurdles to obtaining "informed consent" are not insurmountable, but on the other hand are also not merely perfunctory tasks. If disclosing the facts and circumstances of the situation and the pros and cons of the proposed course of conduct can be articulated to the client in a concise and cogent manner, the client can make its own decision as to whether to grant its "informed consent." Discussing a client's options or alternatives, however, may be complicated. The client's perception of the universe of options and alternatives will likely be limited to what the lawyer conveys to it. The lawyer must be sensitive to avoid having its presentation to the client clouded by the lawyer's desire to have the client provide its "informed consent" with respect to the potential conflict.

One court has shed light on the practical requirements of obtaining "informed consent." The New York State Supreme Court, Kings County, held in *U.S. Bank N.A. v. Emmanuel*,[35] that a lawyer:

> Need[s] to provide an affirmation explaining whether both [clients gave]…"informed consent, confirmed in writing" in the instant action, and the information presented to them by the [lawyer] included "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved."[36]

Suffice to say, in procuring "informed consent," it is in the best interest of a lawyer to be as forthright, open, and inclusive with information as possible in advising the client. Memorializing such consent in a detailed affirmation also can be a viable option.

In regards to whether a governmental entity could provide "informed consent" under the Rules, the New York Bar Association, in a 1992 Committee on Professional Ethics Opinion, abrogated the prior "per se ban" on a governmental entity's providing informed consent, and stated that "a blanket prohibition against lawyers accepting the consent of governmental entities is paternalistic and excessive."[37]

As a result, a lawyer:

> seeking consent from [a governmental] official must be satisfied not only that the official in question is legally authorized and empowered to furnish the requested consent and has complied with all applicable legal requirements, but also that the process by which the consent is granted is sufficient to preclude any reasonable public perception that the consent was provided in a manner inconsistent with the official's public trust.[38]

Determining whether the lawyer is representing "differing interests" that could arguably compromise his or her judgment is probably the most difficult self-assessment presented to a lawyer evaluating his or her ethical obligations in these matters.

Municipal Conflicts: Representing One Municipality on a Substantive Issue and Counseling a Private Entity Who May Oppose the Same Substantive Issue

Consistent with the above, can a municipal or environmental practitioner represent, for example, mining interests interested in securing leaseholds to permit hydraulic fracturing in certain geographic areas while simultaneously assisting municipalities seeking to restrict or prohibit hydraulic fracturing in other areas? Would this violate Rule 1.7's prohibition against representing "differing interests?" Alternatively, would this type of concurrent representation "adversely affect either the judgment or the loyalty of a lawyer to [either] client, whether it be a conflicting, inconsistent, diverse, or other interest?"[39] Or would Rule 1.6 be triggered, requiring that a lawyer "not knowingly reveal confidential information…or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person"?[40]

While many lawyers represent different clients involving the same or similar legal issues, in the aforementioned hypothetical, the threshold issue is whether the lawyer believes that he or she can retain his or her independence to advocate certain legal theories regarding hydraulic fracturing in furtherance of a municipal client's objectives, while concerned that he or she does not alienate his or her private clients by advocating legal positions that could be construed as hostile to its industry clients? This is the honest self-assessment that must guide the ethical lawyer. The other issue is whether Rules 1.0 and 1.7 would be invoked because the lawyer in such dual representation would inherently obtain confidential information or knowledge related to each client in this specialized area so as to present the potential for an improper conflict?

In such a scenario, the conservative—and probably unappealing—approach would be for the lawyer to avoid the perception of a conflict, and obtain the "*informed consent, confirmed in writing*" from each of the clients. Most lawyers, presented with such facts in these demanding economic times, will more than likely rationalize that the two clients hold differing viewpoints on this discrete issue, maintaining that it will not affect his or her objectivity or competent representation of either client. Your call.

Municipal Conflicts: Representing a Municipal Agency and Subsequently Representing a Private Applicant Before the Same Agency or Body

After representation of a municipal agency terminates, a lawyer (or his firm) may have a private client who ends up before that same municipal agency. Rule 1.9 (a) speaks to this issue. Rule 1.9(a) states that:

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, *confirmed in writing*.[41]

The integral part of Rule 1.9(a) can be found in the phrase "substantially related matter in which that person's interests are materially adverse to the interests of the former client."[42] The New York State Bar Association's Commentary states that:

> matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.[43]

There is often ambiguity, however, as to where the line is drawn regarding what matters can be construed as "substantially related," and whether the interests are in fact "materially adverse." In *Pellegrino v. Oppenheimer & Co.*,[44] for example, the First Department indicated, in reference to the analogous Disciplinary Rule, that there is a presumption of a conflict if a former client is involved, the current issues are substantially related to those involved in the former client's representation and the positions are materially adverse.[45] In *Pellegrino*, an employee complained to in-house counsel about sexual harassment by another employee.[46] Before speaking with the in-house counsel, the employee asked her to "keep the substance of their conversation within the confines of the attorney-client privilege."[47] The Court held that:

> As a result, when [the employee] testified at her first examination before trial, she stated that she believed she and [in-house counsel] had an attorney-client relationship and declined to answer several questions based on that asserted privilege. However, at [the employee's] second deposition, conducted after defendants moved to disqualify [the employee's hired counsel], she no longer asserted the privilege for questions pertaining to communications between herself and [the in house counsel].[48]

In-house counsel and the employee, "due to the alleged pervasive discriminatory environment," went to the employee's hired counsel to "inquire as to how they could notify their employer about the difficult situation in the office in an effective manner without suffering adverse employment consequences."[49] After the employee's termination, the in-house counsel "related to [the employee] the substance of conversations she had with [the general counsel] subsequent to [the employee's] termination."[50]

The First Department found, however, that while the presumption of a conflict exists, there was no basis in the record to conclude that an attorney-client relationship existed between the in-house counsel and the employee's retained counsel who was hired by the employee after she was fired, or that confidential information was disclosed when the in-house counsel met with employee's new counsel.[51]

The First Department also held, in *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*,[52] that where a lawyer represented a development corporation over a number of years in various matters, and then subsequently represented a developer on limited matters relating to the same development corporation and project, said lawyer could represent that development corporation in connection with the environmental review of the developer's project.[53] Such representation was allowed under the rules because the lawyer received informed consent in writing from both the development corporation and the developer.[54] The First Department added that, as an initial matter, the advocacy group that challenged the lawyer's representation lacked standing to even raise the conflict issue because it had no attorney-client relationship with the lawyer.[55] Further, the advocacy group's "recourse for protecting the public interest" was instead participating in the environmental review process.[56] The First Department added that even if there had not been informed consent, there would still have been no "appearance of impropriety," and set forth "three basic principles" of inquiry:

- "[I]f the representation does not violate another ethical or disciplinary rule [such as regarding representing concurrent clients or protecting former client interests], there can be no appearance of impropriety,
- [T]he mere appearance of impropriety alone is insufficient to warrant disqualification, and
- [T]he appearance of impropriety must be balanced against a party's right to the counsel of its choice as well as the possibility that the motion for disqualification may be motivated purely by tactical consideration."[57]

The Second Department reached a somewhat opposite conclusion in *Astor Rhinebeck Assoc., LLC v. Town of Rhinebeck*, where there was no written confirmation of consent, although the former client indicated a de facto consent to the arrangement.[58] In *Astor Rhinebeck*, the author's firm was very briefly retained by a landowner, and then represented the municipality (in which the owner's land was located) two years later, in connection with the Town's comprehensive planning and rezoning effort.[59] When the landowner sought to rehire the firm soon after the firm was retained by the municipality, the landowner did not object, and merely asked for a referral. The landowner moved to disqualify the law firm three years later, after the lengthy administrative process, in which it fully participated. The Town ultimately adopted zoning changes, which the landowner opposed.[60] The Court held that disqualification was still warranted notwithstanding the fact that the landowner raised no objection to the law firm's retention by the municipality until the land owner commenced a legal challenge to rezoning.[61] The Second Department found that the landowner "is not barred from moving to disqualify their attorney by the doctrine of laches," because the "interests of the petitioner/plaintiff and the appellants did not become materially adverse until the commencement of the present litigation, the petitioner/plaintiff could not have sought disqualification at an earlier time."[62] As a result there was "no basis upon which to conclude that the petitioner/plaintiff inexcusably waited too long to seek disqualification of the appellants' attorney."[63]

While *Astor Rhinebeck* was noteworthy for the very brief nature of the original representation, the Second Department's decision in *Walden Federal Savings and Loan Association v. Village of Walden*[64] indicates that even the passage of decades will not obviate the potential need for written consent by the parties to overcome a conflict. In *Walden*, a law firm represented a Village as land use counsel for many years. During that period it assisted the Village in enacting, among other things, certain zoning changes. Years after its representation terminated with the Village, the law firm represented a bank in a legal challenge against the Village with respect to certain approvals granted to the bank, involving zoning provisions, which the law firm helped enact during its representation of the Village.[65] Even though decades had passed since the representation of the Village, the Second Department held that the law firm's "former and current representations were both substantially related, as well as adverse."[66] Moreover, the Court found that it was reasonable to conclude that the law firm received confidential information during its representation of the Village, and this information could have been used to the advantage of the bank, thus creating an appearance of impropriety.[67]

No matter how minor the representation or the time lapse between the potentially conflicting representations, it appears that the only sure safeguard to avoiding a disqualifying conflict is obtaining the informed consent of both parties.

"Taint Shopping"

"Taint shopping" is a practice where a potentially adverse lawyer is conflicted out of a case because a possible "client" engages the lawyer in preliminary consultations and divulges confidential information to the lawyer. Rule 1.18 establishes that:

> [a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client…" [e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.[68]

To avoid improper taint shopping, Rule 1.18(e)(2) establishes that a person who contacts a lawyer with the sole purpose of conflicting an attorney out is not a prospective client within the meaning of the Rule, stating that "[a] person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of [the Rule]."[69]

Putting aside how one proves that the "purpose" of the interview was to disqualify the lawyer, the New York Bar Association suggests[70] that when meeting with a new client for the first time or undertaking a new matter for an existing client, the lawyer should "limit the initial interview to only such information as reasonably appears necessary for that purpose."[71] A lawyer may also opt to "condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."[72] Worthwhile suggestions, but not very pragmatic from a lawyer's vantage where it is awkward to insist on such qualifiers before meeting with a prospective client.

Correcting False Statements Before Planning or Zoning Boards

Is a lawyer ethically obligated to correct misstatements made before Planning or Zoning Boards? For example, a private client informs his lawyer that he or she should not worry about future mitigation conditions or other conditions of approval since they can be challenged later, and just concentrate on obtaining the necessary approvals. Rule 3.3 states that "[a] lawyer shall not knowingly…make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made *to the tribunal* by the lawyer."[73] Rule 1.0 defines "tribunal" as "a legislative body, administrative agency or other body *acting in an adjudicative capacity*."[74] Peeling this back one more layer, a legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

New York case law is predominantly silent as to what constitutes an adjudicatory body. The Second Department in *Halperin v. City of New Rochelle* noted that a ZBA is generally recognized as a *"quasi-administrative"* rather than quasi-judicial body.[75] The Second Department held that "[m]unicipal land use agencies like the Zoning Board are '*quasi-legislative, quasi-administrative*' bodies," and distinguished Zoning Board actions from "quasi-judicial determination[s] reached upon a hearing involving sworn testimony."[76] The issue is joined, the answer is unclear.

Ex Parte Communications

Is a lawyer allowed to communicate with public officials or municipal consultants outside the presence of counsel? Municipal practitioners regularly practice before municipal boards consisting of public officials and municipal consultants. Rule 4.2, the so-called "No Contact Rule," states that "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, *unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law*."[77]

The New York State Bar Association Committee on Professional Ethics noted, however, that while Planning Board members are parties within the meaning of the Rule, communications between an applicant's in-house attorney and an individual planning board member are "authorized by law" because they are "within the protection of the First Amendment right to petition," and are not prohibited "provided that counsel for the planning board is given reasonable advance notice that such communications will occur."[78] In the environmental or municipal practice context, communication with a Planning Board member is further allowed if the communication is "about pending SEQRA, site plan and subdivision determinations *provided* that: (a) the proposed communications solely concern municipal development policy issues; and (b) the *lawyer*

gives planning board counsel reasonable advance notice of the proposed communications."[79] Query, since the New York State Bar Association Committee on Professional Ethics specifically noted that its opinion does not "address ex parte communications with an *adjudicatory body*," would the result be different for a zoning board of appeals, which may constitute a "tribunal" or adjudicatory body?

Ex parte communications with municipal engineers, planners and municipal consultants do not appear to be covered as "parties" under Rule 4.2 since they *do not have the ability to bind* the municipality.[80]

Conclusion

The best analogy for me in summarizing the theme of this article is the scene at the end of the movie *Saving Private Ryan* when the older Private Ryan is at the cemetery with his family and grandchildren, and turns to them and asks, "Tell me I have been a good person."[81] Isn't that the question we all ask in the end, "Have I been a sensitive and ethical attorney?" Presumably, we all try our best.

Endnotes

1. Earl Warren, Chief Justice, U.S. Supreme Court, Speech at the Louis Marshall Award Dinner of the Jewish Theological Seminary of America (Nov. 11, 1962).
2. *See e.g.,* N.Y. Comp. Codes R. & Regs. tit. 6, § 613.8 (2011).
3. NYSBA Rules of Prof'l Conduct R. 1.6(a) (2009).
4. *Id.*
5. *See* NYSBA Rules of Prof'l Conduct R. 1.6(b) (2009).
6. *Id.* at (b)(6) (emphasis added).
7. N.Y. Comp. Codes R. & Regs. tit. 6, § 613.8 (2011).
8. The Supreme Court, Albany County held in *State v. Vantage Petroleum*, 2008 WL 4096527 (N.Y. Sup. Ct. Albany Cty), for example, that the DEC regulations create an obligation to report any spill, leak or discharge of petroleum" and that this regulatory requirement demanded the "mandatory reporting of a discharge" of petroleum. *Id.* at *4.
9. NYSBA Rules of Prof'l Conduct pmbl. (2009). The preamble to the New York Rules of Professional Conduct states that "[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." *Id.*
10. NYSBA Rules of Prof'l Conduct R. 1.6 cmt. 12 (2009).
11. *Id.* (emphasis added).
12. NYSBA Rules of Prof'l Conduct R. 1.6 (b)(1-2) (2009).
13. *See* N.Y. Envtl. Conserv. Law § 33-1301 (McKinney 2010) (establishing criminal violations for the unlawful sale of certain pesticides); N.Y. Envtl. Conserv. Law § 11-2503 (McKinney 2005) (addressing violations of the Interstate Wildlife Compact); N.Y. Comp. Codes R. & Regs. tit. 6, § 750-2.4 (2003) (establishing operator and permitee criminal liability for SPDES permitting); N.Y. Comp. Codes R. & Regs. tit. 6, § 550.6 (1972) (setting offenses and penalties for violating mineral resources regulations).
14. *Id.*
15. *Id. Cf. Art Capital Group LLC v. Rose*, 54 A.D.3d 276, 862 N.Y.S.2d 369 (1st Dep't 2008) (holding that "[a] party may not invoke the attorney-client privilege where 'it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct'").
16. NYSBA Rules of Prof'l Conduct R. 1.6 cmt. 6A (2009).
17. NYSBA Rules of Prof'l Conduct R. 1.6 cmt. 14 (2009) (emphasis added).
18. NYSBA Rules of Prof'l Conduct R. 1.16(b)(1) (2009).
19. NYSBA Rules of Prof'l Conduct R. 1.16(c)(2-4) (2009).
20. The Rules of Professional Conduct, which are set forth in 22 N.Y.C.R.R. Section 1200.0, replaced the prior Disciplinary Rules, with certain changes, and are set forth in a format and numbering system based on the American Bar Association Model Rules. *See* Editors' Note to Judiciary Law Appendix Rules of Professional Conduct.
21. NYSBA Comm. on Prof'l Ethics, Informal Op. 545 (1982).
22. NYSBA Rules of Prof'l Conduct R. 1.16(e) (2009).
23. *Id.*
24. NYSBA Rules of Prof'l Conduct R. 1.6 cmt. 15 (2009).
25. NYSBA Rules of Prof'l Conduct R. 1.7(a)(1-2) (2009) (emphasis added).
26. NYSBA Rules of Prof'l Conduct R. 1.0(f) (2009).
27. NYSBA Comm. on Prof'l Ethics, Informal Op. 630 (1992).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. NYSBA Rules of Prof'l Conduct R. 1.7(b)(1-4) (2009) (emphasis added).
33. NYSBA Rules of Prof'l Conduct R. 1.0(j) (2009).
34. NYSBA Rules of Prof'l Conduct R. 1.0 cmt. 6 (2009).
35. 2010 WL 1856016 (N.Y. Sup. Ct. Kings Cty.).
36. *Id.* at *3-*4.
37. NYSBA Comm. on Prof'l Ethics, Informal Op. 629 (1992).
38. *Id.*
39. NYSBA Rules of Prof'l Conduct R. 1.0(f) (2009).
40. NYSBA Rules of Prof'l Conduct R. 1.6(a) (2009).
41. NYSBA Rules of Prof'l Conduct R. 1.9(a) (2009) (emphasis added).
42. *Id.*
43. NYSBA Rules of Prof'l Conduct R. 1.9 cmt. 3 (2009).
44. 49 A.D.3d 94, 851 N.Y.S.2d 19 (1st Dep't 2008).
45. *Id.* at 23.
46. *Id.* at 21.
47. *Id.*
48. *Id.*
49. *Id.* at 22.
50. *Id.*
51. *Id.* at 23-25.
52. 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006).
53. *Id.* at 428-33.
54. *Id.* at 431.

55. *Id.* at 430.
56. *Id.*
57. *Id.* at 432.
58. 85 A.D.3d 1160, 925 N.Y.S.2d 896 (2d Dep't 2011).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).
65. *Id.* at 797.
66. *Id.*
67. *Id.*
68. NYSBA RULES OF PROF'L CONDUCT R. 1.18(a-b) (2009) (Rule 1.9 generally allows a lawyer to disclose confidences of former clients where the same would be permitted under Rule 1.6 (e.g., to prevent reasonably certain death or bodily harm)).
69. NYSBA RULES OF PROF'L CONDUCT R. 1.18(e)(2) (2009).
70. NYSBA RULES OF PROF'L CONDUCT R. 1.18 cmt. 4 (2009).
71. *Id.*
72. NYSBA RULES OF PROF'L CONDUCT R. 1.18 cmt. 5 (2009).
73. NYSBA RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009).
74. NYSBA RULES OF PROF'L CONDUCT R. 1.0(w) (2009).
75. 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dep't 2005) (holding that "[m]unicipal land use agencies like the Zoning Board are 'quasi-legislative, quasi-administrative' bodies," distinguishing ZBA actions from "quasi-judicial determinations reached upon a hearing involving sworn testimony").
76. *Id.* at 103 (emphasis added).
77. NYSBA RULES OF PROF'L CONDUCT R. 4.2(a) (2009) (emphasis added).
78. NYSBA Comm. On Prof'l Ethics, Informal Op. 812 (2007).
79. *Id.* (emphasis added).
80. *See* NYSBA RULES OF PROF'L CONDUCT R. 4.2(a) (2009) (emphasis added).
81. SAVING PRIVATE RYAN (Dreamworks SKG 1998).

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The Authority (or Rather Inability) of a Municipality to Adjudicate Land Use Violations Administratively

By Adam L. Wekstein

It would be tempting for a municipality to act as the accuser, judge and executioner (figuratively speaking) in controlling and punishing the conduct of violators of land use regulations, particularly the transgressions of recidivists who have learned how to manipulate the system. Being able to resolve land use violations administratively without the need to go to court could save time and expense. In fact, at least some municipalities have attempted to eliminate the need for judicial involvement in the disposition of land use offenses by establishing and/or empowering administrative entities to adjudicate violations of zoning ordinances,[1] accessory apartment regulations,[2] building codes[3] and local freshwater wetland ordinances.[4] Unfortunately for these municipalities, such a shortcut is not legal. Just last year, the Appellate Division reaffirmed the existing, albeit limited, authority holding that violations of land use regulations must be adjudicated in court, and not by a municipal administrative body.

Stoffer v. Department of Public Safety of the Town of Huntington

In *Stoffer v. Department of Public Safety of the Town of Huntington*,[5] the Second Department held that a town may not create a separate bureau to adjudicate land use violations since the authority to do so is vested solely with the Unified Court System. It found that delegation of the authority to resolve land use disputes to a municipal agency violates both statutory and state constitutional imperatives.

In *Stoffer* the Appellate Division reviewed the Town of Huntington's accessory apartment law. The Court framed the central issue as follows: "…whether the Accessory Apartment Bureau of the Town of Huntington Department of Public Safety, a quasi-judicial tribunal, had jurisdiction to adjudicate a violation of the Town Code of the Town of Huntington… and to revoke the petitioners' accessory apartment permit."[6] Pursuant to the challenged local law, residents seeking to establish an accessory apartment in their home were required to obtain a permit from a hearing officer following a public hearing.[7] In turn, as a *quid pro quo* for obtaining the permit, the owner of the home had to consent to an inspection of his or her property upon reasonable notice to allow confirmation that the property was in compliance with not only building and fire codes, but with the rules and regulations of any other agency having jurisdiction. The regulations provided that a determination by the hearing officer (who was also the chairman of the town's accessory apartment bureau ("AAB") that there was a refusal to allow a required inspection, could result in the revocation of the accessory apartment permit and the imposition of fines or penalties of between $250 and $500 for each week an inspection was not conducted and could not be completed.[8]

The Stoffers owned a single-family home which had received an accessory apartment permit. In November of 2007 the Stoffers were issued a violation for allegedly operating a kennel on their property and were notified that unless they remedied the alleged violation they would be referred to the AAB for possible revocation of their accessory apartment permit. When the Stoffers refused to allow a search of their property, as required under the accessory apartment law, the AAB scheduled a hearing, on notice, to consider the revocation of their accessory apartment permit. Following the hearing, the hearing officer revoked the Stoffers' permit, finding that they violated the law by refusing to allow a warrantless search of their premises.[9]

The Stoffers commenced an Article 78 proceeding challenging the determination by the AAB alleging, among other things, that: (1) the provision of the accessory apartment law which required consent to warrantless property searches was unconstitutional, and (2) the AAB did not have jurisdiction to adjudicate the violation of the accessory apartment provisions of the town code.

The Suffolk County Supreme Court granted the Stoffers' petition and annulled the hearing officer's determination, holding that "…the Court of Appeals' decision in *Sokolov v. Village of Freeport*…prohibited the Town 'from conditioning the continued use of an accessory apartment…upon the requirement that [the owners] consent to a warrantless search of the premises.'"[10] As the lower court annulled the AAB's decision on Fourth Amendment search and seizure grounds, it did not reach the question of whether the town could create and authorize the AAB to adjudicate zoning violations.

In contrast, the Appellate Division refused to reach the propriety of the accessory apartment law's requirement of consent to administrative searches. The Second Department stated that before it could consider the constitutionality of the warrantless search requirement im-

posed by the regulations, it had to address the threshold question of whether the AAB could be granted the authority to hear and resolve land use violations.[11] On this issue, the Appellate Division held that the AAB did not possess (and could not have been authorized to have) jurisdiction to adjudicate land use violations.

The Appellate Division invoked several bases for its conclusion. First, it relied on the decision of the Supreme Court, Suffolk County, in *Greens at Half Hollow, LLC v. Town of Huntington*[12] *("Greens at Half Hollow")*, and Informal Opinion Number 2003-18 of the New York State Attorney General's Office,[13] both of which, as discussed below, invalidated attempts by towns to hear and decide land use violations in their own administrative tribunals. In citing such authority the Court did, however, recognize that as *Greens at Half Hollow* and Opinion No. 2003-18 were a lower court decision and administrative opinion, respectively, neither was binding on the Appellate Division.

Second, the Appellate Division invoked Article VI, Section 30, of the New York State Constitution, which grants to the State Legislature the power "to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised" and the Legislature's enactment of relevant statutes thereunder. For example, it relied on the authority granted to District Courts to adjudicate, among other things, zoning violations. Under Section 203(a) of the Uniform District Court Act ("UDCA") such courts, which exist only on Long Island,[14] are expressly given jurisdiction over actions to impose and collect penalties for the violation of state or local laws for the establishment and maintenance of housing standards, including local housing maintenance codes, building codes and health codes, and actions seeking "…the issuance of an injunction, restraining order or other order for the enforcement of housing standards…"[15]

The Appellate Division also considered the implications of the combination of the Criminal Procedure Law and the Town Law in concluding that both local criminal courts, which include District Courts (and for that matter, City, Village and Town Courts and New York City Criminal Court),[16] and the Supreme Court and County Court have been delegated the power to try violations of local ordinances, rules and regulations. Specifically, the Second Department recognized that Criminal Procedure Law §10.30[a] vests local Criminal Courts with jurisdiction to try petty offenses and misdemeanors, and that under Criminal Procedure Law §10.20 Supreme and County Court have jurisdiction to try misdemeanors and jurisdiction to try petty offenses only when such offenses are included in an indictment charging a crime. Bolstering its conclusion that the courts, rather than the localities, have jurisdiction over zoning and land use violations, the Court pointed out that Town Law §135 explicitly categorizes violations of a building code or zoning ordinance as an offense which, for the purposes of jurisdiction only, is treated as a misdemeanor; therefore, it recognized that such violations were designated for trial in local criminal courts and Supreme and County Court.

Third, the *Stoffer* decision rejected the possibility that the Town could employ any legal mechanism to interfere with the judiciary's authority over land use violations. It acknowledged that supersession of state law is allowed in certain circumstances under the Municipal Home Rule Law[17] and that Article IX of the State Constitution imbues local governments with power to adopt and amend local laws not inconsistent with any general law. However, it held that Article IX, §3(a)(2) of the Constitution prohibits the implementation of local laws "…abrogating or superseding the jurisdictional framework created by the Legislature in order to try zoning violations in an administrative tribunal."[18] Section 3(a) of Article IX of the Constitution reads, in pertinent part, as follows:

> (a) except as expressly provided, nothing in this article [which includes the bill or rights of local governments and limitations of such rights] shall restrict or impair any power of the [state] legislature in relation to...
>
> > (2) the courts as required or provided by Article VI of this constitution ...[19]

Fourth, to bolster its conclusion, the *Stoffer* decision noted that Article 14-BB of the General Municipal Law permits municipalities with a population of between 300,000 and 350,000 to "adopt a local law establishing an administrative adjudication hearing procedure…for all code and ordinance violations"[20] and that the Article was inapplicable to the Town of Huntington and could not have been the basis for the creation of the AAB.[21] The Appellate Division stated that "…in light of the Legislature's specific pronouncement regarding the conditions under which it will permit the creation of an administrative tribunal for the purpose of code enforcement, it is clear that the Legislature sought to preempt local governments that do not meet these conditions from creating such tribunals."[22] Conversely, it reasoned that if any municipality, such as the Town of Huntington, could create its own administrative adjudicatory procedure for violations of zoning ordinances and other local code provisions without specific legislative authority, Article 14-BB would be rendered superfluous,[23] a result it was unwilling to sanction.

As a result of its multi-pronged analysis, the court, in *Stoffer*, concluded that the AAB lacked jurisdiction

to adjudicate the claims that the Stoffers violated the accessory apartment law by refusing to consent to the search of their home. Consequently, it annulled the revocation of the Stoffers' accessory apartment permit and affirmed the lower court's decision.

Greens at Half Hollow

In *Greens at Half Hollow*, which preceded *Stoffer*, the court reached essentially the same outcome as *Stoffer* with respect to a locally created zoning violation bureau (the "ZVB"), although it showed more of a penchant for discussing abstract legal theory. The ZVB was established, also by the Town of Huntington, to hear and adjudicate all town land use codes, that is, zoning and land use violations.[24] The private plaintiff, Greens at Half Hollow, LLC (the "Greens") commenced an action seeking a declaration that the law which established the ZVB was unconstitutional and illegal and to enjoin any prosecutions before the ZVB. The Greens did not have to go it alone, as New York's Unified Court System, jealously guarding its turf, asserted that the ZVB was "…an unconstitutional usurpation of the judicial function which rests exclusively with the New York State Court System."[25]

The Supreme Court first rejected the Town's defense that because the Greens were not the subject of any prosecution before the ZVB, it lacked standing to maintain the action. It ruled that because the Greens were subject to the constraints of the local law which created the ZVB and in jeopardy of possible prosecutions or adjudication thereunder, the plaintiff clearly had standing.[26] Additionally, the court found that the Unified Court System had standing in light of its interest in protecting its exclusive authority to hear and determine cases and prevent the erosion of the courts as a co-equal branch of government.[27]

Reaching the merits of the case, the court actually referenced *Marbury v. Madison*[28] (something the author of this article has wanted to do since law school) and relied on scholars whose views shaped the governmental system of the United States. It began analyzing the merits of the case as follows:

> The Court is ever mindful that the doctrine of separation of powers as first presented by the French aristocrat Charles de Secondat, Baron de la Brede et de Montesquieu (hereinafter Montesquieu), who propounded the tripartite form of government with its built-in checks and balances on the power given to the executive, legislative and judicial functions. In his treatise "Of the Laws which Establish Political Liberty with Regard to the Constitution," Montesquieu stated "that men's minds can not be at rest if two or three kinds of governmental power are held within the same hands." Montesquieu's vision of a tripartite government clearly sets forth a basis of the separation of functions, i.e. legislative, executive and judicial, a doctrine adopted by and expanded by Sir William Blackstone and James Madison.[29]

The court continued its eloquent analysis, albeit on a more concrete level, in condemning the town's effort to solve its perceived problem. The decision stated:

> …no town is above the law, nor should we as a freedom loving people tolerate the relaxation of constitutional safeguards and due process rights in the name of a "more effective, novel, creative and new" remedy in dealing with the persistent problem of zoning violations. The Court is cognizant of the Town's dilemma in developing adequate means and remedies within which to address the recurring problem of zoning violations and the enforcement of its local laws which it believes are ignored, trivialized and minimized. Nevertheless, the Court cannot condone clear violations of the New York State Constitution, statutory authority and attempts to make an "end run" around the court's jurisdiction as a means to a justified end by "taking the law into its own hands" under the guise of a pseudo "administrative tribunal" (ZVB) of its own creation.[30]

Among other things, in *Greens at Half Hollow*, the court rested its determination on the precept that the jurisdiction to try land use violations rests with the judiciary. As in *Stoffer*, the decision grounded its holding on the facts that Article VI §16 of the New York State Constitution gives the state legislative authority to regulate and/or discontinue District Courts, and, in turn, that Section 203 of the District Court Act expressly invests the District Courts with jurisdiction over actions brought to impose and collect a civil penalty for a violation of, *inter alia*, housing standards, including, applicable local housing maintenance codes, building codes and health codes.[31] Additionally, it invoked Municipal Home Rule Law §11(1)(e) in support of its holding, characterizing that statute as precluding municipal legislative bodies from superseding a state statute if the local law "…'[a]pplies to or affects the courts as required or provided by Article 6 of the Constitution.'"[32]

Greens at Half Hollow also emphasized that in identical language in Town Law §§135 and 268(1), the latter of which is included in the article of the Town Law which constitutes the enabling legislation for zoning, gives the courts jurisdiction over violations of zoning or a town building code.[33] Finally, it held the provision of the local law which granted the Town Attorney authority to appoint the hearing officer for the ZVB, when the Town attorney acted as the prosecutor of the zoning violations, contravened the requirement for due process.[34]

Opinion 2003-18

The final precedent directly addressing the legality of the adjudication of land use violation by a local administrative body is Attorney General Opinion 2003-18. Therein, the Attorney General's Office considered the Town of Hamburg's request for an opinion as to the propriety of the creation of an administrative tribunal to decide building code violations. It should be noted that unlike in *Stoffer* and *Greens at Half Hollow*, the Town of Hamburg is not located in a geographic area where a District Court would adjudicate code violations, but rather where such disputes would be heard in Town Court. This factor played no role in the Opinion's conclusion.

The Attorney General opined that the proposal was impermissible, stating "…the contemplated tribunal would thus possess judicial powers normally performed by the court."[35] The opinion again relied on the Criminal Procedure Law, finding that local courts, such as a town court, have jurisdiction over all offenses except felonies[36] and that with one exception they have exclusive trial jurisdiction over petty offenses, including violations, and concurrent jurisdiction with Supreme and County Courts over misdemeanors.[37] It also concluded that "…both the constitutional article conferring home rule power on municipalities and the statutes implementing this power limit the town's ability to adopt a local law that affects the courts."[38] In addition to citing Article 14-BB of the General Municipal Law, as an example of where the Legislature has expressly authorized local administrative tribunals to consider code violations, the Opinion relied on Vehicle and Traffic Law Article 2A, which empowers hearing officers to adjudicate traffic infractions in certain jurisdictions, to confirm the conclusion that the Legislature had granted no such quasi-judicial power to municipalities in general.

The Attorney General also reached an issue not raised in either of the judicial decisions. It expressed the view that a town may not enact legislation creating the position of a hearing officer to assist the town court in adjudicating criminal cases against persons charged with violating the town building code.

Conclusion

Both court decisions and the Attorney General's opinion discussed in this article appear to foreclose municipalities from utilizing administrative processes to adjudicate land use violations in the absence of express Legislative authorization to do so. Such authority makes clear that efforts at employing the home rule power to circumvent this principle would be unavailing. Rather, in order to bypass the courts and resolve zoning, building code and other related violations by a strictly administrative process, a municipality would need to obtain Legislation granting it jurisdiction to employ such means.

Endnotes

1. *Greens at Half Hollow, LLC, v. Town of Huntington*, 15 Misc.3d 415 (Sup. Ct. Suffolk Co. 2006).
2. *Stoffer v. Dep't of Public Safety of Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
3. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
4. Town of Lewisboro, N.Y., Code § 271-11E (granting authority to the Town Planning Board to adjudicate guilt, impose civil penalties of up to $7,500 per wetlands violation and order mitigation, and making violations of the Planning Board's orders to be offenses and misdemeanors).
5. *Stoffer*, 77 A.D.3d at 305.
6. *Id.* at 307.
7. *Id.* at 307-308.
8. *Id.* at 308.
9. *Id.* at 310.
10. *Id.* at 311 (citation omitted). In *Sokolov v. Village of Freeport*, 52 N.Y.2d 341(1981), the Court of Appeals held that an ordinance requiring landlords to allow a warrantless inspection of their premises as a precondition to the issuance of a municipal permit authorizing the rental thereof was unconstitutional.
11. *Stoffer*, 77 A.D.3d at 312.
12. *Greens at Half Hollow, LLC*, 15 Misc.3d at 415.
13. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
14. The District Courts have been established only in Nassau and Suffolk Counties on Long Island. N.Y. Uniform District Court Act (UDCA) §2300.
15. *Stoffer*, 77 A.D.3d at 313-314. Curiously, while the Uniform City Court Act ("UCCA") contains a provision that is alike with that in the UDCA (UCCA §203), the Uniform Justice Court Act ("UJCA") (applying to Town and Village Courts) contains no like provisions. District, City, Town and Village courts are all explicitly vested with more generic jurisdiction over criminal matters as is provided by the Criminal Procedure Law. *See* UDCA §2001, UJCA §2001 and UCCA §2001.
16. N.Y. Crim. Proc. Law §10.10(3) (McKinney's 2010).
17. N.Y. Mun. Home Rule Law §10(1)(i),(ii)(d)(3) (McKinney's 2010).
18. *Stoffer*, 77 A.D.3d at 316.
19. N.Y. Const. Art. IX §3(a) (McKinney's 2010).
20. N.Y. Gen. Mun. Law §380, allows creation of the administrative adjudication hearing procedure "for all code and ordinance violations regarding conditions which constitute a threat or danger to the public, health, safety or welfare."

21. *Stoffer*, 77 A.D.3d at 316.
22. *Id.* at 316-317.
23. *Id.* at 317.
24. *Greens at Half Hollow, LLC*, 15 Misc.3d at 416.
25. *Id.* at 417.
26. *Id*.
27. *Id*.
28. 5 U.S. (1 Cranc) 137, 2 L.Ed 60 (1803).
29. *Greens at Half Hollow, LLC*, 15 Misc.3d at 418.
30. *Id.*at 419-420.
31. *Id.* at 421.
32. *Id*.
33. The Zoning enabling article of the Village Law contains no provision which is analogous to the sections of the Town Law cited in text. N.Y. VILLAGE LAW §7-714 merely provides that in addition to other remedies, an action may be commenced to restrain, prevent or abate land use violations. N.Y. VILLAGE LAW §20-2006 is analogous to such Town Law provisions but applies only to violations or ordinances enacted prior to September 1, 1974. A provision mirroring Town Law §268 is absent from those provisions conferring zoning authority on Cities (Sections 20(24) and 20(25) of the General City Law), although Cities are afforded the authority to impose penalties, imprisonment or forfeitures for violation of any local law or ordinance or to seek injunctive relief or restrain violations. In particular, section 42 of the Second Class Cities Law provides that any person violating an ordinance of the common council is guilty of a misdemeanor although the ordinance may provide that a violation constitutes an offense.
34. *Greens at Half Hollow, LLC*, 15 Misc.3d at 422, 831 N.Y.S.2d at 654.
35. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
36. N.Y. CRIM. PROC. LAW §§10.10 (3)(d), 10.30 (1).
37. N.Y. CRIM. PROC. LAW §§10.30 (1)(a), (b).
38. Interestingly, in Informal Opinion No 2005-18, the Attorney General concluded that the Town of Huntington (clearly an active player in attempts to tinker with state land use law) had authority to modify penalties imposed by Town Law §268 by eliminating the possibility of imprisonment for first and second offenses and increasing the amount of fines imposed for such violations. The Opinion expressed the view that the modification of penalties did not interfere with the jurisdiction of courts, even though it speculated that the elimination of the possibility of imprisonment for the first and second offenses could divest Supreme and County courts of jurisdiction over such violations. At least this latter conclusion would seem to be at odds with *Stoffer* and *Greens at Half Hollow*.

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Land Banking, TIF Amendments, and the Tax Cap: What the Heck Do They Have in Common?[1]

By Kenneth S. Kamlet

This article will address three issues with significant implications for local government finance and economic development. They also have major environmental implications because they involve, directly or indirectly, vacant, abandoned, tax-delinquent, or otherwise underutilized, real estate, which is often environmentally impaired.

The three issues are (1) Land Banking, which the NYS Legislature approved in the spring of 2011,[2] (2) Tax Increment Financing (TIF) amendments, which the Legislature failed to enact this year for the fourth or fifth time in a row,[3] and (3) Tax Cap legislation, passed by the Legislature after strong prodding by the Governor.[4]

The Land Bank Act (LBA)

The LBA gives local taxing jurisdictions (called "Foreclosing Governmental Units" or "FGUs"), the authority to legislatively establish Land Banks with broad powers "to facilitate the return of vacant, abandoned, and tax delinquent properties to productive use" by acquiring such properties and eliminating "the harms and liabilities caused by such properties." The law authorizes only 10 Land Banks to exist at any given time, with the Urban Development Corporation (UDC) (otherwise known as Empire State Development) given the power to review and approve or disapprove Land Bank resolutions or local laws enacted by local legislatures.[5]

Land Banks are to be structured, similar to Local Development Corporations, as Type C not-for-profit corporations,[6] but do possess some attributes of state or local agencies.

They are treated as state agencies for the limited purposes of promoting employment and business opportunities for minority and women-owned business enterprises (M/WBEs).

They are treated as "local authorities" under the Public Authorities Accountability Act of 2009 (including review by the Authorities Budget Office[7]), and are considered an "agency" for purposes of compliance with the State Environmental Quality Review Act (SEQRA). They are also subject to the Freedom of Information Law (FOIL) and the Open Meetings Law.[8]

Although not specifically addressed in the LBA, it would appear that Land Banks qualify for the "municipal liability exemption" under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the NYS Brownfield Cleanup Program (BCP) law as a "public corporation" (which includes a "local public authority" and, presumably, a "land bank corporation").[9]

Municipalities may convey environmentally impaired properties to Land Banks without giving up their own municipal liability exemption and, at the same time, adding an additional layer of insulation (the Land Bank, as current owner[10]) between themselves and a subsequent transferee. This is a valuable benefit to local governments reluctant to subject themselves to potential environmental liability by taking title to tax-delinquent properties and retaining them for prolonged periods. This reluctance is understandable given the limitations of the municipal liability exemption.[11] While Land Banks may have the same reluctance, their vulnerable assets will at least generally be more limited than those of the FGU or municipality contributing the suspect real estate. The Land Bank's board of directors will need to decide whether to reject environmentally suspect properties entirely, or—if they do choose to accept them—to accept them only in accordance with strict procedures that ensure adherence to the limitations of the municipal liability exemption or other applicable CERCLA exemptions, such as the "bona fide prospective purchaser" exemption.

While a Land Bank may be able to extinguish liens, including environmental liens, if the property is contaminated, the underlying liability will remain. The U.S. Environmental Protection Agency (and the State) may consider Land Banks, given their role in revitalizing underutilized properties, as preferential recipients of environmental assessment and cleanup grants.[12]

Other benefits to turning underutilized properties over to a Land Bank include:

- The ability to maximize potential returns (shared between the Land Bank and the FGU) on land assemblages that are rehabilitated, redeveloped, and/or resold (especially when done pursuant to a well-considered "redevelopment plan"), rather than selling such properties piecemeal at auction for pennies on the dollar.[13]
- Land Banks that bid at tax auctions are given priority over other bidders, as long as they pay any overdue taxes and certain other costs to the foreclosing municipality (i.e., the municipality is at least assured of being paid what it is owed).[14]

- The Land Bank, in acquiring properties from the FGU (or directly from localities), will negotiate a division of the proceeds (of rentals or resales) between the Bank and the FGU (or locality); the returns to the taxing jurisdictions involved will be far higher (although less immediate) than under the current tax auction system.
- When Land Banks acquire properties at a judicial sale, they acquire them with clear title, which greatly facilitates resale and redevelopment.
- Land Banks can issue revenue bonds, which are repaid strictly out of Land Bank assets (with no recourse against the FGU or locality), with no impact on constitutional debt limits.
- Land Banks concentrate their efforts on restoring value to under-performing properties; by doing so, they not only enhance the taxable value of the rehabilitated properties, but they also boost the assessed value of nearby properties the values of which are significantly depressed by the mere proximity of vacant, abandoned, and deteriorating land.

Land Banks have very broad powers ("all powers necessary") to effectuate the purposes and provisions of the LBA, and they are to be "construed liberally." Indeed, in the exercise of its powers and duties, a Land Bank "shall not be subject to restrictions imposed by the charter, ordinances, or resolutions of a local unit of government." However, it is subject to local zoning laws and building codes and it is expressly denied the power of eminent domain.

Revenue bonds issued by a Land Bank are tax-exempt, and the Land Bank's real property, and its income and operations, are exempt from all taxation by the State and its political subdivisions.

Although Land Banks may acquire all kinds of property from political jurisdictions, they may only acquire property from other entities if the property is tax delinquent, tax foreclosed, vacant or abandoned—unless the agreement to purchase is made consistent with an approved "redevelopment plan." For example, the Land Bank could approve a redevelopment plan authorizing the acquisition of all available real estate within the boundaries of an approved Brownfield Opportunity Area (BOA) under the General Municipal Law,[15] where such acquisition would help effectuate the objectives of the BOA plan.

Local land bank enabling legislation may establish a "hierarchical ranking" of priorities for the use of real property conveyed by a Land Bank. Such uses might include uses for: public spaces; affordable housing; retail, commercial and industrial activities; and wildlife conservation.

The authors of the LBA placed a premium on public accountability and transparency, including the requirement that Land Banks maintain complete inventories of all property received and all real property dispositions. The Land Bank must, in addition, keep minutes and a record of all its proceedings. And, as noted, it will generally be subject to the Open Meetings Law and FOIL. The Land Bank must hold a public hearing prior to financing or issuing bonds and consider the comments received. And, the Bank's chairperson must deliver, orally and in writing, an annual report to the FGU/municipality, describing in detail the projects undertaken, monies spent, and administrative activities. Strict conflict-of-interest rules also apply to any member or employee of a Land Bank.

Additional details concerning the structure and operations of Land Banks are set forth in a "Land Banking Q&A," annexed hereto as an attachment.

Tax Increment Financing (TIF)

Land Banks, although they may require some initial infusions of funds or property at the outset, if they function properly, should become self-sustaining, supporting future real estate acquisitions from the sale and rent of ongoing real estate holdings. They can also raise capital by issuing tax-exempt revenue bonds that are repaid from Land Bank assets. Land Banks are also about revitalizing underutilized land and assembling and redeveloping real estate in furtherance of an approved "redevelopment plan."

These characteristics of Land Banks are somewhat similar to how Tax Increment Financing (TIF) is designed to operate.[16] Instead of sustaining itself and repaying investors with the proceeds of *real estate* transactions, TIF is a self-sustaining financing mechanism used to fund *infrastructure improvements* in blighted areas, which stimulate economic development in accordance with a "redevelopment plan." TIF bonds, like Land Bank bonds, are tax-exempt revenue bonds. In the case of TIF, the bonds are repaid by increased property tax revenues resulting from the new economic activity spurred by the initial TIF infrastructure investment. In the case of Land Banks, the bonds are repaid by the increased value of the Land Banks' real property holdings resulting from selective rehabilitation, redevelopment, and resale of portfolios of those holdings, along with rental incomes and other proceeds of property management. Both TIF and Land Banks promote economic development and revitalization of underutilized or blighted property by enhancing the value of urban real estate.

In other states, where Land Banks are operational,[17] effective TIF laws also exist and are used to good advantage, in supplementing other sources of revenues, to carry out land banking objectives.

TIF and Land Banks are rare examples in New York of self-help programs, which give local governments the opportunity to steer their own destinies, by partnering with private sector investors and developers to expand their tax bases and promote economic development—and doing so, without relying on handouts from the State or increasing the burden on taxpayers. Although the LBA was enacted in New York on the third try (once, after passing the Legislature but being vetoed by former-Governor Paterson), TIF reform legislation has had more difficulty gaining traction.[18]

After the New York State Constitution was amended in 1983[19] to allow a municipality to contract indebtedness for eligible redevelopment projects by issuing bonds backed, not by full faith and credit, but by "the payment…[of] that portion of the taxes raised by it on real estate in such area which, in any year, is attributed to the increase in value of taxable real estate resulting from such redevelopment," the Legislature enacted a TIF law the next year as part of the Municipal Redevelopment Law.[20] The 1984 TIF law, however, had a major defect that has resulted in its being very rarely used[21] in the last 27 years. That defect is that, unlike TIF laws in the vast majority of other states, New York's TIF law does not authorize the use of incremental *school* tax revenues to repay TIF debt. Since, in most parts of the State, school property tax revenues exceed municipal property tax revenues by up to two-to-one, or more, the unavailability of the incremental revenues resulting from the enhanced value of benefiting-school-district real estate in the TIF-supported redevelopment area makes investing in TIF bonds a far riskier investment than it ought to be.

TIF reform legislation over the years has sought to rectify this deficiency. In recent sessions of the Legislature, the Schimminger-Young proposal (2011) and the identical Schimminger-Stachowski bills (2009-2010), as well as prior versions of the Schimminger bill, would all authorize, but not require, school districts within a proposed redevelopment area (TIF district) to opt-in to the TIF project, after full review and public process. On this basis, the New York State School Boards Association enthusiastically supported the Schimminger bill in 2008.[22]

What is the basic structure and mechanics of New York's current TIF law?

The concept of TIF is simple but powerful. Municipalities are empowered to issue TIF bonds or notes for certain allowed public purposes to stimulate private sector economic development in blighted and underutilized areas. Instead of using new taxes to repay the bonds, the bonds are repaid by the increased revenues generated by the new development and tax base enabled by the TIF financing. TIF bonds are "revenue bonds" backed by the earmarked revenue stream, and not "general obligation" bonds backed by the municipality's "full faith and credit." They don't count against a municipality's constitutional debt limit. That is a good thing for Upstate municipalities like Rochester and Binghamton that are rapidly approaching that limit. Under the "revenue bond" mechanism, if the expected revenue growth fails to occur, the loss is borne by the investor and/or the developer—not the municipality or its taxpayers.

TIF instruments may only be issued in support of locally approved "redevelopment plans" in defined "project areas" (sometimes known as "TIF districts") which are defined by a predominance of "blight."

TIF financing is authorized for a limited number of specified public uses and purposes to remedy conditions of obsolescence, deterioration and disuse "in order to facilitate commercial and industrial development, to promote low- and moderate-income housing, and to maintain and expand employment opportunities for jobless, unemployed and low income persons." And, it may only be utilized when such redevelopment "cannot be accomplished by private enterprise alone without public participation and assistance."

Allowed TIF "objects and purposes" include:

- Acquisition of land and site preparation and, most likely, cleanup of contaminated sites or "brownfields."
- Installation, construction or reconstruction of public utilities (including streets, walkways, parking facilities, and water and sewer systems), parks and playgrounds.
- Other public improvements or services integral to the redevelopment plan.

The sponsoring municipality establishes a TIF area, with specified boundaries and duration, and dedicates the increase in property taxes from the area, from the establishment date forward, to the support of one or more eligible development projects within the TIF area. The locality then issues bonds to pay for certain designated allowable uses and purposes. Alternatively, the municipality can issue a promissory note, or TIF bond anticipation note, to reimburse a developer for advancing these funds initially. After the redevelopment project is complete, until the TIF area terminates, the municipality uses the incremental tax revenue to pay off the debt. Once the debt is paid, or when the TIF district otherwise terminates, the municipality reaps the benefits of increased tax revenues, a larger tax base, and increased economic activity.

The process requires that the TIF area meet certain statutory requirements, such as being "blighted" and being suitable for economic development. The proj-

ect must meet a but-for test—that is, it must be one which would be unlikely to occur without municipal participation.

The municipality, often with the aid of an involved developer, must establish a TIF area redevelopment plan, which addresses economic feasibility, land use impacts, and estimated costs and benefits.

The municipality must then hold a public hearing and receive inputs from other taxing districts and the public within the TIF area.

Then, the municipality must enact a local law empowering it, or a redevelopment agency, to take the steps necessary to move the redevelopment forward. It establishes the base year against which the tax increment will be measured. It then selects a developer with whom to enter into a redevelopment agreement. A TIF bond or note is issued to incur long-term debt—usually for 15 or 20 years. If successful, the TIF district will produce sufficient incremental tax revenue and the debt is paid off. After the TIF district terminates, the municipality and the region reap the benefits.

TIF financing works best when several adjacent projects are combined into a large development in order to produce the diversity and economies of scale necessary to generate sufficient incremental revenues.

As of 2004-05, TIF was the economic development tool most widely used by U.S. municipalities of 10,000 or more and counties of 50,000 or more,[23] second only to general fund revenues. Between 2005 and 2010, seven states generated more than $500 million apiece in revenues from TIF bonds.[24] Ten additional states generated more than $100 million apiece. TIF bond sales nationwide have grown from about $1.7 billion a year in 1990-95 to $3.3 billion a year in 2005-2010. New York has been missing out on a lot of economic activity.

The Schimminger-Young TIF reform legislation, or its similar predecessors, have been endorsed or supported by more than 50 organizations, associations, individuals and other entities in all parts of the State and of every political persuasion. They include major business groups, environmental organizations and other non-profits, local governments and government associations, and school districts and associations. It has also been endorsed by the Environmental Law Section of the New York State Bar Association.

Tax Cap Legislation

The local "tax cap" legislation initially proposed by the Governor and passed by the State Senate (S.2706) would cap increases in new property tax impositions by local governments and school districts. However, it purported to cap "the *amount* of the real property taxes" that may be levied. The amount of these taxes "shall not exceed" a specified "tax levy limitation" defined as "the amount of taxes a local government is authorized to levy" in relation to the previous year's *amount* of taxes levied.

This language had some unintended consequences, as I pointed out to the Senate leadership. By basing the tax cap on the previous year's tax levy *amounts*, rather than on tax *rates* or total *assessed value* (or a combination of the two), the legislation did not distinguish between taxes generated by increasing the tax burden on existing residents and businesses (undesirable) and taxes generated by attracting new residents and businesses, thereby expanding the tax base (very desirable).[25]

The problem with this initial approach was that it would have rewarded inefficient, stagnant municipalities while penalizing forward-looking municipalities that were trying to reduce the tax burden on their taxpayers by broadening the tax base. If it had not been subsequently corrected, it would have provided a strong negative incentive against blight-fighting, development-stimulating programs of the sort promoted by programs like Land Banking and TIF.

Fortunately, legislation subsequently passed by the Assembly (A.7916), ultimately approved by the Senate and the Governor and enacted into law, included a "carve-out" to avoid this anomaly. As described in a June 20, 2011 letter to those who had expressed support for tax cap legislation, Assembly Speaker Sheldon Silver described this carve-out as "includ[ing] a tax base growth factor to account for any increase in the full value of taxable real property." Comptroller DiNapoli, in a more recent summary of the tax cap legislation, described this as "[a]n adjustment for certain tax base growth, such as new construction (i.e., 'tax base growth factor'). This is driven by a 'quantity change factor' which is calculated by the Department of Taxation and Finance [DTF] and is used in determining the tax base growth factor, if any, for each local government and school district."

In DTF's Publication 1000 (9/11),[26] the Tax Department further clarifies that the "Quantity Change Factor" provides an adjustment only to reflect "an increase in the full value of taxable property…due to physical or quantity change—i.e., new growth or significant additions to existing properties." It does not cover:

- "Increases in full value due to changes in assessment only."
- A change in full value due to the splitting or merging of parcels.
- Property returning to the tax rolls after the expiration of a PILOT.

Moreover, Publication 1000 indicates that the DTF Commissioner "will issue a Quantity Change Factor for all local governments that have experienced an increase in the full value of taxable real property due to a physical or quantity change." Thus, it will evidently not be left to individual municipalities or their assessors to make the case that a Quantity Change carve-out is appropriate. But, at least, such a carve-out was included in the law. Without it, serious anomalies would proliferate.

The law, unfortunately, left two other somewhat related issues unaddressed.

It doesn't exclude from the computation of the previous year's tax levy amount, repayment of principal and interest on previously issued general obligation municipal bonds. This is seemingly a problem because the New York State Constitution bars the Legislature from restricting the power to levy taxes on real estate to pay interest or principal on previously contracted indebtedness.[27] The tax cap law could force municipalities to choose between supporting operations and investing in infrastructure. It could also potentially disrupt the municipal bond market. Twenty-seven county attorneys have, reportedly, submitted requests[28] for an opinion from the State attorney general's office as to the constitutionality of GML §3-C. Specifically, they have asked whether, in light of this constitutional limitation, a municipality may exclude its debt payments from the tax levy limitation calculation.

It also doesn't exclude from the computation of the previous fiscal year's tax levy amount, repayment of principal and interest on previously issued revenue bonds, including TIF bonds and bonds issued by Land Banks. This is seemingly an even more serious substantive problem because these kinds of revenue bonds rely for their repayment on growth in the value of real estate.[29] Instead of viewing Land Banks and TIF as ways to expand their tax bases and to carve out safe harbors from the rigid application of a tax cap, municipalities are likely to view revenue bond repayments as competing with other budgetary priorities.

Still, the tax cap can be overridden by a 60 percent vote.[30] And, in any given year, municipal bonded indebtedness (whether of general obligation or revenue bonds) is likely to be a small proportion of annual property tax revenues. So, hopefully, the "constitutional imperative" that debts must be paid will prevail for all types of bonds—whether or not bonded indebtedness is deemed to be an extra-statutory (imputed) carve-out from the general tax cap.

With or without an imputed carve-out for debt service, as explained, *supra*, there is an explicit carve-out in GML §3-C for "quantity growth" associated with expansion of the tax base by increasing the full value of taxable real property. From this vantage point, as I wrote to the Lieutenant Governor,[31] "[i]f properly explained, TIF could be presented as a powerful tool for enabling municipalities to attract economic development (without raising taxes) and expand their tax bases, which would help to offset what they see as the negative impacts of a Tax Cap."

Conclusions

The Land Bank Act (as enacted) and Tax Increment Financing (if enhanced) both provide useful tools, which could reinforce one another, for local governments to revitalize blighted and underutilized land, to further economic development, and to expand their tax bases. They could also operate in conjunction with the New York Brownfield Cleanup Program law, and other federal and state environmental programs, to promote the assessment, cleanup, and redevelopment of environmentally impaired land, including Brownfield Opportunity Areas (BOAs).

These authorities are especially useful to municipalities as direct and indirect sources of funding, and in promoting economic development, in the wake and aftermath of natural disasters, economic recession, and tax cap legislation (which is regarded by some as the worst of the three). The carve-out in the enacted tax cap for new economic growth makes TIF and Land Banks especially valuable in helping municipalities balance their budgets in these difficult times.

Endnotes

1. Originally presented Oct. 23, 2011 at the NYSBA Environmental Law Section and Municipal Law Section Fall Meeting, Gideon Putnam Hotel, Saratoga Springs, NY.
2. The Land Bank Act (LBA) was added to the Non-Profit Corporation Law as §§1600-1617. It also amended §2 of the Public Authorities Law. It was signed by the Governor on July 29, 2011.
3. TIF legislation was initially enacted in New York in 1984 as part of the General Municipal Law, Article 18-C, GML §970-a *et seq.* In 2011, the Senate TIF reform bill, S.2446, was sponsored by Sen. Catharine Young. It passed the Senate overwhelmingly, 61 to 1. Identical legislation was also incorporated as "Part E" in a Senate omnibus bill, S.5758, introduced by Senate Majority Leader Skelos (to address a tax cap, mandate relief, rent control, and several other issues). The Assembly TIF reform bill, A.5296, sponsored by Assemblyman Robin Schimminger, was reported out of the Local Governments Committee, but subsequently languished in Ways and Means to which it was sequentially referred but never voted on.
4. The tax cap legislation, passed by the Assembly as A.7916 and by the Senate as S.5856, Chapter 97 of the Laws of 2011, was codified in GML §3-C and Ed.Law §2023-A.
5. The LBA doesn't specify the criteria on which the Urban Development Corporation is to base its yea or nay decisions—other than the statute's requirements for the contents of Land Bank local laws and the make-up of its Board of Directors. It would not appear that the UDC has the authority to disapprove a Land Bank on the basis of geographic

distribution, or any other factor not contained in the LBA, and must approve complete submittals as received, on a first-come, first-served basis.

In November 2011, Empire State Development issued "Land Bank Approval Guidelines," http://www.esd.ny.gov/AboutUs/Data/BoardMaterials/November2011/03b_21NovItem3LandBankAttGuidelines-112111.pdf, which appear to go beyond the authority given to UDC/ESD in several respects:

- Instead of reviewing and approving land bank resolutions on a first-come, first-served basis, ESD "anticipates approving applications in multiple rounds," with recommendations to "not exceed five in the first round" to "ensure that municipalities will be able to seek approval for their land banks in later application rounds if they are not prepared to submit an application in March [2012]"
- The extra-statutory decision to "approve land bank applications in a geographic proportional manner across the state" and to "have the discretion to consider additional factors in determining the relative merits of any land bank application'
- Extra-statutory reporting requirements, calling for annual reporting to ESD on or before March 15 (this is in addition to statutory audit by the Authorities Budget Office and the State Comptroller and potential oversight by the Charities Bureau of the State Attorney General's office)
- Extra-statutory criteria for assessment of applications, including: "the aggregate inventory of vacant, abandoned, tax-delinquent and tax foreclosed properties within the jurisdiction of the FGU"; the "capacity of the participating FGUs and municipalities to undertake acquisition, management and disposition of land bank real property"; the "diversity in the socio-economic characteristics of the FGUs submitting proposals…in order that maximum benefit can be achieved across the state from utilization of this new tool"; the "diversity in the nature of the inventory that is to be the focus of the work of a land bank"; the "diversity in the extent of intergovernmental collaboration and cooperation reflected in the land bank proposals"; the "diversity in the stated mission of the land banks (i.e., blight elimination, affordable housing development, market rationalization/stabilization, greening, etc.)"; and "[t]he extent that the geographic area of a land bank includes or is part of a distressed community."

6. In addition to being subject to audit by the Authorities Budget Office, Land Banks may also be audited by the State Comptroller.
7. Under N.Y. Exec. Law §172.1, Land Banks, as "charitable organizations" (i.e., not-for-profit corporations), would appear to be subject to registering and filing annual reports with the Charities Bureau of the NYS Attorney General's office. Given the oversight of Land Banks by both the Comptroller and the ABO, this additional requirement would appear to be redundant and superfluous—but may still be legally required.
8. It would not appear that Land Banks are subject to the prevailing wage law because the LBA specifies that a Land Bank is to be "deemed a state agency" for purposes of promoting minority- and women-owned business enterprises "only." Other than state agencies, the prevailing wage law only applies to public benefit corporations, municipal corporations, or commissions appointed pursuant to law. The LBA adds "land bank corporations" to the definition of a "local authority," but distinguishes it from other enumerated local authorities such as a public authority or a public benefit corporation.
9. *See* Envtl. Conserv. Law §27-1323.2 (McKinney's 2010).
10. The "current owner" bears strict, joint and several liability for non-exempt ownership of contaminated property under CERCLA, while a prior owner or operator who did not cause or contribute to the contamination has no such liability.
11. The municipal liability exemption covers involuntary acquisition of real property by a public corporation acting in its sovereign capacity. While this includes tax foreclosures and their equivalents, it does not cover assumption of ownership or control primarily for investment purposes, or participation in the rehabilitation or development of the site—except for improvements carried out as part of a site remedial program under the BCP law or in furtherance of site safety. The exemption is also voided if the public corporation that has taken possession of the site fails to notify NYSDEC of any hazardous waste release within 10 days of obtaining actual knowledge of such release.
12. Dan Kildee, President and CEO of the DC-based Center for Community Progress, has stated (Binghamton Land Bank forum, Sep. 13, 2011) that EPA frequently awarded brownfield assessment grants to land banks with which he was associated in Michigan. At the State level, New York Governor Cuomo noted in his News Release (July 29, 2011), announcing he had signed the LBA, that the regional economic development councils that will compete for state economic development funding would "benefit from the creation of land banks" because they would "create an inventory of land that the councils can use when developing their plans."
13. Land, when treated like real estate (i.e., bought and sold on the open market), tends to realize a greater return than when treated like a commodity (i.e., when sold at auction).
14. In some counties, such as Broome, the county pays outstanding tax liens to municipalities in return for taking title to tax delinquent properties.
15. N.Y. Gen. Mun. Law § 970-r (McKinney's 2010).
16. Another, albeit less exact, similarity is that the LBA authorizes a municipality, school district or any taxing district, to allocate to a Land Bank, by lawfully adopted local law or resolution, in accordance with regulations adopted by the Department of Taxation and Finance, 50% of the real property taxes collected "on any specific parcel of real property" for a period of five years. (One wonders how often taxing jurisdictions will elect to turn over such revenues to the Land Bank, even though the turnover is limited as to extent and duration.) In the case of TIF, all incremental property tax revenues attributable to TIF-stimulated increases in property values in the TIF district must be set aside for repayment of TIF bonds, until the bonds are paid off or the term of the bonds has expired.
17. According to Dan Kildee (Binghamton Land Bank forum, Sep. 13, 2011), there are currently 79 known Land Banks throughout the U.S.
18. Prospects for TIF reform may be more favorable in 2012 for several reasons: several natural disasters in New York in 2011 and the depressed general economy have put a strain on local and state infrastructure and the ability to keep pace with replacement and maintenance needs; the new tax cap legislation has placed stringent new restrictions on the ability of localities to raise money by increasing property taxes; and a majority of Upstate regional councils have reportedly (personal communications) cited an effective TIF law as a key economic development tool.
19. N.Y. Const. Art. XVI, §6.
20. N.Y. Gen. Mun. Law §§970-a -970-q (Municipal Redevelopment Law).
21. It was successfully used only twice—in 1987, in connection with the Route 9A Corridor project (a $1.2 million TIF district)

in the Village of Elmsford, Westchester County, and in 1994, in the Town of Victor, Ontario County, to fund $8 million in infrastructure improvements to support a $53 million addition to the Eastview Mall.

22. In addition to providing school district opt-in authority, recent TIF reform legislation has included four other desirable enhancements:
    - A "brownfield" enhancement, which allows TIF bond proceeds to be used for environmental remediation and brownfield redevelopment—including Brownfield Opportunity Area (BOA) projects.
    - An incremental "sales tax" enhancement, which allows incremental sales taxes, if any, to be pledged if necessary toward repayment of TIF debt.
    - A "special use district" enhancement, which allows a special assessment to be imposed on a TIF district if, but only if, necessary to repay TIF debt.
    - And an annual "good faith estimate" enhancement that requires municipalities to keep track of changes in assessed value during the TIF period. This good faith estimate has two objectives—first, to ensure that incremental property values are keeping pace with initial projections, to ensure that sufficient revenues continue to be generated to repay TIF principal and interest; and, second, to ensure that only property value increments attributable to the TIF investment are siphoned off a municipality's revenue stream to repay TIF debt, and not incidental inflation or appreciation unrelated to TIF.
23. As of 2005, more than 28 percent of medium and large counties and municipalities used TIF bonds to fund economic development.
24. California–$12.7 billion; Colorado–$846 million; Missouri–$722 million; Pennsylvania–$637 million; Minnesota–$558 million; Georgia–$554 million; and Connecticut–$544 million.
25. The rationale for basing the cap on levy amounts rather than rates was probably to avoid evasion of a rate-based cap simply by raising the assessment on properties.
26. *The Property Tax Cap: Guidelines for Implementation*, 12 pages plus appendices.
27. Article VIII, §12 of the NYS Constitution provides: "Nothing in this article shall be construed to prevent the legislature from further restricting the powers herein specified in any county, city, town, village or school district to contract indebtedness or to levy taxes on real estate. *The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted.*" (Emphasis added.)
28. These requests were, reportedly, submitted during the week of September 5, 2011. Posted to the MuniLaw ListServ by Richard J. Graham, Esquire, Lewis County Attorney.
29. *Flushing Nat. Bank v. Municipal Assistance Corp. for City of N.Y.*, 40 N.Y.2d 731 (1976), which overturned the state's attempt to impose a moratorium on repayment of New York City bonds, held that debt service payments were not subject to an existing 2.5 percent cap on New York City property taxes. It read Art. 8, §12 of the state constitution (which bars the state from restricting the power to levy taxes on real estate for the payment of interest or principal on previously contracted indebtedness) in conjunction with Art. 8, §2 (which requires issuers of public debt to pledge their "faith and credit" to repayment of bonds) to "express a constitutional imperative: debt obligations must be paid, even if tax limits be exceeded."

    A subsequent case, *Quirk v. Municipal Assistance Corp. for City of N.Y.*, 41 N.Y.2d 644 (1977), held that the state's diversion of the proceeds of the tax on stock transfers from general City revenues to the Municipal Assistance Corporation does not impair any contractual obligations under the U.S. constitution (Art. I, §10) merely because "fewer tax revenues will be available for repayment of principal and interest on city bonds." Neither the bonds themselves (despite a "first lien" on the City's revenues), nor the state constitution, requires that the collection of particular taxes be continued. "In no way was the city ever committed to maintain…stock transfer tax revenues for the benefit of its bondholders." 41 N.Y.2d at 646-47. The Court held (citing *Flushing National Bank*) that what was important "is that city bondholders are protected by the State Constitution which obligates the city to appropriate moneys for the repayment of city bonds, and to exceed normal real estate tax limitations in order to raise the necessary moneys." *Id.* at 647. The diversion or diminution of a tax does not alleviate the issuer's liability to raise revenues from any source to pay debt service on debt.

    However, in the case of tax increment financing, where the issuers of TIF bonds are not required (or allowed?) to pledge their "faith and credit" to repay the bonds (see, N.Y. CONST. Art. XVI, §6), but must specifically pledge incremental property tax revenues, a cap on property tax revenues would seem to have a much more direct impact on the bondholder's assurance of being repaid. The logic of the *Flushing Bank* case would appear to apply with special force to revenue bonds which rely on property tax increments and are not backstopped by other sources of municipal revenues.
30. Sixty percent of the members of the governing body of a county, city, town or village. Or, sixty percent of the voters in a school district.
31. Letter of June 6, 2011 to Lieutenant Governor Robert J. Duffy.

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ATTACHMENT

Land Banking Q&A

1. What is the *intent* of the new New York Land Bank Act (LBA)?

To allow localities to create Land Banks "to facilitate the return of vacant, abandoned, and tax delinquent properties to productive use" by acquiring such properties and using the LBA's tools to "eliminate the harms and liabilities caused by such properties."

2. What are the primary *"harms and liabilities"* created by vacant, abandoned, and tax delinquent properties that the LBA is designed to redress?

These properties represent lost revenues and large costs to local governments. Costs include demolition, effects of safety hazards, and spreading deterioration of neighborhoods—including resulting mortgage foreclosures.

3. *Who may creat*e a Land Bank?

Any "Foreclosing Governmental Unit" (FGU) may create a Land Bank by adopting a local law, ordinance, or resolution which specifies the name of the Land Bank; the number of Board members (between 5 and 11); the initial Board Members and the length of their terms; the qualifications, manner of selection, and terms of office of Board Members; and Articles of Incorporation (to be filed with the Secretary of State).

An FGU is a "tax district" (as defined in the RPTL)—basically a municipality (county, city, town or village). Two or more FGUs may enter into an intergovernmental cooperation agreement, which creates a single Land Bank to act on behalf of such FGUs.

Any FGUs and any municipality and/or any school district may enter into such an agreement. Where a school district participates, the agreement must specify the membership, if any, of the school district on the Land Bank's Board. (Where multiple FGUs jointly create a Land Bank, each FGU is given at least one appointment to the Board.) Any public officer or municipal employee is eligible to serve as a Board Member. Board members serve without compensation but may be reimbursed for expenses incurred in the performance of their duties.

4. What is the *geographical jurisdiction* of a Land Bank?

Jurisdiction is limited to the geographical boundaries of the entity or entities that created it. In the case of a county, a Land Bank may only acquire real property outside the boundaries of any other Land Bank created by any other FGU located partially or entirely within the county.

5. What is the *legal structure* of a Land Bank?

It is structured (similar to Local Development Corporations) as a Type C not-for-profit corporation because special state legislative action is required to create municipal authorities.

6. Does the *State* play any *role* in the approval or oversight of Land Banks?

Yes. No more than 10 Land Banks may exist in the State at any one time. FGUs proposing to establish a Land Bank must submit their enabling legislation to the Urban Development Corporation (dba ESD) for its review and approval.[1] A Land Bank cannot be created without such approval. The Office of the State Comptroller (OSC) and the Authorities Budget Office (ABO) are empowered to audit any Land Bank. As a Type C not-for-profit corporation, Land Banks *may* also be subject to registration with and reporting to the Attorney General's Charities Bureau under Executive Law §172. In "Land Bank Approval GUIDELINES," issued by Empire State Development in November 2011, ESD purports to require land banks to report to it annually (p. 4).

7. What *staff* is available to a Land Bank?

Any permanent or temporary agents and employees as it may require. It may also enter into contracts and agreements with municipalities for staffing services to be provided by one to the other.

8. What *powers* does the Land Bank have?

All powers necessary to carry out the purposes and provisions of the LBA. Such powers specifically include (but are not limited to): to sue and be sued in its own name, including actions to clear title to property of the Land Bank; to make contracts, give guarantees and incur liabilities, and borrow money at such interest rates as

it determines; to issue negotiable revenue bonds and notes; to procure insurance or guarantees from the State or the Federal Government of the payment of any debts incurred by the Land Bank, and to pay premiums in connection therewith; to enter into necessary contracts and other instruments, including intergovernmental agreements, or necessary to the performance of functions on behalf of municipalities (or of municipal agencies or departments) or the performance by such entities of functions on behalf of the Land Bank; to procure insurance against losses in connection with the assets or activities of the Land Bank; to invest the Land Bank's money in instruments, obligations, securities, or property deemed proper by the Board; to enter into contracts for the sale of the Land Bank's real property, or for the collection and management of rent; to design, develop, construct, demolish, rehabilitate, renovate, relocate, and otherwise improve real property (or interests therein); to charge and collect rents, fees and charges; to grant or acquire interests in real property; to enter into collaborative relationships with public and private entities (including municipalities) for the ownership, management, development, and disposition of real property; to develop a redevelopment plan to be approved by the FGU or FGUs; to be subject to municipal building codes and zoning laws; and to enter into agreements with FGUs for the distribution of revenues to the FGU and school district.

The provisions of the LBA are to be "construed liberally" to effectuate the LBA's legislative intent and purposes "as complete and independent authorization" for the performance of every "act and thing" authorized therein. In the exercise of its powers and duties and its powers relating to the property held by the Land Bank, "the Land Bank shall have complete control as fully and completely as if it represented a private property owner and shall not be subject to restrictions imposed by the charter, ordinances, or resolutions of a local unit of government."

9. Are there any *limits to the Land Bank's powers*?

Yes. Its only powers are those necessary to achieve the objectives and purposes of the LBA. It is expressly denied the power of eminent domain. And it is subject to local zoning laws and building codes.

10. How must a Land Bank *award contracts*?

The Land Bank may not award any construction, demolition, or renovation and reconstruction contract greater than ten thousand dollars, except to the lowest qualified, responsible and reliable bidder. (It may award such contracts "for any subdivision of work" for which it receives bids.) It may, however, reject any or all bids or waive any informality in a bid if it believes that the public interest will be promoted thereby. It may also reject any bid, if in its judgment, "the business and technical organization, plant, resources, financing standing, or experience of the bidder" justifies such rejection "in view of the work to be performed."

11. What are the *fiscal implications* of the Land Bank to the FGU(s) that created it?

The Land Bank's real property and its income and operations are exempt from all taxation by the State and its political subdivisions. However, the municipality or other FGUs that create the Land Bank are free to negotiate the terms and conditions for conveying real property to the Land Bank, including agreements for the distribution of Land Bank revenues to the participating FGUs and school district(s). Any municipality may convey to a Land Bank any real property (or interests therein) on such terms and conditions as determined by the transferring municipality. However, Land Banks may only acquire real property from entities other than political jurisdictions if the real property is tax delinquent, tax foreclosed, vacant or abandoned—unless the agreement to purchase is made consistent with an approved redevelopment plan.

A municipality may contract to sell delinquent tax liens to a Land Bank for more or less than the face amount of the tax liens sold. If no municipality elects to tender a bid at a judicially ordered sale, the property is deemed to be sold to the Land Bank, if the Land Bank tenders a bid at an amount equal to the total of all municipal claims and liens which were the basis for the judgment—regardless of any bids by any other third parties. A Land Bank may receive funding through grants and loans from the FGU(s) that created it, from other municipalities, from the state, from the federal government and from other public and private sources. It may receive and retain payments for services rendered, for rents received, as consideration for disposition of real and personal property, for insurance proceeds, for investment income, and for any other lawfully permitted asset and activity.

A municipality, school district or any taxing district may allocate to a Land Bank, by lawfully adopted local law or resolution, in accordance with regulations adopted by DTF, 50% of the real property taxes collected "on any specific parcel of real property" for a period of 5 years.

A Land Bank may issue bonds for "any of its corporate purposes," with principal and interest to be secured by pledge of and paid from its revenues. Such bonds are "limited obligations" of the Land Bank and "shall not constitute an indebtedness or pledge of the general credit" of any FGU "within the meaning of any constitutional of statutory limitation of indebtedness." Such bonds or other obligations of a Land Bank "shall not be a debt of any municipality or of the State of New York" and neither the members of the Land Bank nor any person executing the bonds shall be liable personally on such bonds. Such bonds are deemed to have all the qualities of negotiable instruments under NYS law.

A major fiscal benefit of a successful Land Bank is the multiplier impacts on surrounding property values of rehabilitating and redeveloping vacant, abandoned and foreclosed properties which were not only yielding little if any property tax revenues of their own, but were depressing the property values and property tax revenues of nearby properties.

12. Will the activities of a Land Bank be transparent and *open to public scrutiny*?

Yes. The Land Bank must "maintain and make available for public review and inspection" a complete inventory of all property received by the Land Bank, including the purchase price, if any, for each parcel received; the current assessed value assigned to the property; and the amount, if any, owed to the locality in real property taxes. All parcels received must be added to the inventory within one week of acquisition and must remain on the inventory for one week prior to disposition. Failure to comply with this requirement for any parcel shall cause such acquisition to be null and void.

The Land Bank must, similarly, maintain and make available for public review and inspection a complete inventory of all real property dispositions by the Land Bank. This must include a complete copy of the sales contract, including any form of compensation received by the Land Bank or any other party. All property dispositions must be listed on the property disposition inventory within one week of the disposition and must remain on the inventory indefinitely. Failure to comply will subject the Land Bank to a civil penalty and the possibility of an action by the Attorney General or District Attorney to seek rescission of the transaction. All real property acquired by the Land Bank must be held in its own name, regardless of the identity of the transferor.

In creating a Land Bank, the enabling legislation may require that any disposition of real property (or any such disposition within specified jurisdictions) be subject to specified voting and approval requirements of the Board. Otherwise, the Board may delegate to officers and employees of the Board the authority to execute any agreements or conveyances.

Also, the enabling legislation may establish a "hierarchical ranking" of priorities for the use of real property conveyed by a Land Bank, including but not limited to:

1, Use for purely public spaces and places

2. Use for affordable housing

3. Use for retail, commercial and industrial activities

4. Use for wildlife conservation

5. Such other uses and in such hierarchical order as determined by the FGU(s).

The Board of a Land Bank must keep minutes and a record of all its proceedings and will be generally subject to the Open Meetings Law and the Freedom of Information Law (FOIL).

The Land Bank must hold a public hearing prior to financing or issuance of bonds and consider the comments received, including "accommodation of the public interest," with the actions taken accommodating the public interest if "deemed in the best interest of the community."

The Land Bank must annually, by March 15th of each year, through its chairperson, deliver in oral and written form, a report to the municipality (to its governing body or board), describing in detail the projects undertaken, the monies expended, and the administrative activities of the past year. At the conclusion of the presentation, the chairperson must be prepared to answer the questions of the municipality with respect to these matters.

No member or employee of a Land Bank may acquire any direct or indirect interest in real property of, to be acquired by, or to be acquired from the Land Bank, or may have any direct or indirect interest in any contract for materials or services to be furnished or used by a Land Bank.

13. To what extent are *Land Banks treated as state or local agencies*?

They are treated as state agencies for the limited purpose of promoting employment and business opportunities for minority and women-owned business enterprises (M/WBEs). They are treated as "local authorities" under the Public Authorities Law. As local authorities, they are subject to the Public Authorities Accountability Act of 2009 (including review by the Authorities Budget Office), and are considered an "agency" for purposes of compliance with the State Environmental Quality Review Act (SEQRA). They are also subject to FOIL and the Open Meetings Law.

14. Do Land Banks receive any *special preferences* or benefits in bidding for or purchasing tax delinquent properties?

Yes. A municipality may enter into a contract to sell some or all of its delinquent tax liens to a Land Bank, under terms and conditions set by the municipality, at more or less than the face amount of the tax liens sold. Property owners are to be given at least 30 days advance notice of such sale, but the failure to provide such notice does not "in any way" affect the validity of the sale.

Prior to commencing a foreclosure action, the Land Bank must give the municipality a list of the liens to be foreclosed 30 days in advance by certified mail. At the sole option and discretion of the municipality, it may repurchase liens on the foreclosure list from the Land Bank at a price equal to the amount of the lien plus any accrued interest and collection fees incurred by the Land Bank. Such a tax lien sale will not operate to shorten the otherwise applicable redemption period or change the otherwise applicable interest rate. Upon the expiration of the redemption period, the purchaser of a delinquent tax lien (or its successor) may foreclose the lien in an action to foreclose a mortgage (following the procedure prescribed for the foreclosure of mortgages). The amount required to redeem the lien or the amount received upon sale of the property, will include reasonable and necessary collection costs, attorneys' fees, legal costs, allowances, and disbursements.

Real Property Tax Law Article 11, Title 5 applies as far as is practicable to a contract for the sale of tax liens pursuant to the LBA. The referenced title of the RPTL sets forth procedures for a tax district to enter into a contract to sell delinquent tax liens to the NYS "municipal bond bank agency" (Bond Bank). Authorities of the Land Bank under the LBA parallel those (in this regard) of the Bond Bank. *Where a party to a judicial foreclosure sale or a prospective purchaser seeks to inspect the real property prior to conveyance to ascertain to what extent it is "environmentally impaired" and permission to enter has been refused, such party or prospective purchaser may petition the court for "license to so enter,"* stating in the motion (and affidavits, if any) "the facts making such entry necessary," and the date(s) on which entry is sought. The court is required to grant such motion "in an appropriate case upon such terms as justice requires." N.Y. Real Prop. Tax Law §1194.11.

If the court orders a public sale (pursuant to the RPTL) and the purchaser is the Land Bank, the form, substance and timing of the Land Bank's payment of the sales price "may be according to such agreement as is mutually acceptable to the plaintiff and the Land Bank." This obligation "shall be deemed to be in full satisfaction of the tax claim which was the basis for the judgment."

Notwithstanding any other provisions of law, if no municipality elects to tender a bid at judicially ordered sale, the Land Bank may tender a bid in an amount equal to the total of all municipal claims and liens which were the basis for the judgment. If the Land Bank makes such a tender, the property shall be deemed sold to the Land Bank regardless of any other bids by third parties. The Land Bank's agreement to pay (where acceptable to the plaintiff) shall be deemed to be in full satisfaction of the municipal claim which was the basis for the judgment. The Land Bank, as purchaser, "shall take and forever thereafter have, an absolute title to the property sold, free and discharged of all tax and municipal claims, liens, mortgages, charges and estates of whatsoever kind." The deed is to be executed, etc. and delivered to the Land Bank within 30 days of the sale.

15. What *environmental liability* does a municipality, FGU, and/or Land Bank have for an environmentally impaired property acquired by a Land Bank?

(This is not addressed in the LBA.) If the Land Bank acquires the impaired property directly without the involvement of the municipality or FGU, there should be no liability on the part of the municipality or the FGU.

All of these entities, to the extent they meet the definition of a "municipality" (defined under the NYS Brownfield Cleanup Program Law as a "public corporation," including a "local public authority"), are exempt from State Superfund liability under the Municipal Liability Exemption of §27-1323.2. (Note that the LBA amends the Public Authorities Law to include a "land bank corporation" in the definition of "local authority.") The Mu-

nicipal Liability Exemption applies where the public corporation acquired the property "involuntarily." Involuntary acquisition includes acquisition by the entity "in its sovereign capacity" including but not limited to the following:

- pursuant to abandonment proceedings or bequest
- acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority
- acquisition of assets through foreclosure and its equivalents, or otherwise, in the course of administering a tax lien, a loan, a loan guarantee, etc.
- acquisition pursuant to seizure, injunction, condemnation, or forfeiture authority—provided that such ownership or control is not retained primarily for investment purposes

If a municipality or FGU qualified for the municipal liability exemption and then transferred its interest in the property to the Land Bank, such conveyance would not cause it to lose its exemption, regardless of the actions subsequently taken by the Land Bank.

The exemption does not apply if the public corporation is a "responsible party" or "participates in the development" of the site—including carrying out, or permitting the carrying out, of any above-grade improvements to the site (or any environmental investigation or remediation except for improvements that are carried out as part of a site remedial program under the BCP law or in furtherance of site safety).

Any public corporation that has taken possession of a site must notify NYSDEC of any hazardous waste release within 10 days of obtaining actual knowledge of such release (unless a shorter notice period is required under any other provision of law). Failure to do so voids the exemption.

Note that the State Municipal Liability Exemption is arguably not quite as extensive as that under Federal CERCLA, where "involuntary acquisition" includes acquisition through bankruptcy, tax delinquency, abandonment, or other circumstances when acting in a "sovereign" capacity.

Endnote

1. ESD, in "Land Bank Approval GUIDELINES," issued November 2011, announced a segmented application acceptance and approval process (to eliminate any advantage on the part of early applicants), along with a list of 14 "criteria for assessment of applications," many of which go beyond the criteria set forth in the Land Bank Act. It also stated its intention to "approve land bank applications in a geographic proportional manner across the state"—a restriction advisedly not included by the Legislature.

Urban Chickens—Neighbors Cry "FOWL!"

By Lisa M. Cobb

In September 2009, the *New Yorker* magazine published an article by Susan Orlean about raising backyard chickens entitled "The It Bird."[1] The article describes Ms. Orlean's personal journey to owning chickens but also provides interesting background information on the backyard chicken movement.

Among other things, the article describes the founding of the McMurray Hatchery which Ms. Orlean described in 2009 as "the largest rare-breed poultry hatchery in the world." The McMurray Hatchery caters to people with backyard flocks, evidencing the growing importance of this trend. In 1917, Murray McMurray (no [*sic*] required) was a banker who sold chickens out of the back of the bank as a hobby. When the Depression hit, the banking business was in trouble but the chicken business soared. Ms. Orlean quotes the president of the company, Bud Wood, as saying: "When times are tough, people want chickens."

Which brings us to today. Times are tough and people want chickens.

The Grassroots Movement: "Give Peeps a Chance"

One of the more interesting aspects of many of the websites devoted to backyard chicken-keeping was the advice on how to have local laws changed to allow the keeping of fowl in a municipality. For example, an article on "So Po Chickens" (for South Portland, Maine) offers a link to the materials they used in their 2007 campaign to legalize urban chicken-keeping:[2] The pro-chicken FAQs page of their website asserts that hens are typically more quiet than dogs and that, unlike dogs and cats which can carry ticks, chickens eat ticks and mosquitoes.

The challenge for municipal attorneys and planners is to parse the vast amounts of available information and misinformation to make reasoned decisions about the optimal regulation of chickens,[3] should the governing body choose to permit them. This article reviews existing laws and offers guidance toward that end.

Municipal Budget Concerns

In the current economic climate, particularly in light of the recently enacted municipal budget cap in New York, added levels of complexity exist, including the cost of evaluating a proposed law prior to its enactment and the cost of monitoring the chicken-keepers if a law is enacted.

At least one municipality has banned the keeping of chickens in part because the city council concluded that it would be too expensive to enforce the ordinance. In January 2011, the officials of Springville, Utah, voted against a proposal that would have allowed the keeping of chickens in the city.[4] Two neighboring communities already allowed the residential coops, and "several" citizens of Springville wanted the same opportunity.[5] Springville had a planning commission review the proposal and its members expressed two concerns: cost and pests.[6] The city council agreed, and voted 3-1 not to enact the ordinance that would permit the keeping of chickens.[7]

> *"Times are tough and people want chickens."*

In Riverdale, Utah, the city council also had a planning commission review the proposed chicken ordinance. Like the other, this commission also was not in favor of the idea, citing the "threat" of having farm animals in a residential neighborhood.[8] I am not aware of many municipalities in New York that have the available resources to form and fund a commission to parse through the often anecdotal evidence concerning, for example, the noise or smell associated with the keeping of chickens. If such a commission already exists in the municipality, it probably has bigger chickens to fry, and will choose to spend its resources on more pressing concerns.

The suggestions below offer examples for streamlining the process of adopting local ordinances to regulate the potential problems of backyard chicken-keeping.

Proponents and Opponents

Those in favor of keeping chickens cite the fresh eggs (reputed to be higher in nutrients and better tasting than store-bought), the free, eco-friendly fertilizer, the "green" weed and bug control, and the entertainment value. The 2007 book *The 100-Mile Diet: A Year of Eating Local* by Canadian writers Alisa Smith and J.B. MacKinnon describes the growing preference for eating food grown locally.[9] Owning laying hens allows someone to add a local source of protein to his or her diet without having to kill it first.

Those opposed to the trend of allowing "farm" animals such as chickens in non-farm zoning districts cite noise and smell, the concerns that unwanted predators such as coyotes and foxes will be attracted to the neighborhood, and the fear pests such as mice will be attracted to the coops. Opponents of permitting chickens to be kept in residential zones also fear that having chicken

coops in their neighborhoods will decrease their property values. They also cite the "slippery slope" of allowing farm animals into residential neighborhoods: chickens today, pot belly pigs and goats on the front lawn tomorrow. The phrase "Beverly Hillbillies" was used more than once by opponents of the enactment of various chicken ordinances.

The mandate for municipal legislators is to balance the desires and rights of all property owners to achieve the optimal use of the land for all concerned. When it comes to keeping chickens, there are as many viewpoints as there are breeds.

Chicken Ordinances—Does Your Municipality Need One?

As Patty Salkin correctly noted in her article entitled "Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens,"[10] there exists little state or federal regulation of the keeping of chickens by individuals on their property for their personal use. The regulation of whether, where and how many chickens may be kept by property owners for their own use has been left largely to the local municipalities.

One doctoral student who did her dissertation on people's attitudes about urban livestock surveyed the zoning codes of American cities and concluded that cities are much more tolerant of domestic livestock than suburbs.[11] That trend is not evident in New York. Interestingly, New York City permits the keeping of any number of chickens while the cities of Albany, Amsterdam, Middletown, Plattsburgh and Syracuse currently ban the practice entirely.[12] In fact, the Albany ordinance proclaims that the purpose of the regulations relating to "farm animals and fowl" is to "protect the residents of the City of Albany from nuisance by animals usually known as farm animals or fowl.[13] The keeping or harboring of farm animals within the City of Albany is incompatible with urban life."[14] Any person violating this provision is subject to a maximum fine of $315.00.[15]

In New York City, a permit is required to keep "poultry" or rabbits for sale, and they must not be allowed to roam at large.[16] The coop must be whitewashed or "treated in a manner approved by the Department" (of Health) at least once per year, and "shall be kept clean."[17] However, no regulations whatsoever were found for poultry that is not kept for sale other than a ban on the keeping of roosters more than four months old. This means that backyard chickenkeepers in New York City may keep as many hens as they choose, wherever they choose, in whatever they choose, provided that the chickens do not become a nuisance.

Regulating Chickens Under Nuisance Laws

Many municipalities such as New York City do not regulate the details of keeping of poultry in urban areas; rather, they seek only to ensure that the practice does not constitute a nuisance. Interestingly, only one of the ordinances that I found addressing the keeping of chickens was located in the municipality's property maintenance code. The majority of the others were under the generic heading "Animals" in the code book, often lumped together with the laws on keeping dogs.

In the Town of Islip, the ordinance generally provides that "[a]ny person may keep, maintain, or house poultry, provided that such poultry does not constitute a nuisance or create a hazard to public health."[18] In one of the broader definitions, "poultry" is defined in the code as including "chickens, turkey, geese, ducks, pheasant or other domestically-maintained fowl."[19] However, the ordinance then specifies precisely what constitutes a nuisance, including how many fowl may be kept, where, how their food will be stored, etc. The specifics of these provisions are discussed in more detail below. The Town of Huntington similarly mandates that the birds not be a nuisance, but then specifies additional requirements for their care and maintenance.[20]

During a city council meeting in Riverdale, Utah in February 2011, the city attorney pointed out that, under the current law, chickens were neither expressly permitted nor prohibited. After a heated debate with several viewpoints represented both by residents of the city and members of the City Council, the Council decided not to enact the proposed chicken ordinance, concluding that their existing nuisance laws adequately addressed the chicken situation, at least for the time being.[21] This result appears to be as much a function of not wanting to alienate any portion of the constituency as a belief that the current ordinance was sufficient. Regardless of the reason, the examination of a municipality's existing nuisance provisions is a good first step in determining what additional regulation might be required, if any.

The City of Rochester prohibits as a nuisance only the accumulation of feces on the property, mandating that the feces of all animals not create a nuisance, attract insects or animals, or facilitate the spread of disease.[22] It does not address any other possible nuisance issues, such as the noise created by the hens. A more encompassing nuisance ordinance would be preferable.

The City of Beacon Code expressly grants to the Dog Control Officer the power to abate nuisances arising from the keeping of chickens and provides that the Dutchess County Department of Health shall be the sole judge as to whether coops shall require cleaning or disinfecting.[23] If your governing body chooses to enact

an ordinance, review your municipality's code to ensure that someone actually has the authority to enforce the new provisions. If the power is not presently there, grant it.

It also would be beneficial for the consultants to the municipal governing body to review the penalties associated with a determination that a particular group of chickens constitutes a nuisance. Penalties in the existing chicken laws ranged from $25.00 to $1,000.00 per offense. Unless the punishment is sufficient to deter the unwanted practice, the cost of enforcing the law may outweigh any benefit therefrom. Attention also should be paid to the continuing nature of the offense, such that penalties accrue for each day that the violation continues unabated after notice. The Saratoga Springs Code at § 101-22 provides an example of a continuing offense.

If Your Municipality Decided to Enact Such an Ordinance, What Should It Include?

A Bird of a Different Color

An initial determination should be made concerning what types of birds will be regulated by the ordinance, and how they will be referenced. If the ordinance is to apply only to chickens, no more need be said. But many municipalities regulate turkey, geese, guinea hens and other birds as well. The definitions of "fowl" and "poultry" in the various ordinances differ widely. In addition, some municipalities regulate "livestock" or "farm animals" and expressly include or exclude various birds.

The majority of the ordinances reviewed for this article differentiate between roosters and hens, prohibiting the former and permitting the latter, for obvious reasons. The sound of a 4 a.m. wakeup call from a rooster travels farther and is more likely to be found to be a nuisance than that of a laying hen. In New York City, for example, roosters (and ducks, geese and turkeys) are banned from the "built-up portion of the City."[24] While this phrasing leaves room for debate concerning whether a particular section of the City is "built-up," most areas likely would fall within this definition, thus effectively banning roosters from the five boroughs, with the noteworthy exception of Decker Farms on Staten Island. In Saratoga Springs, no person shall harbor a crowing cock, the crowing of which disturbs neighbors between the hours from 12:00 midnight to 7:00 a.m. In my limited experience with roosters, they do not keep to such a tight schedule. An outright ban is probably easier and less costly to enforce, and the absence of a rooster does not impact upon a hen's ability to lay eggs.

Distance from Buildings or Lot Lines

Several ordinances regulate the distance that coops must be kept from property boundaries or buildings, or mandate that the location of the coop be in a rear yard.[25] In addition, in Huntington, the coop must be screened from the view of surrounding streets and residences.[26] In addition to aesthetics, these requirements help to insure that any unwanted noise or odor is not observed on adjacent properties.

In New York City, no permit for the keeping of chickens (for sale) will be issued unless the coops and runways are more than 25 feet from an inhabited building, unless the building is a single-family residence occupied by the applicant seeking the permit or the applicant submits the written consent of the owner of the lot on which the poultry are to be kept.[27] Similarly, in Buffalo, chickens shall not be kept less than 20 feet from any door or window of a dwelling other than the applicant's dwelling.[28]

Proponents of keeping chickens complain that a substantial setback requirement will significantly decrease the number of properties that contain sufficient room to put a coop. As chickens are not native to urban environments, this restriction does not seem unreasonable. In addition, as with other setback requirements, variances may be sought. That process allows neighbors to express their concerns and zoning boards to impose any necessary conditions.

In my opinion, setting the minimum distance from a neighbor's property, and/or requiring screening is justified both aesthetically and for quiet enjoyment purposes. I submit, however, that an applicant should not be barred from keeping fowl because, due to the size or configuration of the lot, the coop would be located too close to the *applicant's* dwelling. That should be a choice left up to the applicant.

As a final note on this point, some municipalities in other states have "permitted" no chickens, by requiring that any chickens be kept at least 150 feet, or in one case, at least 300 feet, from any residence, a mandate that excludes most, if not all lots in these urban areas.[29] In these times of fiscal conservatism, the time and money spent enacting a permissive prohibition could be put to better use.

Noise

If noise is the concern, then limiting the number of hens and barring roosters entirely should alleviate that concern. In addition, the setback requirements discussed will help to alleviate unwanted noise from traveling beyond property boundaries. In Islip, no noise is permitted to be heard beyond the property line

between the hours of 11 p.m. and 7 a.m.[30] The Binghamton Code provides that no "disturbing" noise is permitted beyond the property line at any time.[31] Both of these approaches should appease neighbors with concerns about the noise of the flock, and prevent the housing of birds where the property is too small to insure that the neighbors are not disturbed.

Regulating the Number of Chickens That May Be Kept

In Saratoga Springs, as in New York City, there is no limit on the number of fowl that may be kept, only the requirement that they not be permitted to "run at large."[32] In Huntington, owners may keep up to eight "chickens or ducks or any combination thereof."[33] In Buffalo, it is five chickens[34] and in Binghamton it is four chickens or rabbits.[35]

The determination of whether to establish a maximum number of birds or a maximum amount of space to be devoted to these animals must be analyzed on a municipality-by-municipality basis. The determination is a function of the type, size and nature of the properties in the municipality.

Regulating for the Good of the Chickens

Other ordinances take a more "pro-chicken" approach by mandating minimum square footage per chicken. In the City of Rochester, for example, not more than 30 fowl may be kept in an open area of 240 square feet.[36] In Islip, no more than 15 birds may be maintained for every 500 square feet of rear yard space being used for the keeping of poultry.[37] In Huntington, the requirement is for not less than 2 square feet and not more than 5 square feet of floor space per bird.[38] Again, this analysis should be undertaken in light of the type, size and nature of the properties in the municipality and is not subject to a hard and fast rule.

Keeping Chickens "Cooped Up"

Several ordinances mandate that the chickens be kept either in enclosed yards, with clipped wings so that they cannot escape the enclosure, or in enclosed coops and runways. The City of White Plains mandates that fowl be "securely enclosed in such a manner as to prevent them from straying from the premises of the person owning them."[39] The penalty for violating this ordinance is $25 per occurrence.[40] In Islip, poultry is required to be confined to the premises on which its owner resides.[41] In addition, each structure housing poultry is classified as an accessory building requiring a building permit.[42]

These provisions are easily enforceable and help to insure that the birds do not become a nuisance to neighbors. Another advantage of this requirement is less readily apparent. In one municipality, a complaint against the purported owners of the chickens was dismissed for failure to assert and prove the required element of ownership. It could not conclusively be determined by the evidence before the Court that the chickens belonged to the individuals charged. Requiring that the chickens be maintained in an enclosure potentially eliminates this issue.

If predators such as coyotes and foxes are the concern, then keeping the chickens in an enclosed structure is an obvious response. However, drafters should note that the imposition of this requirement would eliminate two of the benefits sought by many chicken owners, namely weed control and garden pest control. Requiring that the chickens be kept in an enclosed area such as a fenced-in yard offers a compromise position. Again, this determination should be made on a municipality-by-municipality basis, with the optimal outcome being a solution that adequately addresses the concerns of those on both sides of the fence.

Smell/Sanitation

The City of Rochester requires that "[a]ll coops, runways and premises where fowl are kept shall be at all times clean and sanitary."[43] The Code also requires that "[a]ll premises where fowl are kept shall at all times be subject to inspection.…"[44] However, the code does not specify the frequency of cleaning required.

Similarly, the Beacon City Code mandates that flocks shall be kept in "suitable" coops "properly cleaned."[45] This approach makes the enactment of the ordinance easier but its enforcement more subjective and therefore more difficult.

In contrast, in Islip, "[t]he area in which poultry are kept shall be cleaned regularly (at least once each day) and shall always be maintained in a sanitary condition."[46] Similarly, in Huntington, the coops are required to "be cleaned once each day and maintained in a sanitary condition."

The "fowl" odor associated with chicken coops is the most frequent objection I have heard to permitting this use in residential neighborhoods. Backyard chicken supporters claim that their coops are cleaned on a sufficiently regular basis so that this is not a problem.

Municipal budgets being what they are, requiring regular inspections of chicken coops, whether annual or at other intervals, may not be feasible. But neighbors being what *they* are, a truly odiferous coop is likely to be reported. It is difficult to conceive of a cost-effective policing mechanism for determining whether a coop is being cleaned on a daily or frequent basis, but any accumulation of dirt and feces would be a good indication that it is not. The requirement that inspections be permitted is a good enforcement tool as well as a possible deterrent to lax cleaning habits.

The Saratoga Springs Code has an interesting provision relating to the keeping of swine that could be of benefit to the drafters of chicken ordinances. In that municipality, odors from a swine enclosure offensive to passers-by or neighbors "shall be presumptive evidence of the unsanitary condition" of the enclosure.[47]

Some municipalities require that the coops be "whitewashed" on a periodic basis. This assumes that the coops are made of wood or other material that may be whitewashed. With the advent of dyed plastic coops,[48] and the increasing use of other materials for the pens, a better practice would be to simply mandate that the coop be cleaned, disinfected and maintained on a regular basis.

Neighbor Consent

Some ordinances require the consent of the neighbors to the keeping of fowl.[49] I generally am not in favor of this approach, as it may have more to do with the popularity (or lack thereof) of the individual seeking to keep the birds than it does with responsible planning practices. However, Buffalo also requires the consent of all residents of multi-family buildings and duplexes, and all tenants in the building other than the applicant. This requirement is critical as it gives a voice to those who would be living on the same lot with the birds.

Exceptions

In discussions on the topic, in municipalities that did not permit the keeping of any chickens, exceptions were sought for the keeping of fowl for certain purposes, such as 4-H competitions. No ordinances were found that contained this exception, unless such competitions are encompassed within an educational use. For example, in the City of Albany, an exception is made from the outright ban on fowl for not-for-profit organizations, upon proof that the farm animals are being kept for educational purposes "in such a manner so as to not disturb the health and safety of the surrounding neighborhood."[50]

Food Storage

Finally, the requirement that feed be stored in metal or rodent-proof containers should be included in every ordinance.[51] The benefit of this action to the community significantly outweighs the minimal cost to the owner of the fowl. The requirements contained in the Buffalo ordinance are unusual in their specificity. They mandate that the food be kept in fastened containers, opened only during feeding time and immediately closed thereafter, and ban the practice of scattering feed on the ground, requiring the chickens to eat out of a trough.[52] Again, each municipality should determine whether this level of detail is required within its boundaries.

Accessory Use, Special Use Permit, or Other Permit or License?

Depending upon the scope of the regulation that is enacted, some level of review by the municipality is probably called for prior to permitting the use to commence.

If a municipality has chosen to enact an all-encompassing chicken law, such that every concern is regulated, then making the use an as-of-right accessory use may be warranted. In that situation, the municipality has undertaken a comprehensive review of all potential situations, making further review of each specific situation unnecessary.

In the absence of such a global ordinance, then review of applications by either the code enforcement officer or a municipal board is warranted. The determination of what individual or entity that will undertake the review is impacted by the municipality's budget and past practices.

Some municipalities require that a Special Use Permit be obtained before the use can commence. This avenue allows review by the municipal board, usually either the Planning Board or the Zoning Board of Appeals, that is tasked with the review of such applications, and has the added advantage that neighbors are often required to be notified of the application, thereby giving them a forum in which to express their concerns.

But not every municipality will want board involvement prior to allowing the keeping of a chicken. If review by a code enforcement officer is preferred to board review, then requiring a building permit for the installation of a coop, or requiring a permit for the keeping of any chickens, becomes an attractive alternative. Both Special Use Permits as well as building or other permits have the added benefits of advising the municipality, in advance, of the proposed chicken use as well as generating additional fees for the municipality. In addition, requiring the periodic renewal of permits offers a built-in opportunity for the municipality to review the condition of the coop and the complaints of neighbors, if any.

Buffalo requires a license before one can keep chickens. As part of the licensing process, all property owners within 50 feet of the applicant's property are notified of the pending application.[53] If written comments are received in opposition to the application, it must be forwarded to the Common Council for review and approval.[54] Buffalo also requires inspection by the Office of Animal Control following the issuance of license.[55] The licenses are renewed annually.[56]

As with any other application, perhaps more so in this case, if the applicant is not the owner of the property, the written consent of the owner for keeping the fowl should be required to be submitted with the application.[57]

Endnotes

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13. City of Albany, N.Y., Code § 115-30.
14. *Id.*
15. *Id*. at § 115-33.
16. New York City, Health Code § 161.19.
17. *Id*.
18. Town of Islip, N.Y., Code § 12-31.
19. *Id*. at § 12-32.
20. Town of Huntington, N.Y., Code § 78-25.
21. *See* City of Riverdale, UT, *Minutes of Regular Meeting of the Riverdale City Council* (February 1, 2011) *available at* http://www.riverdalecity.com/meetings_events/meetings/council/minutes/2011/020111cc_min.pdf (last visited December 8, 2011).
22. City of Rochester, N.Y., Code § 30-34.
23. City of Beacon, N.Y., Code § 99-7.
24. City of New York, Health Code § 161.19.
25. Town of Islip, N.Y., Code § 12-33 (must be kept in rear yard); Town of Huntington, N.Y., Code § 78-25 (must comply with setback and side-yard requirements); City of Beacon, N.Y., Code § 99-6 (not less than 15 feet from the nearest dwelling); City of Buffalo, N.Y., Code §§ 341-11.1, 341-11.2 (rear or backyard, and at least 20 feet from any door or window, but only 18 inches from the rear property line.).
26. Town of Huntington, N.Y., Code § 78-25.
27. New York City, Health Code § 161.09.
28. City of Buffalo, N.Y., Code § 341-11.2.
29. *See,* William C. Singleton III, *Homewood Hens Fly the Coop, Move to Shelby County,*The Birmingham News (July 7, 2010) *available at* http://blog.al.com/spotnews/2010/07/homewood_hens_fly_the_coop_mov.html (last visited December 7, 2011).
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31. City of Binghamton, N.Y., Code § 410-19.
32. City of Saratoga Springs, N.Y., Code § 101-19.
33. Town of Huntington, N.Y., Code § 78-25.
34. City of Buffalo, N.Y., Code § 341-11-1(A).
35. City of Binghamton, N.Y., Code § 410-19(C).
36. City of Rochester, N.Y., Code § 30-19(C).
37. Town of Islip, N.Y., Code § 12-33.
38. Town of Huntington, N.Y., Code § 78-25.
39. City of White Plains, N.Y., Code § 5-2-1.
40. *Id*.
41. Town of Islip, N.Y., Code § 12-33.
42. *Id*.; *Accord* Town of Huntington, N.Y., Code § 78-25; City of Binghamton, N.Y., Code § 178-2.
43. City of Rochester, N.Y., Code § 30-19(E).
44. *Id*. Please note that the author offers no opinion on the constitutionality of such provisions.
45. City of Beacon, N.Y., Code § 99-6.
46. Town of Islip, N.Y., Code § 12-33.
47. City of Saratoga Springs, N.Y., Code § 101-21.
48. S*ee, e.g.,* Chicken Houses and Beehives (2010) *available at* http://www.omlet.us/homepage (last visited December 8, 2011).
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51. *See, e.g.,* Town of Islip, N.Y., Code § 12-33.
52. City of Buffalo, N.Y., Code § 341-11.3.
53. City of Buffalo, N.Y., Code § 341-11.4.
54. *Id*.
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57. *(The author sheepishly apologizes for the flock of animal references and puns in the preceding pages, pleading "herd mentality" as a defense, citing such erudite sources as* Catherine Price, *"A Chicken on Every Plot, a Coop in Every Backyard,"* September 19, 2007, *available at* http://www.nytimes.com/2007/09/19/dining/19yard.html?pagewanted=all (last viewed on September 26, 2011), *and* Peter Applebome, *Envisioning the End of 'Don't Cluck, Don't Tell,* The N.Y. Times, April 29, 2009, at A21 *available at* http://www.nytimes.com/2009/04/30/ nyregion/30towns.html?ref=nyregion (last viewed on September 26, 2011).

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Conflicts of Interest Laws Governing Public Servants Should Be Applied to Employees of Not-for-Profits Receiving Municipal Funding

By Asaf Naymark

I. Introduction

Many not-for-profits receive funding from local governments for performing what are often, in effect, government functions. While these organizations are beholden to federal and state laws governing not-for-profits, those laws often provide few ethics restrictions. By contrast, the municipal employees who dole out public funds to such groups are accountable to state and municipal laws governing the actions of public servants, often including stringent ethics restrictions. This article will address that disparity.

Public servants may be prohibited from, among other things, taking part in their organization's business dealings with the municipality or in any business dealings where they have conflicting interests.[1] This may preclude even attending a meeting about municipal funding for a not-for-profit organization in which the public servant is an employee.[2] Additionally, a municipality's code of ethics may forbid using one's municipal position for private or personal gain or advantage for oneself, one's close relatives, or one's business associates.[3] For example, a council member may thus be permitted to sponsor funding for an organization where a relative or business associate is a paid employee only if there is no reasonable likelihood that the employee will benefit from the transaction.[4]

In the absence of such rules for not-for-profit organizations, the violation of such precepts has resulted in the leaders and other employees of not-for-profits receiving excessive compensation, among other forms of self-dealing and corruption, that codes of ethics are meant to prevent. A few months ago, for example, the *New York Post* reported egregious instances of self-dealing in not-for-profits receiving New York City funds.

> Some of the ugliest abuse [of New York City funding by not-for-profits], of course, comes courtesy of lawmakers who steer public bucks, through a member item or pork-barrel system, to nonprofits that hire friends, relatives or even themselves…. Topping the list: Pols like Assemblyman/Brooklyn Democratic boss Vito Lopez, Ridgewood Bushwick Senior Citizens Council's founder. The council, which relies heavily on public cash, pays big bucks to Lopez's girlfriend and campaign treasurer, who run the place. Also: The Metropolitan Council on Jewish Poverty, whose boss, Willie Rapfogel, is married to Assembly Speaker Sheldon Silver's chief of staff. Silver makes sure the council gets ample public funding: Tax forms for its 2008-09 fiscal year list some $14 million in government grants about half its total revenue. Rapfogel's share? A whopping $409,916 in salary, deferred pay and nontaxable benefits.[5]

The amount of similar bad press that not-for-profits have been receiving for shady business practices makes it seem clear that federal and state laws, as well as market forces, have been unable to help these organizations meet their duty of undivided loyalty to their public funders and to the public. Professor Melanie Leslie has attributed this failure to the lack of clear rules that focus on procedure instead of outcomes and that, according to her, would help enforce positive governance norms in not-for-profit organizations.[6] Specifically, Professor Leslie explains, requiring disclosure of conflicts of interest can increase boardroom awareness of the conflict, and requiring advance approval of a transaction can increase awareness that such transactions are often problematic.[7] Additionally, there should be clear rules guiding board approval of transactions, requiring recusal of interested directors from meetings where approval of the interested transaction is being voted on, and providing no defense for violations.[8]

Municipalities should apply their local ethics laws governing municipal employees, if they have them, and adopt them if they do not, to not-for-profits that receive municipal funding because those who run them and work for them often function largely as public servants when expending municipal funds. They should be held accountable to the government and to the public for using resources and positions meant to provide a public benefit. Applying these local ethics laws to not-for-profits can help prevent governance issues and breaches of fiduciary duty by authorizing local governmental agencies to advise, discipline, train, and vet not-for-profits by using the clear guidelines of the local ethics law and an understanding of the idiosyncrasies of the conflicts of interest that local not-for-profits may be guilty of allowing.

II. Shortcomings of Current Not-for-Profit Law

The growing not-for-profit sector has undoubtedly for many years raised governance issues that do not exist, or that exist but to a lesser degree, in the for-profit sector. These issues include self-dealing, such as excessive executive compensation and other irresponsible or dishonest use of the organization's assets, and of positions of influence. The disparity between the enforcement of ethical precepts in the two sectors largely results from the control that market forces impose on for-profits that is mostly absent among not-for-profits.

Market forces such as the influence of institutional investors, share prices that telegraph the financial health of the business, shareholders, and the threat of takeovers that will oust inefficient managers, combine to help check some of the wasteful or abusive practices of for-profit directors and managers.[9] Accordingly, a court's application of the business judgment rule, designed to implicate only the most reckless corporate behavior, sets a legal standard that is usually high enough to hold a company's managers and directors responsible for their actions.[10]

By contrast, not-for-profits, whose bottom line is eleemosynary rather than financial, are legally accountable only to the Attorney General for all but the most abusive or dishonest practices, because the market does not eliminate the lesser abuses. Even when the Attorney General does have a viable cause of action against a not-for-profit, the dearth of resources and lack of institutional interest may keep an "Aspiring Governor" from pursuing most such cases. Additionally, the standard of the business judgment rule is too low, leaving many negligent and irresponsible board members unscathed. As tax-free dollars pour in, boards charged with promoting the public welfare may squander the government's tax dollars. Furthermore, any attempt to examine a not-for-profit board's practices may be met with a concern that the investigation could tarnish its reputation and curb whatever benefit it was conferring on the public.

It should be noted that, in some states, the lack of resources to prosecute is not the only impediment to effective imposition of ethics rules on not-for-profits expending taxpayer dollars. Rather, the actual legislation governing not-for-profits does not even place a sufficient burden on these organizations to hold their officers and employees to high ethical standards. New York Not-for-Profit Corporation Law is one of those less-than-helpful examples. Under that law, an interested transaction is not void if its material facts were disclosed in good faith to the members voting on it.[11] Furthermore, the interested person can be counted in the quorum of a meeting to authorize the transaction.[12] This completely disregards deleterious effects of groupthink on not-for-profit governance.[13] Moreover, even in the absence of good-faith disclosure, if the transaction was "fair" to the corporation, it is not void.[14]

Federal tax law also comes up short in addressing growing governance issues, especially excessive executive compensation. The Internal Revenue Code prohibits 501(c)(3) organizations from engaging in transactions in which the net earnings inure to the benefit of private shareholders,[15] including excess benefit transactions such as excessive executive compensation.[16] However, the intermediate sanctions regime meant to prevent such transactions[17] allows organizations to invoke a "rebuttable presumption,"[18] which in practice, once invoked, will not be rebutted by the IRS.[19] Furthermore, one questions the extent to which smaller organizations have the budgets necessary to regularly consult with legal counsel about such matters and to obtain advice about paying competitive salaries to skilled employees while staying within the IRC's safe harbor. Therefore, while this safe harbor should incentivize organizations to implement more procedures against self-dealing, many not-for-profits have been unaffected by the provision.

III. Proposed Solution—Applying Ethics Laws Regulating Municipal Officers and Employees to the Officers and Employees of Not-for-Profits Receiving Municipal Funding

There are strong policy reasons justifying the extension of laws governing the behavior of public servants to their counterparts who receive government funding to meet public needs. Furthermore, this extension would appear to offer a promising way to ensure that those who spend public money do not breach their duty of loyalty to the public and destroy its trust in the municipal funder.

A. Why Should Municipal Ethics Laws Be Applied to Not-for-Profits Receiving Municipal Funding, and How Would It Prevent Conflicts of Interest in the "Independent" Sector?

Privatization and public-private partnerships have caused additional governance issues to emerge in the intersection of the government and not-for-profit sectors. Certain provisions of ethics laws that were traditionally applicable only to local government and its civil servants are becoming applicable to the private, not-for-profit sector as the government continues to contract out governmental functions. Municipal contractors who are essentially employed by the municipality to perform municipal functions are in a position

similar to that of public servants, because both are compensated by public funds and are charged with performing a public service.

Thus, local ethics laws—which, as noted above, may prohibit a municipal employee, or one of his or her immediate family members, from being involved in an organization that deals with the municipality—should apply not only to the municipal employee but also to the associated party on the other side of the transaction. By applying such ethics provisions to employees of not-for-profits receiving municipal funding, the municipality can increase oversight of nonprofits through the municipal ethics board, which should have the authority to investigate, give advice on, and enforce compliance with ethics laws.[20]

Additionally, through its policies regarding procurement of human services, a municipality can further regulate not-for-profits in the area of conflicts of interest. For example, New York City's procurement policy already requires that provisions prohibiting conflicts of interest be included in City contracts; the Mayor's Office of Contract Services (MOCS), which works with each City agency's chief contracting officer to ensure compliance with Procurement Policy Board rules and other laws, including the City's ethics law, has authority to help regulate employees of not-for-profits contracting with the City.[21] Furthermore, the Capacity Building and Oversight unit of MOCS, which carries out its charge of regulating not-for-profits contracting with the City by training and vetting not-for-profits,[22] is able to inspect not-for-profits based on their compliance or ability to comply with the City's ethics law, and raise awareness of the importance of such compliance through MOCS' training and assistance programs.

B. An Example of Broadening the Scope of a Municipal Ethics Law as It Would Apply to the Officers and Employees of Not-for-Profits

In order to illustrate how one might broaden the scope of municipal ethics laws to apply to not-for-profits expending municipal funds for essentially municipal functions, one might examine how New York City has done so in the context of discretionary funds granted by the New York City Council to not-for-profit organizations. As news articles suggest, not-for-profits receiving discretionary funding from New York City Council Members are an especially ripe area for cracking down on self-dealing by broadening the scope of the City's ethics law beyond City employees. Council Members have been caught funneling City money to friends and relatives who have lined their pockets with the funds. News articles from recent months seem to suggest that, despite tougher regulations set in place since some big scandals were brought to light a few years ago, there is still too much room for those ignorant or scornful of the law to maneuver.

1. Current Law Governing the Discretionary Funding Process

The New York City Policy Procurement Board promulgates rules that govern the City's procurement of goods and services,[23] including procurements funded by discretionary funds.[24] Under the discretionary funding process, Council Members may use their allotted funds to sponsor community-based not-for-profit organizations of their choice[25] and vote on the budget proposals that provide that funding.[26]

Although per the Policy Procurement Board Rules Council Members have the authority to spend public dollars on community-based not-for-profits, as public servants, they are beholden to the City's ethics law. For example, a Council Member may not sponsor funding where a person with whom he or she is "associated" within the meaning of the ethics law has a paid position with the recipient not-for-profit and may benefit as a result of the funding.[27] In close cases, the Council Member may solicit the advice of the Conflicts of Interest Board, the City's ethics board, and if that agency determines that no reasonable likelihood exists that the associated person will directly benefit from the funding, the sponsorship will be permissible.[28]

On the other hand, a Council Member may vote on a budget bill to provide discretionary funding to not-for-profits even if a person who is "associated" with that Council Member has a paid position at a particular organization that is set to receive funding,[29] provided that the Council Member discloses the interest to the Conflicts of Interest Board.[30]

As to requirements imposed on the recipients of discretionary funds, there are many, some of which are similar in substance to the requirements imposed on the Council Members who vote to provide the funding, such as disclosure requirements and restrictions on use of the funds. For example, information about organizations receiving discretionary funds, including descriptions of how the organization intends to use the funds, is publicly available.[31] Also, an organization must apply to receive discretionary funding, and in doing so, answer questions about, among other things, "qualifications, and integrity."[32] Additionally, organizations receiving more than $10,000 of discretionary funds must go through a pre-qualification process, with the City agencies overseeing each program determining whether the organization is "qualified,"[33] and requiring a "Conflicts of Interest Disclosure Certification."[34] Furthermore, organizations must use the funds for a "City purpose," and organizations that receive between $10,000 and $1 million must attend training on topics such as legal compliance and internal controls.[35]

2. Closing the Circuit: Enacting Procedural Requirements to Help the Council and the Not-for-Profits It Supports Achieve Better Governance and Avoid Conflicts of Interest

Despite the Council's disclosure, training, vetting, and spending requirements for not-for-profits receiving its funding, there are a number of areas where applying the City's ethics law to the officers and employees of these organizations would ensure for the Council, and assure the public, that Council Members and their funded organizations are acting ethically.

First, if the ethics law applied to the recipient organizations' officers and employees in the context of their involvement with City funds, they would be held to the same standards as Council Members when it comes to avoiding a conflict of interest. For example, as discussed, in close questions Council Members are expected to seek advice from the Conflicts of Interest Board about the legality of funding an organization where an associated party is a paid officer or employee; and only after the Board has determined that there is no reasonable likelihood that the officer or employee will benefit from the transaction may the Council Member proceed.[36] Applying the ethics law to the paid officers and employees on the other side of the transaction would impose on that officer or employee not only a higher ethical standard but would encourage the officer or employee to seek advice, on penalty of being held accountable for engaging in conflicts of interest. This would at least put such officers and employees on notice; and, at best, it would help the organization create more internal controls, thereby contributing to a more robust governance system within the not-for-profit.

Second, as previously noted, Council Members who wish to vote on a budget bill providing discretionary funds are allowed to do so, provided that they disclose any potential conflicts of interests. The reason for the different standards between voting on and sponsoring funds is that voting is considered part of the elected official's essential function, because not voting can disenfranchise one's constituents.[37] In other words, if not for the "essential function" quality of the voting power, a Council Member would be held to the same standard when voting on as when sponsoring funds. Holding the associated party of a voting Member accountable for violations of the City's ethics law and requiring that associated party to seek advice from the City's ethics board to determine whether to proceed with the transaction would help compensate, at least partially, for the voting Member's reduced responsibility in the voting process. The associated party, not being an elected official, would not have the benefit of relying on the "essential function" of the voting power.

Finally, if the municipal ethics law were applied to not-for-profit officers and employees, the ethics board would have the authority to impose fines and other sanctions on those who violate that law, as well as to provide training on the law, which currently only public servants must attend, and to give advice. This approach would, one hopes, reinforce governance norms and minimize destructive groupthink within not-for-profit organizations receiving municipal funding.

IV. Conclusion

News reports on self-dealing among charities suggest that these scandals are rocking the not-for-profit world. Legislation and enforcement resources at the federal, state and municipal level seem inadequate to regulate these organizations or to help them create better internal controls. The law is changing quickly, while high-ranking government officials are promising to bring new order to charities by capping executives' salaries[38] and requiring fuller disclosure on executive compensation.[39] However, with increasing privatization and public-private partnerships, conflicts of interest among not-for-profits are a growing concern. At the same time, at the municipal level this trend can present more opportunities to help these organizations achieve better governance and preserve the public trust. Applying municipal ethics laws to the not-for-profits that do business with the government offers such an opportunity to provide these organizations with more oversight, clear advice, and training on good governance.

Endnotes

1. *See, e.g.*, N. Y. City Charter § 2604.
2. *See, e.g.*, New York City Conflicts of Interest Board, Ethics: A Plain Language Guide to Chapter 68, (Dec. 2010), *available at* http://www.nyc.gov/html/conflicts/downloads/pdf2/books/orange_bk.pdf (accessed Dec. 8, 2011).
3. § 2604.
4. *See, e.g.*, New York City Conflicts of Interest Board, COIB Advisory Opinion No. 2009-2, *available at* http://archive.citylaw.org/coib/AO/arch%202009/AO2009_2_Council_discretionary_funding.pdf (accessed Dec. 8, 2011).
5. Editorial, *The Nonprofit Crackdown*, New York Post, Aug. 15, 2011.
6. Melanie B. Leslie, *The Wisdom of the Crowds? Groupthink and Nonprofit Governance*, 62 Fla. Law Rev. 1179, 1180 (2010).
7. *Id.* at 1220–22.
8. *Id.* at 1223–24.
9. See Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. Sch. L. Rev. 457, 476–77 (1996).
10. See Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Haw. L. Rev. 593, 615 (1999).
11. N-PCL § 715(a).
12. N-PCL § 715(c).

13. Leslie, *supra* note 6, at 1183.
14. N-PCL § 715(b).
15. I.R.C. § 501(c)(3).
16. I.R.C.C.F.R. § 1.501(c)(3)-1(f)(2)(ii).
17. I.R.C. § 4958.
18. I.R.C.C.F.R. § 53.4958-6(b).
19. *See* Staff of the Joint Comm. on Taxation, 109th Cong., *Options to Improve Tax Compliance and Reform Tax Expenditures* 263 (2005) (JCS-02-05) ("If the procedures were followed, the agent knows success on the merits is unlikely because the IRS will have to overcome a presumption of reasonableness in favor of the taxpayer. Under such circumstances, agents often will abandon the issue.")
20. *See, e.g.*, N.Y. CITY CHARTER § 2603.
21. New York City Mayor's Office of Contract Services, About MOCS, http://www.nyc.gov/html/mocs/html/about/about.shtml (accessed Oct. 28, 2011).
22. New York City Mayor's Office of Contract Services, Agency Procurement Indicators (2011), http://www.nyc.gov/html/mocs/downloads/pdf/procurement_indicators_2011.pdf (accessed Dec. 8, 2011).
23. N.Y. CITY CHARTER § 311.
24. Rules of City of N.Y. Procurement Policy Board (9 RCNY) § 1-02(e).
25. *Supra* note 4, at 3.
26. *Id*. at 5.
27. *Supra* note 4, at 8, 14–15. "A person or firm 'associated' with a public servant includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest." N.Y. CITY CHARTER § 2601(5).
28. *Supra* note 4, at 14–16.
29. *Id*. at 8.
30. *Id*. citing N.Y. CITY CHARTER §2604(b)(1)(a).
31. New York City Council, Discretionary Funding Policies and Procedures, *available at* http://council.nyc.gov/html/budget/PDFs/DiscretionaryFundingPoliciesFY12.pdf (accessed Dec. 8, 2011).
32. *Id*. at 3.
33. *Supra* note 22.
34. New York City Department of Youth & Community Development, Prequalification for City Council Discretionary Awards, *available at* http://home2.nyc.gov/html/dycd/downloads/pdf/PQL_Application4_1_2010.pdf (accessed Dec. 8, 2011).
35. *Supra* note 31.
36. In fact, the Council Member may proceed without consulting the Board, but does so at his or her peril. Misreading the applicable law and precedent may well result in an enforcement action.
37. *Supra* note 4, at 8.
38. *See, e.g.*, Susan K. Livio, *N.J. Gov. Christie Looks to Impose Salary Cap on Nonprofit CEOs*, NEWARK STAR-LEDGER, Apr. 26, 2010.
39. *See, e.g.*, Russ Buettner, *Panel Asks Nonprofits for Compensation Data*, N.Y. TIMES, Aug. 26, 2011, at A23.

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Land Use Case Law Update

By Henry M. Hocherman and Noelle Crisalli Wolfson

Those of you who are regular readers of this column will perhaps recall that, since at least the beginning of last year, we have lamented the lack of genuinely precedent-setting cases in the land use area, and have attributed the ongoing drought to the weakness of the economy. This quarter presents us with similarly thin gruel; the cases upon which we report serve more as a reminder of what the rules are and how they will be applied than as a revelation of new law or even a significant gloss upon existing law.

All four of our cases come to us from the State's southern tier; three are Second Department cases and the fourth is, in a departure from our usual practice, a New York County Supreme Court case which we report both for its interest (the decisions, for the case is comprised of three, are exceptionally well reasoned and written) and in the expectation that it will ultimately make its way up the appellate ladder. If these four cases have anything in common, it is that all four of them appear to be correctly decided, and that all four stand upon fairly one-sided records which very much compel their ultimate outcomes.

SEQRA: When Substantial Change in Build Year Requires an SEIS

Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation ("Develop Don't Destroy (Brooklyn) III")[1] is yet another chapter in the ongoing saga of the Atlantic Yards Project (the "Project") currently being developed by Forest City Ratner Companies ("FCRC")[2] with funding assistance from ESDC[3] in the Borough of Brooklyn, in which a well-organized community opposition has mounted continuous challenges to the development of a mixed-use commercial and residential (including affordable housing) project on what is essentially fallow land.[4] Prior challenges were focused on the appropriateness and the procedural adequacy of property takings associated with development of the Project, and on the adequacy of ESDC's original SEQRA review. The instant case, again a SEQRA challenge, addresses the question of when emerging changes in the construction period ("build year") initially used in determining the impacts of a project under SEQRA are so significant as to mandate the preparation of a supplemental environmental impact statement ("SEIS") to address the potential adverse impacts of such changes. Central to that determination is the question of when and how *de facto* failure of the original schedule and the relative certainty of the new schedule are so well established as to render the assumptions underlying the original EIS patently incorrect.

In *Develop Don't Destroy (Brooklyn) III*,[5] the petitioners challenged a determination by ESDC, which is a partial funder of the Project and is the lead agency for purposes of SEQRA review, that a modification of the development plan for the Project which reflected an extension of the projected completion date for the Project by some 15 years (from 10 years to 25 years) would not have so material an effect on the environmental impacts of the Project as to require a supplemental environmental impact statement. The Court's decision in this case is actually the third in a sequence of three decisions, the first of which initially rejected petitioners' challenge,[6] the second of which granted, in part, petitioners' motion for leave to reargue and renew;[7] and the third of which, as reported here, ultimately granted the petition, remanded the matter to ESDC, and required the preparation of an SEIS to assess the potential environmental impacts of a delay in the construction of Phase II of the Project.[8]

The Atlantic Yards Project is a publicly-subsidized mixed-use commercial and residential Project for the development of 22 acres, consisting in large part of disused railroad switching yards, in the Borough of Brooklyn. As proposed, the Project is to be built in two phases, Phase I to include construction of a sports arena for use by a professional basketball team and construction of a new rail yard on the site of the rail yard currently owned by the Metropolitan Transportation Authority ("MTA"). The Project also includes 16 high-rise buildings which will contain commercial space and between approximately 5,000 and 6,000 residential units, of which approximately 2,250 units are proposed to be affordable to low-, moderate- and middle-income persons. Four to five of these buildings are to be built in Phase I, and the remainder are to be constructed in Phase II.[9]

The original General Project Plan ("GPP") for Atlantic Yards was approved by ESDC on July 18, 2006 and was modified on December 8, 2006, and the Project immediately became the subject of extensive challenges, including SEQRA challenges mounted by petitioners.[10] The EIS for the Project as originally adopted by the ESDC weighed in at some 3,500 pages and was itself (unsuccessfully) challenged by the petitioners on the basis, among others, that the "build years," or the time it would take for each phase of the Project to be completed (four years for the completion of Phase I and 10 years for the completion of Phase II), were optimistic and incorrect.[11]

On June 23, 2009 ESDC adopted a Modified General Project Plan ("MGPP") which it affirmed by resolution on September 17, 2009. Petitioners commenced this

proceeding challenging the ESDC's September 17, 2009 resolution on the grounds, *inter alia,* that ESDC had run afoul of SEQRA by not preparing an SEIS.[12] Petitioners' initial challenge rested primarily upon the renegotiation in June of 2009 of the agreement between FCRC and the MTA for the purchase of air rights necessary to construct six of the 11 buildings that were to be constructed in Phase II of the Project. Under the original FCRC/MTA Agreement, a $100,000,000 purchase price for the air rights was to be paid at the inception of the Project, whereas under the modified agreement only $20,000,000 of the purchase price was to be paid up front, with the balance to be paid in installments over a period extending until the year 2030, permitting the building sites for each of the buildings in Phase II to be taken down as needed over that period.[13]

Upon its motion for leave to reargue and renew (their petition having been denied), Petitioners' argument was extended to include a modification to the original Development Agreement between FCRC and ESDC, entered into by FCRC and ESDC after the proceeding was commenced.[14] As modified, the Development Agreement provides for commencement and construction of the sports arena and the commencement of the Phase I buildings within three to ten years of the Project start date (or between 2013 and 2020) and the substantial completion of the Phase I buildings by 2022. Notably, the modification includes substantial and meaningful sanctions, including liquidated damages in the amount of as much as $341,000,000, upon the developer's failure to meet the Phase I dates. In stark contrast to the Phase I sanctions, however, the Phase II timetable does not require commencement of Phase II buildings until the fifteenth anniversary of the Project's start, or 2025, and permits a substantial completion date that could be as distant as the year 2035. Most significantly from the court's point of view, with respect to Phase II, the modification did not include meaningful sanctions or liquidated damages of any kind, but merely gave ESDC the option to terminate the applicable lease for any portion of the Project site on which construction of improvements had not commenced in accordance with the terms of the modified Development Agreement.[15]

Thus, at the time of its initial decision to dismiss the petition, the Court had had before it only the MTA Agreement, which, petitioners argued, essentially removed any incentive on the part of the developer to complete Phase II of the Project. In denying the petition the Court noted that ESDC had its consultants prepare a Technical Memorandum, dated June 2009, which was used, among other things, to determine whether or not an SEIS was necessary. Among the stated purposes of the Technical Memorandum was to assess whether "the potential for delay due to prolonged adverse economic conditions would result in 'any new or substantially different significant adverse impacts than those addressed in the FEIS' that was prepared in connection with the ESDC's approval of the 2006 plan."[16] The ultimate determination of the Technical Memorandum was that the changes it examined "'would not, considered either individually or together, result in any significant adverse environmental impacts not previously addressed in the FEIS.'"[17] Further, the Court looked to an ESDC staff memorandum prepared in September of 2009 which concluded that the Project remained viable and that the Project schedule was "'achievable based on existing and projected economic conditions'" and on the report of a real estate consulting firm retained by ESDC.[18]

Deferring to what it correctly perceived to be its limited prerogatives in assessing a determination by a lead agency whether or not to prepare an SEIS, and noting that ESDC's determinations were based upon, among other things, the Technical Memorandum, the Court found that ESDC's actions in not requiring an SEIS were not irrational based on the record before it, and denied the petition.[19] The Court noted that although the MTA Agreement permitted the developer to acquire the necessary air rights for Phase II buildings on a parcel-by-parcel basis, the existence of the MTA Agreement did not necessarily vitiate the lead agency's determination that the Project could still be completed within a period reasonably close to that originally contemplated.[20]

On the motion to reargue, the Court was presented for the first time with the modified Development Agreement between FCRC and ESDC which, although it had been in the works at the time of the original petition, had not yet been executed. A broad outline, but not the proposed language, of the modified Development Agreement had been brought to the Court's attention during the initial proceeding.[21]

In granting the reargument motion the Court noted that ESDC had, in arguing that the MTA Agreement did not necessarily extend the build-out until the year 2030, emphasized that that agreement would be subject to a modified Development Agreement to be entered into between ESDC and the developer, in which the developer would be bound to complete the Project within ten years, or by 2019. ESDC supported this claim by providing a summary of the modified Development Agreement, but the actual text thereof was never introduced during the initial proceeding.[22]

In deciding the reargument motion in petitioners' favor, the Court noted that ESDC for the first time acknowledged the fact that the revised Development Agreement provided a 25-year outside date for the development of Phase II of the Project. The Court's indignation at ESDC's admission that it was aware of the 25-year outside date even during the initial pro-

ceeding is obvious in its grant of petitioners' motion to reargue and renew,[23] and ultimately carries through to its final decision in this case, reversing its prior determination.[24]

In ultimately reversing its earlier determination, the Court relied heavily on the terms of the revised Development Agreement which, when read together with the MTA Agreement, made it appear substantially more likely that Phase II would be delayed beyond the initial build-out period used in the underlying EIS.[25] The Court accorded great weight to the fact that whereas the developer's failure to complete Phase I (the arena, the rail yards, and some of the buildings) in a timely manner would subject the developer to substantial monetary sanctions, the developer's delay, and possible ultimate default, in the completion of Phase II would not give rise to similar sanctions but would result only in the forfeiture of development rights. The Court noted that although the Development Agreement requires the completion of Phase II construction within a 25-year period, or by 2035, failure to substantially complete Phase II construction, while defined as an "event of default" under the Development Agreement, is not the basis for the payment of liquidated damages but merely grants ESDC the option to terminate the applicable Project lease for any portion of the Project site on which construction of the improvements had not been commenced.[26] In short, the Court in essence determined that the revised agreements essentially constituted recognition by all parties (FCRC, ESDC and MTA) that the original build year assumptions were no longer realistic or achievable.

Ultimately, while citing and purporting to defer to strict limitations on the Court's prerogatives in reviewing the lead agency's decision, the Court held that ESDC's determination not to require an SEIS was arbitrary and capricious. In so doing, the Court stated that:

> In so holding, the court recognizes, as the Appellate Division held in a prior litigation involving the Atlantic Yards Project, that a mere inaccuracy in the build date will not invalidate the basis data used in the agency's environmental assessment.… However, as the Court also held, ESDC's choice of the build year is not immune to judicial review but, rather, is subject to review under the rational basis or arbitrary and capricious standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding.… In the instant case, ESDC's continuing use of the 10 year build date was not merely inaccurate; it lacked a rational basis, given the major change in deadlines reflected in the MTA and Development Agreements. (citations omitted)[27]

In a sense, petitioners' contentions in attacking the original EIS were partially vindicated.

The thrust of the Court's holding is that when intervening events (in this case the revisions to the key agreements governing the Project) so clearly cast doubt upon the continued likelihood that the original build year assumption can or will be met, and expressly point to new, more likely build years, the failure to address the more likely build year in an SEIS will be deemed irrational or arbitrary.[28]

The inclusion of a "build year" in an EIS is, by its nature, always speculative, the more so in the case of a large and complex project, in that it assumes market conditions, the availability of money, absorption rates, and the availability of labor and materials, none of which can be guaranteed by a project sponsor. The inherent vagaries of any build year assumption have been recognized by the courts.[29] As noted by the Appellate Division in petitioners' first SEQRA challenge,[30] the acceptance by a lead agency of a build year assumption as proffered by a project sponsor is subject to the same test as any other SEQRA determination by a lead agency, that is, whether, based upon the record, the agency's determination can be deemed by a court to be "irrational or arbitrary and capricious." As oft cited in SEQRA cases, including this one, the court may not substitute its judgment for that of the lead agency unless that judgment fails that fundamental test.

In assessing the import and ultimate precedential value of this case, it should be noted that the facts in this case differ from the typical build year delay in significant ways. In general, the fact that a build year will be delayed emerges slowly as a project progresses and is rarely so starkly articulated as it was here. Further, a build year delay does not generally, in and of itself, become the subject of an action by the SEQRA lead agency, as it did here when the lead agency adopted a revised project plan to which it was itself a party and in which the potential for delay was memorialized. Finally, to the extent that there are build year delays, they rarely approach the magnitude of the delays in this case, nor is that magnitude so readily apparent so early on in the history of a project. That said, however, the decision (albeit a lower court decision) is important in that it presents a compact statement of the applicable law and reaches what appears to be, under the facts of this case, the correct determination, although one cannot help but wonder whether the decision was influenced to some extent by the court's indignation at ESDC's lack of candor in disclosing the contents of the revised Development Agreement during the first hearing of the case.

The Smell Test; Justice Triumphs

Cacsire v. City of White Plains Zoning Board of Appeals[31] and *Gentile v. Village of Tuckahoe Zoning Board of Appeals*[32] are two cases involving challenges to determinations by zoning boards of appeal, in one case denying variances, in the other granting the variance subject to a condition so burdensome as to constitute a *de facto* denial. The cases break no new ground at all, but are interesting in that, looking only to the very brief description of the facts that appear in the Appellate Division decisions, the Appellate Division appears to have been moved by, among other things, the sheer inequity of the ZBA's and lower court's determinations. In both cases, the circumstances under which the denied variances were originally sought were extraordinarily compelling in favor of the petitioners.

Cacsire involved a house purchased by petitioners in 1993 that had been built in or about 1904, which predated White Plains' certificate of occupancy regulations.[33] The house was located in a residential neighborhood zoned for one- and two-family houses. At the time petitioners acquired the house it was being used as a two-family residence, was referred to in the real estate listings as a two-family dwelling, and was so described in petitioners' contract of sale. Petitioners' mortgage was conditioned upon use of the building as a legal two-family residence. Petitioners' title search disclosed, among other things, that the property was classified by the City of White Plains as a two-family dwelling for tax purposes. Thus, all involved (petitioners, their counsel, their mortgagee and, presumably, the city) believed, and had a good faith basis for believing, that the building was a legal two-family dwelling.[34]

In 2002, having rented the property as a two-family dwelling for some nine years, and having paid taxes on it as a two-family dwelling for that entire period, petitioners applied to the White Plains Department of Buildings for a permit to renovate the upstairs kitchen.[35] They received the permit, spent $10,000 on the renovations, and upon completion thereof the Department of Buildings refused to issue certificates of completion for the work, informing petitioners, for the first time, that there was a "'non-consistency [sic] with [its] records in regards to the classification of the property"[36] and that petitioners would need to obtain a variance permitting the use of the building as a two-family dwelling before a certificate of completion would be issued.[37] In fact, six variances were required to render the building conforming. The ZBA denied the variances finding, among other things, that petitioners' hardship was self-created. Petitioners commenced an Article 78 proceeding; Supreme Court upheld the denial of the variances and petitioners appealed.[38]

Although the ZBA paid lip service to application of the applicable balancing test as set forth in General City Law Section 81-b, the Appellate Division, after reiterating all five prongs of the test, found that the ZBA was arbitrary and capricious in all of its findings but for the finding that the requested variances were substantial, and that the ZBA's determinations were wholly lacking in any evidentiary support.[39] The Court stated that "a determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual base."[40]

At bottom, however, the Appellate Division's motivation for reversing the lower court appears in the antepenultimate paragraph of the decision in which the Appellate Division stated that "[t]o the contrary, the record indicates that the property owned by the petitioners had been used by its residents and taxed by the City as a two-family dwelling for over 50 years."[41] In essence, the Appellate Division applied the smell test rather than (or perhaps in addition to) the balancing test and found that the ZBA and the lower court had failed both.

Gentile is a case in which the equities, although perhaps less compelling than those in *Cacsire,* also tip in favor of the petitioner. In *Gentile*, Tuckahoe's Zoning Board of Appeals was slightly cagier than White Plains', but the Second Department was not to be deterred in its insistence upon justice.

Petitioners owned a single-family home in the Village of Tuckahoe. In 2001 they applied for a permit for, among other things, reconstruction of existing retaining walls in their back yard.[42] During the process of reconstructing the retaining walls, petitioners also reconstructed an existing exterior stairway in the back yard. Five years later "it was discovered" that the stairway was in violation of Tuckahoe's four-foot side yard requirement.[43] Petitioners filed an application to the ZBA for an area variance to permit continuing use of the stairs. The ZBA granted the application, but imposed a condition that the stairway be set back at least two feet from the property boundary which, it would appear from the Appellate Division's decision, was essentially physically impossible.[44]

The lower court upheld the validity of the condition and Petitioner appealed. The Appellate Division found that the condition was arbitrary and capricious, and upheld the grant of the variance while annulling the condition.[45] The Appellate Division quoted *St. Onge v. Donovan*,[46] to the effect that a zoning board does have the jurisdiction to impose reasonable conditions directly related to and incidental to the proposed use of the property, but held that the imposition of unreasonable or improper conditions may be annulled and the variance otherwise upheld.[47] Interestingly enough, the Appellate Division held that the stairway setback condition was unreasonable "as there was no evidence adduced at the hearing that compliance of such condition would be feasible,"[48] but having said that, it does

not appear that there was direct evidence to the effect that it was not feasible. In effect, the Court refused to permit what it saw as the indirect denial of a variance which, based upon the equities of the case, should have been granted. The decision does reaffirm the rule that a conditional variance may be stripped of an invalid condition and remain valid as modified by the court, without the necessity for a remand to the ZBA.

As noted above, neither *Cacsire* nor *Gentile* make new law, but they do stand as examples of what the courts (and in particular the Second Department) will do to right a wrong when the equities are screamingly obvious.

Since we are on the topic of conditional approvals, brief reference to the case of *Greencove Associates, LLC v. Town Board of the Town of North Hempstead*[49] is appropriate in that it illustrates a set of facts in which a condition of site plan approval limiting the size of buildings in a shopping center to approximately 6,800 square feet where the dimensional limitations in the zoning ordinance would permit 10,000 square feet was upheld.

Petitioner, the owner of a shopping center in the Town of North Hempstead, sought site plan approval from the town board for expansion of an existing shopping center by the addition of a 10,000-square-foot retail building. The town board approved the site plan but, giving effect to a recommendation by the Nassau County Planning Commission, imposed a condition on site plan approval limiting the size of the new building to approximately 6,800 square feet.[50]

The basis of the town board's condition was the existence of a restriction, imposed at the time that the shopping center was originally approved in 1959, requiring the maintenance of a landscaped buffer along a portion of the property adjacent to a residential neighborhood. In 1999, the town board had approved a site plan application to expand the shopping center subject, among other things, to a condition requiring improvements to the landscaped buffer. Following that site plan approval, the buffer measured, on average, 22 feet in width.[51]

As proposed by the petitioner, the new building would have reduced the buffer, in an area directly behind the building, to a width of just four or five feet.[52]

The petitioner having challenged the condition in an Article 78 proceeding, the lower court made no determination, but transferred the proceeding to the Appellate Division pursuant to CPLR 7804(g).[53] The Appellate Division held that the transfer was improper since the determination to be reviewed was not made following an evidentiary hearing, but insofar as the whole record was before it, made a determination to decide the proceeding on the merits.[54]

The Appellate Division held that the determination was not arbitrary and capricious, an abuse of discretion, or irrational in that it was intended to maintain the integrity of the landscaped buffer and gave effect to a condition that had long been in place.[55] Inherent (although unspoken) in the Appellate Division's determination was an acknowledgment that the petitioner had long been aware of the condition requiring the existing buffer, had acceded to it in 1999, and that the Code of the Town of North Hempstead, in retaining site plan authority in the town board, explicitly gave the town board power to consider, among other things, "compatibility of design considerations and adequacy of screening from residential properties."[56] The Court held that "[A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property."[57] As noted above, the case breaks no new ground, but it does make it clear that notwithstanding that a proposed building complies with the dimensional limitations in the zoning ordinance, a condition reducing its size below those limitations will not be invalid if there are other factors (including, presumably, SEQRA factors) justifying the reduction in size.

As the reader will readily discern, none of the four cases reported this quarter will have anyone scurrying to buy the movie rights, but they retain a level of interest nonetheless, particularly the three decisions constituting *Develop Don't Destroy (Brooklyn)*, which gives some insight into when a clearly documented and obviously material change in circumstances will require the preparation of an SEIS, notwithstanding that original SEQRA review was extremely comprehensive and that its original build year assumptions had once survived a judicial review.

Endnotes

1. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 33 Misc.3d 330 (Sup. Ct. NY Co. 2011) ("*Develop Don't Destroy (Brooklyn) III*").
2. The authors and the law firm with which they are affiliated have represented Forest City Ratner Companies in various matters, none of them related, however, to the subject of this litigation.
3. Referring to the New York Urban Development Corporation doing business as Empire State Development Corporation ("ESDC").
4. *See, e.g., Goldstein v. New York State Urban Development Corporation,* 13 N.Y.3d 511 (2009), as reported in Henry M. Hocherman and Noelle V. Crisalli *Land Use Case Law Update,* 24.1 Municipal Lawyer 5-12 (Winter 2010).
5. *Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d 330.
6. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 26 Misc.3d 1236(A), 2010 WL 936220 (Sup. Ct. NY Co. 2010) (unreported decision) *("Develop Don't Destroy (Brooklyn) I"*).
7. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 30 Misc.3d 616 (Sup. Ct. NY Co. 2010) ("*Develop Don't Destroy (Brooklyn) II*").

8. *Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d at 349.
9. *Id.* at 333.
10. *See Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *1; *see also Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp*., 59 A.D.3d 312 (1st Dep't 2009*); Goldstein*,13 N.Y.3d 511.
11. *Develop Don't Destroy (Brooklyn), Inc.*, 59 A.D.3d at 317-318. Interestingly, that challenge also included an allegation that the EIS failed to take a hard look at the project because, among other things, it failed to evaluate the project's potential for inciting terrorism.
12. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *1. The SEQRA Regulations provide that the lead agency may require an applicant to prepare an SEIS to review specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS which arise from a change in the project, newly discovered information or a change in the circumstances related to the project. 6 NYCRR 617.9(a)(7).
13. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *2.
14. *Develop Don't Destroy (Brooklyn) II*, 30 Misc.3d at 619-621.
15. *Id.* at 622-625.
16. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *4.
17. *Id.*
18. *Id.* at *5.
19. *Id.* at *6-*9.
20. *Id.* at *7.
21. *Develop Don't Destroy (Brooklyn) II*, 30 Misc.3d at 619-621.
22. *Id.*
23. *See id.* at 627-628.
24. *See Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d at 335-338.
25. *Id.* at 340.
26. *Id.* at 335-338.
27. *Id.* at 340-341.
28. *Id.* at 346-348.
29. *See, e.g., Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp*, 59 A.D.3d 312, 318 (1st Dep't 2009). "Turning now to the 'build year' issue, it is petitioners' contention that the build years, i.e., the time periods by which the phases of the project were predicted to be substantially operational, were intentionally underestimated in the project EIS and that the EIS's disclosure of the project's environmental impacts was consequently fatally skewed. The record, however, discloses that in selecting the build years to be used in the EIS, the lead agency did not arbitrarily select a build year it found favorable but relied upon the detailed construction schedules of the project's highly experienced general contractor and upon the opinions of its own consultants and an independent contractor. It is, of course, possible that the lengths of the projected build-out periods (four years for the first phase of the project, including the arena, and 10 years for the remaining elements) were underestimated, but the ultimate accuracy of the estimates is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build dates based on its independent review of the extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious . . . , and it may not. The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use. Indeed, we have, in rejecting a similar challenge to an EIS, held that reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Council of City of N.Y.*, 214 A.D.2d 335, 337 [1995], *lv denied* 87 N.Y.2d 802 [1995])."
30. *Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp*., 59 A.D.3d 312 (1st Dep't 2009).
31. *Cacsire v. City of White Plains Zoning Board of Appeals*, 930 N.Y.S.2d 54 (2d Dep't 2011).
32. *Gentile v. Village of Tuckahoe Zoning Board of Appeals*, 87 A.D.3d 695 (2d Dep't 2011).
33. *Cacsire*, 930 N.Y.S.2d at 56.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 56-57.
39. *Id.* at 57-58.
40. *Id.* at 57 (citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768 (2d Dep't 2005)).
41. *Cacsire*, 930 N.Y.S.2d at 58.
42. *Gentile*, 87 A.D.3d at 695.
43. *Id.* The decision does not offer any more detail as to how the "discovery" came about; one suspects the neighbors.
44. *Id.*
45. *Id*. at 696.
46. *St. Onge v. Donovan*, 71 N.Y.2d 507, 515-516 (1988).
47. *Gentile*, 87 A.D.3d at 696.
48. *Id*. (citing *Martin v. Brookhaven Zoning Board of Appeals*, 34 A.D.3d 812, 813 (2d Dep't 2006)).
49. *Greencove Associates, LLC v. Town Board of the Town of North Hempstead*, 929 N.Y.S.2d 325 (2d Dep't 2011).
50. *Greencove Associates, LLC*, 929 N.Y.S.2d at 326-327.
51. *Id*.
52. *Id*. at 326.
53. *Id*. at 327.
54. *Id*.
55. *Id*. at 327-328.
56. *Id*. at 327 (citing the Code of the Town of North Hempstead §§70-219[E](1), 219[B]).
57. *Greencove Associates, LLC*, 929 N.Y.S.2d at 327 (quoting *International Innovative Tech Group Corp. v. Planning Board of the Town of Woodbury*, 20 A.D.3d 531, 533 (2d Dep't 2005)).

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Municipal News in a New York Minute

By Amy Lavine

The following summaries of recent cases may be of interest to municipal attorneys in New York.

Economic development subsidies. The New York State Court of Appeals held that public authorities and state agencies, with appropriate legislative authorization, may provide grants and loans to private companies in an effort to spur economic development. The court, with two judges dissenting, concluded that such assistance is constitutionally defensible. *Bordeleau v. New York State*, 2011 N.Y. Slip Op. 8444 (N.Y. Nov. 21, 2011).

Public employees. In a 4-3 decision, the Court of Appeals ruled that a "no lay-off" provision in a collective bargaining agreement didn't protect union firefighters from having their jobs eliminated due to municipal budget cuts. The majority concluded that the term "lay-off" is ambiguous, but the finding was sharply criticized by a dissenting judge. "At a time when the term 'layoff' pervades the public dialogue," the dissent wrote, "it is reasonable to conclude that the parties employed that term to succinctly but thoroughly address the threat of job insecurity." *Matter of Johnson City Professional Firefighters Local* 921, 2011 N.Y. Slip Op. 8226 (N.Y. Nov. 17, 2011).

Public hearing requirements. The New York Appellate Division, First Department, reversed a decision enjoining the MTA from closing subway token booths and customer assistance kiosks. The authority didn't have to hold a new public hearing, the court said, when it decided to implement the closings via attrition instead of mass closings. *Matter of Samuelsen v Walder*, 2011 NY Slip Op. 7487 (1st Dept. Oct. 25, 2011).

Zoning. The Second Circuit held that a zoning height restriction enacted to protect river views was void for vagueness because it didn't include specific instructions for measuring the height limit. *Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612 (2d Cir. Oct. 19, 2011).

Governmental immunity. A jury found the Port Authority liable for failing to provide sufficient security to prevent the 1993 terrorist bombing at the parking garage of the World Trade Center. The Court of Appeals, however, found that the authority was entitled to governmental immunity from tort liability because it was performing a government function by providing "security for the benefit of a greater populace involving the allocation of police resources." *Matter of Word Trade Ctr. Bombing Litig.*, 2011 NY Slip Op. 6501 (N.Y. Sept. 22, 2011).

Public education. The First Department threw out a suit brought by the United Federation of Teachers and the NAACP seeking to force class size reductions in New York City, as required by a 2007 law, and despite evidence of a covert agreement to increase class sizes. The sole remedy is a petition to the New York State Education Department, the court said, and even if the court had authority to review the case, the petitioners still failed to exhaust their remedies. *Mulgrew v. Bd. of Educ.*, 88 A.D.3d 72 (1st Dept. Jul. 28, 2011).

Home rule. The Third Department dismissed a lawsuit challenging several new zoning and land use rules enacted by the Adirondack Park Agency. The local government petitioners were limited by state law to challenging the regulations on home rule grounds, and this claim failed because Adirondack Park regulations are a matter of state concern, even if they have some impact on local interests. As for the private property owners, their claims weren't ripe for judicial review because they only argued that the regulations would negatively impact them in the future or cause indirect economic harm. And even if an actual conflict were to arise under the regulations, the property owners would still need to apply for variances or other relief before challenging them in court. *Matter of New York Blue Line Council, Inc. v. Adirondack Park Agency*, 2011 N.Y. Slip Op. 5920 (3d Dept. Jul. 14, 2011).

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