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A Message from the Chair

Fiscal strain is still a prevalent theme for many municipal entities in New York. Soaring gas and energy prices are just one of the many hurdles facing governmental entities as they try to manage budgets and hold down what are already some of the highest taxes in the country. The State Comptroller's office has recently reported that real property taxes increased on average 60% over the last ten years (42% within the last five years alone). More and more often school budgets, being the only budgets in New York which can be directly voted upon, are being rejected. Since many budget items cover mandated services, oftentimes there are few options left for governments but to raises taxes. As many of you know, the Governor has just rejected a proposal by the Legislature to provide refund checks from current year surpluses as imprudent given the forecast for future operating difficulties, especially in light of what appears to be a never-ending increase in State spending.

In addition to increased pension obligations, the recent GASB 45 announcement has municipalities hiring actuaries to calculate OPEB (other post-employment benefits) liabilities. As many experts predict, this number will appear staggering. Substantial portions of municipal budgets are already dedicated to payments for those who no longer work for the government and such payments are only expected to rise.

What does all of this mean for municipal lawyers? Well for starters people tend to get "creative" when confronted with fiscal stress. This is not in any way unique to the municipal world. Financial products emerge which, in less stressful climates, would never see the light of day. In an effort to improve investment returns, questionable investment vehicles are proposed. While I strongly believe that the investment options (and financial products generally) available to municipal governments in New York are outdated and ultra conservative, the proper

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course of action to expand such alternatives and provide more flexibility is through legislative action.

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Another alternative touted to municipalities is the so-called "one-shots," such as asset sales. Trouble is the assets involved are still needed for municipal use. Generally, an asset must no longer be needed for municipal use in order to sell and then the proceeds from the sale are required to be used to defease debt incurred with respect to the asset or to fund other capital items. I am reminded of the sale of the Attica prison to a State agency with a lease back to the State equal to the debt incurred by that agency to buy the prison. Fortunately, other such asset transfers by the State were successfully challenged. Indeed, I am working with a large county that has navigated its way out of a fiscal nightmare created in no small part through asset sales in which contingent liabilities remained and proceeds of the sale were used to fund current operating expenses. In fact, the sale of the hospital remains this county's most pressing obstacle to long-term fiscal stability.

In an effort to save costs, capital projects are proposed using funding mechanisms that are designed to avoid competitive bidding, WICKs and/or prevailing wages. Off balance sheet transactions, such as lease financings, are explored. The list goes on and on.

As a result, we are often put in the position of naysayer and obstructionist. While creative solutions may still be possible, they oftentimes preclude the original proposal and the false promises it contained. The snake oil salesman will always find someone willing to entertain his pitch. As a county attorney friend of mine reminds me from time to time, it is our job to keep clients properly informed and advised, to let sound legal advice serve as the benchmark and let the rest of it fall where it may.

Thomas Myers

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *Municipal Lawyer* Editor:

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

From the Editor

A recent federal court decision delivered two cautionary messages to local government officials. First, notations on a filed subdivision map that certain parcels are to remain as open space and not be developed are not binding on subsequent purchasers of those parcels who did not have notice of those restrictions. Second, be careful what you say, someone may be listening.

In *O'Mara v. Town of Wappinger*,[1] the Planning Board adopted preliminary and final subdivision resolutions for a seven-lot subdivision. Two of the parcels were designated as permanent open space parcels on the plat and the Planning Board minutes clearly established that no building permit would be issued for those two parcels. A subdivision map was filed in the office of the Dutchess County Clerk and in the office of the Town Clerk of Wappinger.

After the death of one of the original applicants, his estate did not pay the taxes on the two open space lots and the lots were subsequently sold in a tax sale. Presumably, the heirs did not pay the taxes because they believed, based upon the original conditions imposed on the development, that the lots were not buildable. Plaintiff O'Mara acquired the properties and proceeded with their development. Apparently, no one in the Town was aware of the building restriction and all approvals for building permits and other matters were granted.

As luck would have it, a son of the original developer witnessed the construction and brought the matter of the restriction on the development to the Town's attention. At that point, the Town issued a stop-work order and refused to grant a certificate of occupancy for the house already built by the plaintiff on one of the parcels. After settlement efforts failed, O'Mara sued the town under 42 U.S.C. § 1983, the Federal Civil Rights statute.

While the lawsuit was pending, further efforts were made to resolve the dispute. In one instance, O'Mara recorded the conversation he had with the building inspector. The building inspector made a variety of statements against his and the Town's interests. Those statements included predicting the Town would say "F— the judge" if it lost the lawsuit and threatening that the Town would take further measures to stop any subdivision of the property even if the right to build was granted by the Court. Finally, the building inspector bet the plaintiff a steak dinner on the outcome of the litigation.

On the merits, the Court ruled that if, as part of a land approval, you want to impose a condition to run with the land that would be binding on future property owners, such condition must be memorialized in a written document that is recorded in the chain of title in the County Clerk's office. Otherwise, a subsequent purchaser for value without notice may not be bound by that condition.

As to the unfortunate statements made by the building inspector on the tape recording, it appears the Court had a sense of humor. At the outset of the Court's conclusions of law, the opinion states as follows "Kolb, (the building inspector) owes O'Mara (plaintiff) a steak dinner."

In this issue of the *Municipal Lawyer*, Municipal Law Section Chair Thomas Myers adds his own cautionary note for attorneys who represent municipal entities confronted with fiscal crises. Tom reminds us that our principal function is to provide our clients with sound legal advice and not to succumb to the pressure to endorse "creative" solutions that are legally suspect and ultimately will only compound the municipality's long-term fiscal instability.

Also in this issue, Chairman Myers, together with Douglas Goodfriend, examines the new reporting, auditing, governance and property disposition requirements imposed upon public authorities by the Public Authorities Accountability Act of 2005. Steven Otis, Mayor of the City of Rye, analyzes recent decisions by the New York State Public Service Commission governing the entry of telephone companies into the local cable television market.

Municipal regulation of cell towers under the Federal Telecommunications Act of 1996 is the subject of an article by Carol L. Van Scoyoc, Deputy Corporation Counsel of the City of White Plains. That article examines the City's denial of a cellular provider's application for a special use permit to erect a 150-foot cellular communications tower on a golf course and the upholding of that denial, on aesthetic grounds, by the Second Circuit Court of Appeals.

Continuing our series of articles on ethical issues, Steven G. Leventhal has prepared a glossary of municipal ethics terms utilized in running a local municipal ethics board. The glossary distills the essential elements of provisions found in both General Municipal Law Article 18 and local codes of ethics.

Endnote

1. 400 F. Supp. 2d 634 (S.D.N.Y. 2005).

Lester D. Steinman

PSC Establishes Framework for Increased Competition in Cable; Protects Municipal Role

By Steven Otis

In a series of decisions beginning in June 2005, the New York State Public Service Commission ("PSC") outlined the application of the state Public Service Law for new providers of cable television service in New York. These decisions define the playing field for expanded competition in New York between existing cable providers and new entrants seeking to avoid some provisions of the Public Service Law or local franchising requirements.

At stake for New York municipalities are a number of issues including local franchising authority; the ability to coordinate and control activity in municipal rights-of-way; revenues from franchise agreements; and support for public, education and government ("PEG") access channels. At stake for competitors is an understanding of what constitutes a level playing field and what rules apply to different kinds of competitors.

All these issues are evolving against a backdrop of telephone companies entering the cable television market and seeking support at the federal level to avoid local franchising or state regulation altogether.

In New York the initial question presented to the Public Service Commission was whether Verizon is required to obtain a local franchise agreement under Article 11 of the Public Service Law (which regulates the provision of cable service) before construction of their hybrid infrastructure that includes the capability to provide cable service. Verizon's fiber to the premises (FTTP) network bundles telephone, cable, and Internet equipment in the mixed-use system. The Town of Babylon, the City of Yonkers, and Cablevision petitioned the PSC for rulings on this and related issues.

In its decision, the PSC stated franchising approval before construction was not required, but that municipal franchises were required at such point Verizon installs a plant "to be used exclusively for cable service or seeks to offer broadcast programming."[1] The PSC also underscored that Verizon must "adhere to all applicable local rights-of-way management requirements with regard to public safety, aesthetics, pole attachments, and other legitimate municipal concerns. Notwithstanding Verizon's authority under its state telephone rights, deployment of its FTTP network is subject to municipal oversight and supervision. We fully expect Verizon to cooperate with those affected municipalities."[2]

While making clear what would trigger a telephone company burden to obtain a local franchise agreement, additional questions regarding the application of this principle would be outlined in the two Franchise Certificate of Confirmation applications that would follow.

The first application came on the proposed agreement for Verizon and the Village of Massapequa Park, which became the next battleground between Verizon and established cable providers over what rules would apply to new entrants.

The franchise agreement submitted by Verizon and Massapequa Park to the PSC for approval was found deficient by the PSC in numerous respects. The Commission stated that "the proposed franchise agreement misinterprets and misapplies the Commission's Declaratory Ruling" in the Babylon case and that "Verizon's attempt to insulate certain portions of its FTTP network from Article 11 cable regulation is inconsistent with our Declaratory Ruling and the Public Service Law."[3]

The PSC conditioned approval of the Massapequa Park agreement upon substantial modification of agreement provisions, including the striking and replacement of provisions with the relevant sections of the Public Service Law, a reaffirmation of the Babylon ruling, and a clear statement that Verizon deployment was covered under Article 11 of the Public Service Law. Sections changed by the PSC included provisions relating to rates, minimum consumer protection and consumer service standards, compliance with PSC rules on PEG access standards, compliance with PSC rules on line extension standards, rules relating to indemnification of municipalities, and system reporting requirements.

The PSC also clarified application of their level playing field rule stating that a term-by-term comparison of franchise agreements is not required, thereby appearing to accept Verizon arguments in the Babylon case that cable companies and telephone companies are governed by different regulatory structures.

> "Our rule does not preclude the existence of different franchise terms for

> different companies as they roll out their cable service in various municipalities, should events and circumstances so warrant. We will, however, ensure that both agreements in a particular franchise area substantially comply with our franchising standards in Part 895, and that no cable operator enjoys a material competitive advantage in that particular community."[4]

"Substantial compliance" with the minimum requirements of the Article 11 rules is the standard the PSC is using in determining whether to approve a franchise agreement. Identical franchise agreements will not be required.

Verizon's petition for approval of their proposed franchise agreement with the Village of Nyack encountered a similar response from the PSC. Verizon submitted a franchise agreement similar to the Massapequa Park application.

The PSC again rewrote sections of the agreement that relate to many of the same issues corrected in the Massapequa Park ruling. In addition, the PSC reiterated the "substantial compliance" test.

The Commission also reaffirmed their support for municipal control over activity in the rights-of-way as outlined in the Babylon ruling. It further clarified that these were not new grants of authority to municipalities:

> [L]ocal governments have oversight authority for facilities in the public rights-of-way, even if they are used exclusively for telephone services. By subjecting Verizon's mixed-use facilities to the Commission's minimum franchise standards and local government's police power, we do not believe that local governments have been granted broad new authority over the construction, placement and operation of Verizon's mixed-use facilities. Local governments have presumably been able to manage the telephone facilities that have utilized the public rights-of-way and need not attempt to exercise additional authority in the cable franchise to govern the construction, placement and operation of mixed-use facilities that will be used to provide video services.[5]

The PSC has jealously guarded the Article 11 rules for providing cable service and has sent a clear message that it will require compliance from new entrants in the increasingly competitive cable television market. The Commission has also ruled that identical agreements within a community are not required so long as "no cable operator enjoys a material competitive advantage."[6]

Local governments should review these decisions before negotiating new agreements with their incumbent local franchise holder or new entrants like Verizon. They would be well-advised to determine in advance what terms they would like to seek in franchise agreements from all companies seeking to provide cable service.

Municipalities should also review their rights-of-way rules given the certainty that additional demands will be made by a variety of applicants to place equipment in and make use of this public property. The ability of municipalities to coordinate the ever-increasing demand to place wires and equipment in limited space will continue to raise issues affecting public safety, equipment safety, and concerns regarding the appropriate use of municipal property.

In these rulings the PSC has established a framework and set of principles that outline how telephone companies are required to comply with the Public Service Law relating to providing cable service. The Commission has thoughtfully recognized similarities and differences between cable and telephone companies and defined a basis for fair treatment of each type of provider. The PSC has reaffirmed local control of the municipal rights-of-way.

The Commission rulings indicate that the timetable needed for new entrants interested in providing cable service to enter the market will be partially based upon their willingness to accept the applicability of the Article 11 rules in franchise agreements. Efforts to avoid compliance will lengthen the process for confirmation of franchise agreements.

Endnotes

1. Cases 05-M-0250 and 05-M-0247, Joint Petition of the Town of Babylon, Cable Telecommunications Association of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc. (Declaratory Ruling) (issued June 15, 2005).
2. *Id.* at 4–5.
3. Case 05-V-2363, Order and Certificate of Confirmation (issued December 15, 2005) Massapequa Park.
4. *Id.* at 23.
5. Case 05-V-1570, Order and Certificate of Confirmation (issued February 8, 2006) (Nyack), pages 7–8.
6. *Id.* at 13.

Steven Otis is Mayor of the City of Rye and Counsel and Chief of Staff for State Senator Suzi Oppenheimer.

Second Circuit Upholds City Planning Board's Decision to Deny a Cellular Telephone Provider a Permit to Build a 150-Foot Communications Tower on a Golf Course

By Carol L. Van Scoyoc

In *Omnipoint Communications, Inc. v. The City of White Plains*,[1] the United States Court of Appeals for the Second Circuit delivered encouraging news to local governments in telecommunications law by upholding the City of White Plains Planning Board's denial of a cellular provider's application for a special use permit to erect a 150-foot cellular communications tower and vacating an award of over $1.5 million in damages and attorneys' fees granted to the provider by a federal Magistrate Judge.[2] The Second Circuit ruling reversed a determination rendered by Justice Colleen McMahon of the United States District Court for the Southern District of New York,[3] who had granted partial summary judgment to the wireless telephone services provider by ruling that the Planning Board's decision was unsupported by substantial evidence and therefore in violation of § 332 of the Telecommunications Act of 1996 ("TCA").[4]

The following article will examine the pertinent provisions of the TCA pertaining to wireless services facilities, describe the background of events concerning Omnipoint Communications, Inc.'s ("Omnipoint") special use permit application and public hearing process before the City of White Plains Planning Board, explain the Planning Board's determination denying the application based upon aesthetics and diminished property values and lack of public necessity, and analyze the relevant issues addressed by the District Court and ultimately resolved in favor of the City's Planning Board by the Second Circuit.

Section 332 of the TCA

The TCA limits state and local regulation "of the placement, construction, and modification of personal wireless service facilities."[5] Such regulation "(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[6] Additionally, state and local governments must act on applications "within a reasonable period of time" and may not deny an application except in a written decision "supported by *substantial evidence* contained in a written record."[7]

A savings clause in the TCA states that, subject to five (5) specific limitations,[8] local governments retain explicit control over the zoning of wireless services facilities:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[9]

As observed by the Second Circuit, the TCA strikes a balance between "two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers."[10]

Omnipoint's Special Permit Application before the Planning Board

Omnipoint is a wireless cell phone provider licensed by the Federal Communications Commission ("FCC"). Omnipoint determined that a 150-foot unmanned telecommunications monopole, with associated equipment, was needed in order to fill a "gap" in its coverage in the City of White Plains. The type of monopole proposed was designed to look like an evergreen tree, with the antennas of the monopole to be camouflaged by affixing imitation branches to the cylindrical tower.

On October 19, 1999, Omnipoint signed an agreement with the Fenway Golf Club located on the border of White Plains and the Village of Scarsdale, to lease a site for the tower. The agreement provided Omnipoint with an "Option Period" of two (2) years

to obtain government approval for the proposed tower. If Omnipoint could not obtain such approval within that time period, Fenway Golf Club had a unilateral right to terminate the agreement.

On or about June 1, 2000, Omnipoint, on behalf of Fenway Golf Club, submitted an application for a special use permit to the White Plains Planning Board. Section 4.4.15.2 of the Zoning Ordinance of the City of White Plains exempts a 150-foot monopole from the height limitations contained in the Zoning Ordinance. As part of its application, Omnipoint included visual simulations of the proposed structure from various viewpoints. The Planning Board held public hearings on the application on July 11, 2000, September 12, 2000, October 10, 2000, November 14, 2000, December 19, 2000, January 16, 2001, February 13, 2001 and March 20, 2001.

During the course of the public hearings, the testimony revealed little doubt that there was a gap in Omnipoint's coverage but the controversy centered upon the proposed solution. Omnipoint maintained the position with the Planning Board that the proposed 150-foot tower on the golf course would have minimal visual impact on the community because a tower disguised as an evergreen tree would "blend" in, camouflaged by the local "mature and deciduous tree line."[11] Omnipoint presented testimony from an expert, a professional planner, who prepared a visual impact study, parking a 150-foot crane at the proposed location, and touring the public roads of the neighborhood to ascertain whether and where the crane was visible. The expert's study concluded that, except for a single property, the crane would be invisible or unnoticeable outside the golf course.[12] A 50 mm camera was used to photograph the observations which were taken from the public streets. The planning expert also utilized computer software to insert into the photographs a simulation of the structure in the precise location and at the exact height that the crane and its mast were located.[13] At no time, however, were residents ever invited to participate in or notified of the study.[14]

Throughout the hearings, neighbors asserted through live testimony and by written communications that the tower would be an aesthetic eyesore. Congregants from Temple Kol Ami, a religious institution whose land abuts the golf course,[15] expressed their concerns that the monopole would detrimentally affect their ability to worship at the Temple, especially since the tower would impair the view from its glass-walled chapel, and would cause parents to withdraw their students from the nursery school.[16] The neighbor's expert, an engineering firm, testified that a 150-foot tower cannot effectively be disguised as an evergreen tree in a neighborhood where the tallest tree stands just fifty-one (51) feet high. Other testimony proffered at the public hearings and credited by the Planning Board indicated that the proposed tower would be at least fifty (50) feet higher than the tallest deciduous trees in the landscape. Experts also testified on the neighbors' behalf regarding the anticipated diminution in property values.[17] Omnipoint's expert concluded that there was "no diminution of value to homes close to cell phone towers."[18]

Planning Board Denial of the Special Permit Application

The Planning Board announced its intention to deny Omnipoint's application at the January 16, 2001 meeting and formally denied the application in a detailed, twenty-five (25) page resolution adopted by the Board at its March 20, 2001 meeting. In summary, the Board's resolution set forth findings and determinations that there was substantial evidence that the tower would have (1) an adverse visual impact on the community; (2) that property values would diminish if the tower was to be erected; and (3) that Omnipoint failed to establish that there was a gap in coverage that would create a "public necessity" for the tower.

As to adverse visual impact, in its findings, the Planning Board, for the most part, rejected the applicant's photo simulations because the Board did not attend the crane testing and ruled that the failure to have the Board members attend was in and of itself sufficient to support "an inference that visual impact analysis testing demonstrated that no measure could mitigate the visual impact of the proposed monopole."[19] The Planning Board also found that "photo simulations provided by the Applicant are not very useful in the review of the project because they do not demonstrate the full visual impact of the tower (i.e., views from the second-story windows, backyards and different angles.)"[20] In addition, the Board credited letters and testimony from nearby residents testifying about the negative aesthetic impact of the proposed tower.[21]

The findings contained in the Planning Board's resolution credited expert testimony from a local realtor and appraiser and from residents that the tower's adverse visual impact (combined with public perception that cell towers may pose health hazards) would result in a decline in the marketability of homes in the community.[22]

Lastly, the Planning Board concluded that Omnipoint failed to demonstrate "public necessity" for the tower, relying upon the public necessity standard set forth by the Third Circuit in *Omnipoint Communica-*

tions v. Newtown,[23] which requires that an applicant show that (1) there is a significant coverage gap in the area; and (2) the manner in which it plans to close the gap is the least intrusive means. Based on testimony and letters from the public stating that cellular telephones serviced by other providers currently operated in the vicinity, the Board determined that no public necessity existed because other wireless providers were able to serve the "gap" area.[24]

Omnipoint Sues the City and Planning Board in Federal District Court

Within a few weeks after the Planning Board's adoption of the resolution denying its special use permit application, Omnipoint commenced litigation in April 2001 against the City of White Plains and the Planning Board and its members ("City defendants") in federal District Court for the Southern District of New York, alleging violations of federal and state law, namely the TCA, 47 U.S.C. § 332 and New York Civil Practice Law and Rules (CPLR) Article 78 and seeking damages pursuant to 42 U.S.C. § 1983.[25] Specifically, Omnipoint alleged (1) a violation of § 704 of the TCA,[26] claiming that the Planning Board's decision was not supported by substantial evidence (Count 1); (2) a violation of 47 U.S.C. § 332(c)(7)(B)(i)(I) for the defendants' "unreasonable discrimination" against Omnipoint (Count 2); (3) for defendants' "prohibit[ion] of the provision of personal wireless services" (Count 3); (4) a violation of 47 U.S.C. § 332(c)(7)(B)(ii) for defendants' unreasonable delay in its processing of Omnipoint's application (Count 4); (5) a violation of CPLR Article 78 for the defendants' abuse of discretion in its denial of the application (Count 5); and (6) a violation of 42 U.S.C. § 1983 for defendants' violation of Omnipoint's rights, privileges, or immunities under the TCA (Count 6). Omnipoint sued for injunctive relief, declaratory relief, damages, costs and attorneys' fees.[27]

In response to the lawsuit, the City defendants cross-moved for summary judgment to dismiss all six counts in Omnipoint's complaint, maintaining that they acted in accordance with both state and federal law at all times, and rendered a determination that comported with the substantial evidence standard of the TCA.[28] In addition, the City defendants also asserted arguments that a violation of the TCA does not support a 42 U.S.C. § 1983 claim.[29]

Fenway Golf Club Terminates Agreement with Omnipoint

Subsequently thereafter, one day before the October 19, 2001 expiration of the Option Period set forth in the lease between Omnipoint and Fenway Golf Club, Fenway Golf Club executed a formal agreement with residents, whereby Fenway agreed not to allow the construction of cell towers on its property in exchange for the residents' acquiescence on Fenway's pending proposal before the City for a maintenance facility. The next day, Fenway Golf Club terminated the agreement with Omnipoint. On December 3, 2001, Fenway's application for a special permit use to construct a maintenance facility was approved by the Common Council of the City of White Plains.[30]

Given the termination of the agreement with Omnipoint and Fenway Golf Club, the City defendants now urged the District Court that the action was moot.[31]

Decision of the District Court

The District Court issued its decision on December 4, 2001, rejecting the City defendants' mootness assertion as to claims related to the TCA and 42 U.S.C. § 1983,[32] and granted Omnipoint's motion for partial summary judgment as to Count 1 and denied the City defendants' motion for summary judgment as to Count 2.[33] The District Court granted summary judgment to the City defendants as to Counts 3, 4 and 5.

In rejecting the mootness argument, the District Court opined that although the termination of the agreement does make the award of injunctive and declaratory relief moot, it does not moot the case. If White Plains indeed did violate the TCA and § 1983, the very issue that moots the claims for declaratory and injunctive relief—failure to issue the necessary special permits—gives rise to damages for such items as lost revenue due to coverage gaps and costs incurred in the fruitless effort to build the monopole, an amount that may be significant.[34] By so ruling, the District Court concluded that § 1983 remedies are viable under the TCA.[35]

In addressing the merits of Count 1, the District Court, while acknowledging that when applying the traditional standard used for judicial review of agency actions in a determination of whether the denial was supported by substantial evidence, it generally defers to a local board's decision by not substituting its own judgment for that of the Board, nevertheless specifically found that the Planning Board's decision to deny permission to erect the wireless telephone transmission tower on the basis of (1) adverse visual or aesthetic impact; (2) diminution of property values; and (3) lack of public necessity as required by the TCA was not supported by substantial evidence in the Court's estimation.[36]

As to the Planning Board's finding of adverse visual or aesthetic impact, the District Court reasoned that the Board improperly rejected evidence from the service provider's expert, consisting of computer-enhanced photographs of the area with the projected image of the tower showing negligible visibility, and that the Board relied instead upon on a flawed study that ignored numerous topographical barriers to visibility and unsubstantiated opinions of nearby residents that the tower would be unsightly.[37]

In a similar vein, the District Court disregarded the Planning Board's finding that the proposed tower would cause declining property values by crediting with great weight the service provider's offered study stating that property values of eighty (80) residences did not fall after a tower was installed nearby, and disputed the Board's reliance upon evidence consisting of letters from a local realtor and appraiser and residents that the values would fall.[38]

The District Court also took issue with the Planning Board's finding that the tower was not a "public necessity" as the tower was a public utility, required to be approved upon a showing of a gap in wireless services. In the Court's view, the applicant provided extensive evidence of a gap, and the Planning Board erroneously relied upon contrary evidence consisting of letters "irrelevantly" claiming that there were other service providers that did not have gaps in service.[39]

Based upon the District Court's finding of liability of the City defendants under Count 1, Magistrate Judge Yanthis conducted a damages trial on the § 1983 claim. In February 2004, the Magistrate Judge directed entry of judgment in the amount of $1,327,665.24 in actual damages (plus post-judgment interest), consisting of damages for costs incurred during the Planning Board process, damages for lost revenue, damages for the expense of locating an alternative site, and $231,152.84 in attorneys' fees.[40]

Second Circuit Reversal of District Court

The City defendants appealed the District Court's decision. While the appeal was *sub judice*, the United States Supreme Court held in *City of Rancho Palos Verdes v. Abrams*[41] that § 1983 damages are not available for violations of the TCA. The Court ruled that a private citizen could not utilize § 1983 to enforce the TCA against local authorities because Congress did not intend that § 1983 would supplement the judicial remedy expressly provided in the TCA.[42]

Reviewing the District Court's summary judgment decision *de novo* and the Planning Board's decision for substantial evidence, the Second Circuit unanimously reversed the District Court by succinctly zeroing in on the rationality and practicability of the three considerations articulated in the Board's resolution denying the permit: (1) adverse visual impact; (2) diminution of property values; and (3) lack of "public necessity."[43]

Adverse Visual Impact

Since aesthetics is a permissible ground for the denial of a permit under TCA, given the reality that a 150-foot tower would rise to three (3) times the height of the tallest evergreen tree and would be twice as tall as any other tree in the neighboring area, the Second Circuit concluded that the Planning Board could reasonably determine (especially given express testimony to that effect) that the tower would be widely visible.[44] In addition, the Second Circuit observed that the Planning Board received substantial evidence of the tower's adverse impact, and had no difficulty in concluding that the Board's rejection of the permit application was premised on "reasonable and substantial evidence."[45]

The Second Circuit rejected Omnipoint's protestations that the Planning Board erroneously focused on the statements by agitated neighbors and their expert, rather than on the testimony of Omnipoint's expert and its visual impact study. First, in the opinion of the Second Circuit, the Board was free to discount Omnipoint's study because it was conducted in a defective manner. While that study concluded that the tower "would be visible from only one property outside the Golf Course," the study was undertaken without notice to the Planning Board or community, the observation points upon which its conclusion was based were limited to locations accessible to the public—mostly public roads—and no observations were made from the residents' backyards, much less from their second-story windows. The study suffered from the further flaw that it failed to consider the tower's visibility in winter, when deciduous trees are bare. Therefore, in the reviewing Court's perspective, the study did not foreclose a finding that the tower would be widely visible.[46]

Second, the Planning Board was not bound to accept Omnipoint's expert testimony merely because it was insufficiently contested by properly credentialed expert testimony. While the residents' visual impact study was prepared by a landscape architect with limited qualification for that undertaking, the residents were not required to proffer any expert testimony at all. The Second Circuit Court has previously refused to fiat a constitutional requirement that all

zoning boards in this Circuit use expert testimony or written studies to support their decisions.[47]

Third, the Second Circuit rejected Omnipoint's contention that the Planning Board gave improper deference to community opposition. In the instant case, some of the residents' comments may amount to no more than generalized hostility, but concomitantly, the appellate court concluded that the Board had discretion to rely (as it did) on aesthetic objections raised by neighbors who know the local terrain and the sight lines of their own homes. The observations of the self-interested neighbors conflict with the expert study submitted by a self-interested applicant. Though a board is not required to give decisive weight to one over the other, Congress has definitely provided it the ultimate voice in the zoning decision-making process.[48]

The Second Circuit also found no evidence, as suggested by Omnipoint, that the Board colluded with the Fenway Golf Course to allow the Option Period to expire, since the record reflects that Omnipoint refused to give the Board a copy of the agreement. Although Fenway obtained the residents' acquiescence to the maintenance facility the day before the Option Period was due to expire (and was not renewed), the Court found no evidence that any alleged machinations by Fenway are imputable to the Board.[49]

Diminution of Property Values

The Second Circuit held that the Planning Board's ruling on property values is closely related to the determination on aesthetics, and stands on much the same footing. The Court noted that the Board credited the expert testimony that the tower's adverse visual impact (combined with public perception that cell towers may pose health hazards) would result in a decline in the marketability of homes in the neighborhood. The Second Circuit declined to reach the issue of whether such testimony by itself would constitute substantial evidence.[50]

Failure to Demonstrate Public Necessity

Finally, the Second Circuit upheld the Planning Board's determination that Omnipoint failed to demonstrate "public necessity" for the cell tower. While finding that the Planning Board utilized the wrong test set forth by the Third Circuit in *Omnipoint Communications v. Newtown*,[51] which addresses the showing that an applicant must establish before TCA § 332(c)(7)(B)(i)(II) will require a planning board to grant its application, the Court found that Omnipoint did not satisfy the applicable standard articulated by the New York Court of Appeals in *Consolidated Edison Co. v. Hoffman*,[52] which concerns the showing that utility must make under New York law before a zoning board may grant a variance. Under the *Consolidated Edison* "public necessity" standard, a utility must demonstrate that (1) its new construction "is a public necessity in that it is required to render safe and adequate service"; and (2) "there are compelling reasons, economic or otherwise, which make it more feasible" to build a new facility than to use "alternative sources of power such as may be provided by other facilities."[53]

Under that test, to establish public necessity Omnipoint had to prove that (1) there was a gap in cell service; and (2) that building the proposed tower at the Fenway site was more feasible than other options. As to the first prong of the test, the City of White Plains conceded that there is a "service gap for [Omnipoint's] particular service."[54] The Court then stated that this provokes the question of whether the necessity can be demonstrated if other providers are meeting the need for cellular coverage, a point that seems to be unsettled by New York State and federal courts. The Second Circuit avoided the question by concluding that in any event, Omnipoint did not satisfy its burden of the second prong of the *Consolidated Edison* requirement.

In reaching this conclusion, the Second Circuit noted that Omnipoint identified several other potential sites but stated in conclusory fashion that they were unfeasible. In a similar manner, Omnipoint contended, without documentation, that it was unable to build a less intrusive structure or combination of structures at the Fenway site. However, the record is clear that other cell companies serve the area in which Omnipoint has its gap. In the Court's view, it was reasonable for the Planning Board to infer that other towers erected by other companies are in the vicinity, and that Omnipoint had the burden of showing either that those towers lacked capacity for an Omnipoint facility or that (for some other reason) those towers were unavailable to bridge Omnipoint's coverage gap.[55] The Second Circuit opined that this is not a theoretical consideration because one finding in the damages opinion is that "the cheapest way for Omnipoint to close its coverage gap would be to co-locate on an existing tower in the Fenway area."[56] While acknowledging that this alternative emerged in the damages trial, and is not in the Planning Board's administrative record, it was an available inference from the facts presented to the Board.[57]

Section 1983 Damages Not Available for Violations of the TCA

The Second Circuit declared that even if the Planning Board's decision was unsupported by substantial evidence, the Court would be required to vacate the District Court's damages award, which had relied solely upon § 1983, under the intervening decision by the United States Supreme Court in *City of Rancho Palos Verdes v. Abrams*.[58] In that decision, the Supreme Court held that § 1983 damages are not available for violation of the TCA. Observing that the Supreme Court opinion does not say whether damages are available under the TCA itself, or what they would be, and that the instant appeal does not turn on the creation of new law in this area, the Second Circuit declined to reach the issue.[59]

Conclusion

The Second Circuit's ruling in *Omnipoint Communications, Inc. v. City of White Plains* signals a positive message to local government boards that federal courts may uphold as reasonable and supported by substantial evidence under § 704 of the TCA determinations denying permits to cellular providers based upon aesthetic grounds. In *Omnipoint*, the Second Circuit took a pragmatical and common-sense approach when analyzing and reviewing the extensive administrative record before the Planning Board and the twenty-five (25) page resolution denying the permit. Where, as here, Omnipoint failed to meet its burden to show that less intrusive alternatives were not feasible, the Appellate Court properly accorded deference to and realistic consideration of the cold, hard truth of the adverse visual impact that would have resulted from the construction of a 150-foot telecommunications tower, three (3) times the height of the tallest evergreen tree and twice as tall as any other tree in the area.

Endnotes

1. 430 F.3d 529 (2d Cir. 2005).
2. *Omnipoint Communications, Inc. v. City of White Plains*, 01 Civ. 3285 at 6 (S.D.N.Y. May 6, 2004) (Yanthis, M.J.) (memorandum decision and order awarding damages and attorneys' fees).
3. *Omnipoint Communications, Inc. v. City of White Plains,* 175 F. Supp. 2d 697 (S.D.N.Y. 2001).
4. 47 U.S.C. §§ 151 *et. seq.*
5. 47 U.S.C. § 332(c)(7).
6. 47 U.S.C. § 332(c)(7)(B)(i).
7. 47 U.S.C. § 332(c)(7)(B) (*emphasis added*).
8. 47 U.S.C. § 332(c)(7)(b)(i)–(v).
9. 47 U.S.C. § 332(c)(7)(A).
10. 430 F.3d at 531, citing *Town of Amherst, N.H. v. Omnipoint Commc'ns*, 173 F.3d 9, 13 (1st Cir. 1999).
11. 175 F. Supp. 2d at 701.
12. 430 F.3d at 532.
13. 175 F. Supp. 2d at 703.
14. 430 F.3d at 532.
15. The religious congregation sought to intervene in the lawsuit. The District Court, McMahon, J., denied the motion, holding that (1) the Temple could not intervene as of right, claiming that the spoliation of the view out of the window of the building was barred by the Religious Land Use and Institutionalized Persons Act (RLUPIA) of 2000, 42 U.S.C. § 2000cc-5; and (2) the congregation would not be granted permission to intervene, due to the lack of common issues of law and fact. *Omnipoint Communications, Inc. v. City of White Plains*, 202 F.R.D. 402 (S.D.N.Y. Sept. 6, 2001).
16. 430 F.3d at 532.
17. *Id.*
18. 175 F. Supp. 2d at 705.
19. *Id.* at 703.
20. *Id.* at 704.
21. 430 F.3d at 534.
22. *Id.* at 534–535.
23. 219 F.3d 240, 244 & note 2 (3d Cir. 2000).
24. 175 F. Supp. 2d at 702.
25. *Id.* at 705–706.
26. 47 U.S.C. § 332(c)(7)(B)(iii).
27. 175 F. Supp. 2d at 699.
28. *Id.* at 706.
29. *Id.* at 699.
30. 430 F.3d at 532.
31. 430 F. Supp. 2d at 706.
32. 430 F. Supp. 2d at 708. The District Court did dismiss as moot, however, Count 5, since damages may not be awarded under Article 78.
33. In denying the City defendant's motion for summary judgment on Count 2, the District Court ruled that there were material issues of fact as to whether providers of wireless services were similarly situated on the claim by the provider that the City discriminated against it, in violation of the TCA, by granting two competitors permission to erect transmission towers while denying the claimant's application. *Id*. at 717–718. Omnipoint subsequently withdrew this claim. *See Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d at 532, footnote 1.
34. 175 F. Supp. 2d. at 706–707.
35. *Id*. at 708.
36. *Id.* at 711–712.
37. *Id.* at 716–717.
38. *Id*. at 717.
39. *Id*. at 712–717.
40. 01 Civ. 3285 at 6.
41. 554 U.S. 113 (2005).
42. *Id.*
43. 430 F.3d at 532–33.
44. *Id*. at 533.

45. *Id.*
46. *Id.*
47. *Id*. at 534 citing *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 501, footnote 3 (2d Cir. 2001).
48. *Id.*
49. *Id.*
50. *Id.* at 534–35.
51. 219 F.3d 240, 244 & note 2 (3d Cir. 2000).
52. 43 N.Y.2d 598, 611, 403 N.Y.S.2d 193, 199–200 (1978).
53. 430 F.3d at 535, *citing Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 371–72, 604 N.Y.S.2d 895, 898–99 (1993), which applied the Consolidated Edison test to a cell phone company's application to build a cell site.
54. *Id.* at 535.
55. *Id*. at 536.
56. 01 Civ. 3285 at 4.
57. 430 F.3d at 536.
58. *City of Rancho Palos Verdes v. Abrams,* 554 U.S. at __, 125 S. Ct. at 1462.
59. 430 F.3d at 537.

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Public Authorities Accountability Act of 2005: Dramatic New Rules—Applicability to Local Agencies, Organizations and Governmental Units

By Douglas E. Goodfriend and Thomas E. Myers

A. In the Spotlight: Overview

The Public Authorities Accountability Act of 2005 (hereinafter, the "Act") was signed into law on January 13, 2006 as Chapter 766 of the Laws of 2005 and is, for the most part, effective immediately in 2006. The primary purpose of the Act, as set forth in the Introducer's Memorandum in Support for Governor's Program Bill No. 90 (S.5927/A.9007) (the "Support Memorandum"), is to "ensure greater efficiency, openness and accountability" for New York's public authorities and to help improve oversight, accountability and transparency at public authorities. (*See also* Chapter 1 of the Laws of 2005 as amended by Chapter 596 of the Laws of 2005 as to the new procurement lobbying law also applicable to certain authorities.) It is a significant attempt to incorporate elements of the federal Sarbanes-Oxley Act of 2002 applicable to corporations into the public authority sector. The Act seeks to accomplish these purposes by establishing comprehensive reporting, auditing, governance, and property disposition requirements for a multitude of "public authorities," including and frequently distinguishing between "State authorities" and "local authorities." The provisions of the Act are in addition to and do not supersede any other existing requirements for such authorities.

The Act also requires that the governor establish an Authority Budget Office. It is the role of this office to (i) review and analyze the operations, practices and reports of the authorities to assess their compliance with this law; (ii) maintain an inventory of authorities and their subsidiaries; (iii) assist the authorities in improving their management practices and financial disclosure procedures; (iv) recommend to the governor and legislature opportunities to improve performance, reporting, reformation, structure and oversight of the authorities; (v) provide additional information and analysis requested by the comptroller, and (vi) issue annual reports to the governor and legislature starting in July 2007. Since there are many ambiguities contained in the Act, it is anticipated that the Authority Budget Office will provide interpretation and guidance concerning compliance with the Act. The Authority Budget Office was established as of April 1, 2006 and presently has a useful website at www.abo.state.ny.us.

Finally, the Act establishes an office of the State Inspector General with jurisdiction over all "covered agencies," which includes "public authorities" and "public benefit corporations," among other agencies, departments and boards, the heads of which are appointed by the governor and which do not have their own inspector general by statute. The primary role of the new office is to initiate or receive and investigate complaints concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in such agencies and authorities. According to the legislative history, the Office of the State Comptroller will maintain concurrent jurisdiction.

An overview of the provisions of the Act together with cites in the amended Public Authorities Law (hereinafter "PAL") in which they appear follows.

B. The Actors: Scope and Applicability

The fundamental question of interpretation raised by the text of the Act in the first instance is what provisions apply to which type entities.

The key to the reach of the new legislation is the definition of a "public authority."

It is important to note at the outset that other versions of a public authorities accountability bill circulated prior to the Governor's Program Bill Number 90, which became the Act. The reason is that at least one version, the "Public Authority Reform Act," provided a definition of "public authority" and a classification of such entities into four classes that had differing levels of accountability. The Support Memorandum for the Act states that Section 2 of the Act amends Section 2 of PAL "to define public authorities for purposes of the Public Authorities Law to include state and local authorities and public benefit corporations and their subsidiaries . . . and not-for-profits sponsored by or created by a county, city, town, or village government." In point of fact, this definition itself does not appear in the final text. Indeed, the definition of "public authorities" itself in the Support Memorandum is ambiguous as to whether the not-for-profits are an exception or an inclusion.

While the Office of the State Comptroller website has divided all authorities in the State into four classes and listed most such authorities by class

(www.osc.state.ny.us/pubauth), the classes are not linked to definitions in the Act. The classes are Class A (major public authorities with statewide or regional significance and their subsidiaries); Class B (entities affiliated with State agencies or created by the State that have limited jurisdiction but a majority of board members appointed by the Governor or other State officials); Class C (authorities with local jurisdiction); and Class D (entities with interstate or international jurisdiction). This classification found in various descriptive documentation of certain versions of public authorities accountability bills has no legislative basis in the Act itself.

Definition of a "Local Authority" (PAL § 2)

As enacted, the new law does not include a definition of "public authority" nor the categorization of same into the four classes noted above. The Act is applicable to any "state authority," and, the focus here, any "local authority." A "local authority" is defined as:

(a) a local industrial development agency (IDA) or authority or other local public benefit corporation.

(b) a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government.

(c) a public authority or public benefit corporation created by or existing under the PAL or any other law of the State of New York whose members do not hold a civil office of the State, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government or governments.

(d) an affiliate of such local authority. (An "affiliate" or "affiliated with" is defined by the Act as a corporate body having substantially the same ownership or control as another corporate body.)

Many of the terms and phrases in the definition of "local authorities" are open to interpretation, e.g., (1) What is an "authority"? Is it a municipal government itself? A department? How about a Community Development or Urban Renewal Agency? A local development corporation? A not-for-profit corporation established to assist a local government in some specified manner? (2) What constitutes an "affiliation" or a "sponsorship?" Substantial ownership or control will govern affiliation. What is it? (3) How much action and of what variety leads to categorization as a "sponsor" or a "creator"?

The legislative history of the Act available so far is not useful in this regard. It is, however, clear that legislators were aware that they were including IDAs "for some of the same standards as other public authorities." The question, of course, is which ones?

C. A Repertoire of New Reporting Requirements

The new legislation imposes significant new reporting requirements on covered local authorities, with reports due both to officers of the authority as well as to the State.

1. Annual Reports (PAL § 2800(2))

Within 90 days after the end of its fiscal year, a local authority must submit to its CEO, CFO, chairperson of the legislative body of the local government (or local governments if jointly affiliated, sponsored or created), and to the Authority Budget Office an annual report that must include:

(a) operations and accomplishments; and

(b) receipts and disbursements, or revenues and expenses, during such fiscal year in accordance with the categories or classifications established by such authority for its own operating and capital outlay purposes; and

(c) assets and liabilities at the end of its fiscal year, including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds; and

(d) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance that includes the date of issuance, term, amount, interest rate and means of repayment. The required debt schedule shall also include all refinancings, calls, refundings, defeasances and interest rate exchanges or other such agreements, and for any debt issued during the reporting year the schedule shall also include a detailed list of costs of issuance for such debt; and

(e) a compensation schedule that shall include, by position, title and name of the person holding such position or title, the salary, compensation, allowance and/or benefits provided to any officer, director or employee in a decision-making or managerial position of such authority whose salary is in excess of $100,000; and

(f) the projects undertaken by such authority during the past year; and

(g) a list of (i) all real property owned by such authority and with regard to which the

authority intends to dispose having an estimated fair market value in excess of $15,000, (ii) all such property held by the authority at the end of the period covered by the report; and (iii) all such property disposed of during such period. This report is required to contain an estimate of fair market value for all such property held by the authority at the end of the period and the price received by the authority and the name of the purchaser for all such property sold by the authority during such period; and

(h) such authority's code of ethics; and

(i) an assessment of the effectiveness of its internal control structure and procedures.

Effective Date: Immediately unless the authority fiscal year began after January 1, 2006. Thus, these reports will first be due March 31, 2007 for local authorities with a January 1 fiscal year and for authorities with a fiscal year which began or begins after January 1, 2006, these reports will first be due within 90 days of the close of the fiscal year which began or begins anytime during calendar year 2006 other than January 1, 2006.

It is important to note that every financial report submitted under this particular provision (which does not include budget reports hereinafter detailed but does include the annual report) must be approved by the board and must be certified in writing by the CEO and the CFO of such authority that, based on that officer's knowledge: (i) the information is accurate, correct and does not contain any untrue statement of material fact; (ii) the report does not omit any material fact which, if omitted, would cause the financial statements to be misleading in light of the circumstances under which the statements are made; and (iii) the report fairly presents, in all material respects, the financial condition and results of operations of the authority as of, and for, the periods presented in the financial statements. This is a disclosure standard which is the equivalent to that of § 10b-5 of the Securities Exchange Act of 1934 and 17 C.F.R. § 240.10b-5 (1987) with origins in the English fraudulent misrepresentation (deceit) law of the 18th century. This requirement applies to both state and local authorities. (An earlier version only applied the certification to Class A and B authorities but Senator Vincent Leibell's introductory remarks in the Senate Debate Transcripts ("Introducer's Remarks") suggests an intent of more general applicability.)

In addition, there is a new reporting requirement to the general public via the Internet.

2. Website Publication

To the extent practicable, the local authority must post its mission, current activities, most recent annual financial report, current year budget and its most recent independent audit report unless such information is exempt from disclosure pursuant to § 87 of the Public Officers Law (hereinafter "FOIL"). If a local authority does not have a website, it would seem impractical to comply with this requirement, but the Sponsor's Memorandum does state that the Act "would require" same, as does the Introducer's Remarks in the Senate debate transcripts.

3. Budget Reports (PAL § 2801(2))

At least 60 days prior to the commencement of its fiscal year the local authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report that must include:

(a) budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and

(b) actual receipts and expenditures for the last completed fiscal year.

Effective Date: Authority fiscal year ending on or after December 31, 2007. Thus, these reports must first be completed by November 1, 2006 if the fiscal year is the calendar year.

D. The New Arena of Audit Requirements (PAL § 2802(2))

1. Audit Report

Within 30 days after receipt, each covered local authority must submit a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller, to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office.

The CPA firm preparing the audit report must report on certain enumerated matters to a newly required audit committee of the board.

2. Certain Matters Exempt from Disclosure or Other Reporting

While a public authority may exempt from disclosure in its reports any information entitled to exemption pursuant to § 87(2) of FOIL, the literal

language of the Act does *not* presently specifically include local authorities in this exemption.

3. Auditor

The lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years. Note that this is not a requirement as to audit firm alteration; rather it is simply a requirement that the partner in charge of the account be rotated at least every five years.

The CPA firm performing the audit is prohibited from performing any non-audit services for the authority contemporaneously with the audit, unless prior approval is granted by an audit committee of the authority to be established.

The CPA firm is prohibited to perform any audit service if the CEO, comptroller, CFO, chief accounting officer, or any other person serving in an equivalent position for such authority was employed by the CPA firm and participated in any capacity in the audit of the authority during the one year preceding the date of the initiation of the audit.

Effective Date: Authority fiscal year ending on or after December 31, 2007.

E. On the Boards: Board Member Requirements (PAL § 2824)

1. Responsibilities

(a) execute direct oversight of the authority's chief executive and other senior management in the effective and ethical management of the authority;

(b) understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority;

(c) establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and senior management;

(d) adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the Public Officers Law;

(e) establish written policies and procedures on personnel, including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority; investments; travel; the acquisition of real property and the disposition of real and personal property and the procurement of goods and services; and

(f) adopt a defense and indemnification policy and disclose such plan to any and all prospective board members.

2. Training

The Act requires that board members participate in State-approved training regarding their legal, fiduciary, financial and ethical responsibilities as directors of the authority within one year of appointment to a board. Yet this provision of the Act by its terms only applies to "public authorities" but not specifically to "local authorities." Such board members must participate in continuing training as may be required to remain informed of best practices, and regulatory and statutory changes relating to effective oversight of management and financial activities of authorities. The New York State Commission on Public Authority Reform, in conjunction with the City University of New York, has begun such training programs across the State for board members of all authority types.

3. Separation of Board and Management

No board member can serve as an authority's CEO, executive director, CFO, comptroller, or hold any other equivalent position while also serving as a board member. While this does apply to "public authorities," it does not specifically apply to "local authorities," and the intent is not clear. Another version of the Public Authorities Accountability Bill made this applicable only to Class A and B authorities.

4. Extension of Credit

The board is prohibited from extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any officer, board member or employee of the authority.

5. Establishment of Committees

Two new committees must be created by all local authorities during their current fiscal year unless the authority does not use a calendar fiscal year, in which case the applicable fiscal year is the one subsequent to that ending on or before January 1, 2006.

(a) Audit Committee: An audit committee comprised of independent members must be established by a "local authority." To the extent practicable, members of the audit committee should be familiar with corporate financial and accounting practices. The audit committee must recommend to the board the hiring of a CPA firm, establish compensation

to be paid to the CPA firm and provide direct oversight of the performance of the independent annual audit performed by the CPA firm.

(b) Governance Committee: A governance committee to be comprised of independent members must be established by a local authority. The governance committee must keep the board informed of current best governance practices, review corporate governance trends, update the authority's governance principles, and advise appointing authorities on the skills and experiences required of potential board members.

Effective Date: Immediately unless the authority fiscal year began after January 1, 2006, in which case such authority has until the end of the fiscal year which began during the 2006 calendar year.

F. Before the Footlights: Independence and Financial Disclosure (PAL § 2825)

1. Independence

Except for board members who serve as members by virtue of holding a civil office of the State, the majority of the remaining members of a local authority who are appointed on or after January 13, 2006 must be independent. An independent member is defined as one who:

(a) is not, and in the past two years has not been, employed by the public authority (here, the term must include a local authority) or an affiliate in an executive capacity;

(b) is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than $15,000 for goods and services provided to the public authority or received any other form of financial assistance valued at more than $15,000 from the public authority;

(c) is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and

(d) is not, and in the past two years has not been, a lobbyist registered under a State or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other similar actions of the public authority or an affiliate. The new audit committee would be required to make recommendations to the board concerning the engagement of a certified independent accounting firm, compensation to be paid for same, and to provide direct oversight of the engagement.

Query: What is an affiliate for this purpose? What is an "executive" capacity? It is again worth noting that one version of the Public Authorities Accountability Bill limited this requirement to Class A and B authorities.

Effective Date: For local authority board members appointed on or after January 13, 2006.

2. Financial Disclosure

Board members, officers, and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local authority has its primary office pursuant to Article 18 of the General Municipal Law.

Effective Date: Immediately unless the local authority fiscal year began after January 1, 2006, in which case such authority has until the end of the fiscal year that began during the 2006 calendar year.

G. The Moveable Stage: Disposition of Property

1. Definitions (PAL § 2895)

(a) "Dispose" or "Disposal" means the "transfer of title or any other beneficial interest in personal or real property" and

(b) "Property" means "personal property in excess of $5,000 in value, real property, and any inchoate or other interest in such property, to the extent that such interest may be conveyed to another person for any purpose, excluding an interest securing a loan or other financial obligation of another party." The full reach of the term "real property" is not clear and could include real property held by an IDA or LDC on a non-recourse basis in connection with a bond and/or lease transaction. "Property" is intended to cover both "personal" and "real" property but personal property up to $5,000 in value is not covered. (Is the first $5,000 of a type of personal property of greater value likewise exempt?) The standard for establishing value is not stated, but presumably it is fair market value as determined by an independent appraisal or appraisals.

By its terms the use in this section of "authority" includes a local authority by statutory reference.

2. Duties of the Authority as to Property (PAL § 2896)

The duties and responsibilities of all "public authorities" as to property are enumerated by the Act. These are:

(a) The Board must adopt by resolution, guidelines which must (i) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for

the disposal of property and (ii) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines. The guidelines must be consistent with the provisions of the Act, the authority's enabling legislation, and any other applicable law for the disposal of property, except that the guidelines may be stricter than the aforementioned if the authority determines that additional safeguards are necessary. The guidelines must be annually reviewed and approved by the governing body of the authority.

On or before the 31st of March of each year, the authority must file with the State Comptroller a copy of the guidelines most recently reviewed and approved by the authority, including the name of the designated contracting officer. The guidelines must be posted on the authority's website and maintained on such site until the procurement guidelines for the following year are posted; and

(b) maintain adequate inventory controls and accountability systems for all property under its control; and

(c) periodically inventory such property to determine which property shall be disposed of; and

(d) transfer or dispose of such property as promptly as possible; and

(e) publish not less frequently than annually, a report listing all real property of the public authority. The report must consist of a list and full description of all real and personal property disposed of during the reporting period. The report must contain the price received by the authority and the name of the purchaser for all property sold by the authority during the reporting period. The report must be delivered to the comptroller, the director of the budget, the commissioner of general services, and the legislature.

While this provision purportedly applies to "every" authority as defined in the Act and the provision heading is entitled "Duties of Public Authorities," the distinction in responsibilities noted above may or may not be intentional. An earlier version of an accountability bill applied certain procedures to be followed by public authorities with respect to sale of authority property, including adoption of rules detailing policies and instructions only to Class A and B authorities, while every authority was to be required to select a "contracting officer," as well as have prior approval of the Office of the State Comptroller for any contract of sale of such property.

Effective Date: Immediately unless the authority's fiscal year began after January 1, 2006, in which case such authority has until the end of the fiscal year that began during the 2006 calendar year.

3. Disposal Requirements (PAL § 2897)

(a) The contracting officer must have supervision and direction over the disposition of property.

(b) The custody and control of the property, pending its disposition, and the disposal of such property must be performed by the authority in possession thereof.

(c) A deed, bill of sale, lease, or other instrument executed by or on behalf of any public authority, purporting to transfer title or any other interest in the property under the provisions of the Act shall be conclusive evidence of compliance with the provisions of the Act insofar as it concerns title or other interest of any *bona fide* grantee or transferee who has given valuable consideration for such title or other interest and has not received actual or constructive notice of a lack of such compliance prior to closing.

(d) The authority must not transfer property for less than fair market value (with exceptions as are set forth in 4(e) and (f) below) and if such property is not subject to fair market pricing due to its unique nature, an appraisal of the value of such property must be made by an independent appraiser and included in the record of the transaction.

4. Procedures for Disposal

(a) All disposals or contracts for disposal of property must be made after publicly advertising for bids (with exceptions as discussed below).

(b) The advertisement for bids must be made at such time prior to the disposal or contract through such methods and on such terms and conditions as shall permit full and free competition consistent with the value and nature of the property.

(c) All bids would have to be publicly disclosed at the time and place stated in the advertisement.

(d) The award of bids shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be "most advantageous to the State." (This appears to be a typographical error in so far as applicable to a local authority.) Price and other factors may be considered, and all bids may be rejected when it is in the public interest to do so.

(e) Exceptions to publicly advertising: The disposal and contracts for disposal of property may be negotiated or made by public auction subject to obtaining such competition as is feasible under the circumstances if:

(1) the personal property involved is of a nature and quantity which, if disposed of using public bidding advertisement and disclosure, would adversely affect the State or local market for such property, and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation;

(2) the fair market value of the property does not exceed $15,000;

(3) bid prices after advertising are not reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;

(4) the disposal will be to the State or any political subdivision, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation; or

(5) such action is otherwise authorized by law.

(f) Exception to publicly advertising and obtaining fair market value: The disposal is for an amount less than the estimated fair market value of the property; the terms of such disposal are obtained by public auction or negotiation; disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the State or a political subdivision (to include but not be limited to, the prevention or remediation of a substantial threat to public health or safety, the creation or retention of a substantial number of job opportunities, or the creation or retention of a substantial source of revenues, or where the authority's enabling legislation permits); the purpose and the terms of such disposal are documented and approved by the board of the public authority;

(g) Ninety-day notice of a negotiated disposal. An explanatory statement would have to be prepared and transmitted to the comptroller, the director of the budget, the commissioner of general services, and the legislature at least 90 days in advance of such disposal in instances of disposal by negotiation where:

(1) any personal property has an estimated fair market value in excess of $15,000;

(2) any real property that has an estimated fair market value in excess of $100,000, except in instances where real property is disposed of by lease or exchange unless such lease or exchange includes:

(i) any real property disposed of by lease for a term of five years or less, if the estimated fair annual rent is in excess of $100,000 for any of such years;

(ii) any real property disposed of by lease for a term of more than five years, if the total estimated rent over the term of the lease is in excess of $100,000; or

(iii) any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

(A copy of the statement must be preserved in the files of the authority making the disposal.)

H. Producing: Investment Guidelines (PAL § 2925)

The Act requires all local authorities to annually adopt and review comprehensive investment guidelines that detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds.

I. Theatrical Concluding Remarks

The application of Sarbanes-Oxley Act type rules and federal disclosure standards from the Securities Exchange Act of 1934 to public authorities represents the beginning of a new era of more public fiscal oversight. While this may make sense for the larger state authorities and agencies with multi-million dollar operating budgets (which can cover the mandated new expenses for compliance) and equally large sponsored projects, the full application of the Act to smaller local authorities and public benefit not-for-profit corporations seems unwarranted, financially burdensome and, perhaps, unintended. As Senator Liz Krueger said in the introductory Senate debates, "There's more work to be done, there are more questions to deal with." This authoritative composition may well need a second act.

Mr. Goodfriend and Mr. Myers are members of the law firm of Orrick, Herrington & Sutcliffe in New York City. Mr. Myers is the Chair of the Municipal Law Section of the New York State Bar Association.

Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms

By Steven G. Leventhal

Local municipal ethics boards typically are composed of public-minded citizens who donate their services to help promote integrity in the operation of their local governments. Often, they are non-lawyers, with no government experience. Yet, in performing their official duties, they must interpret confusing combinations of legal and government terms. This Glossary was compiled to assist the members of local ethics boards in piecing together the puzzle of municipal ethics terminology.

Some of these terms are defined in Article 18 of New York State's General Municipal Law; others may be defined in your local code of ethics. This glossary should be used as a quick reference. It is not a substitute for the statutory definitions in particular cases where those definitions apply.

Advisory Opinion

Confidential ethics advice available to municipal officers and employees from their local boards of ethics, or from the New York State Attorney General. In order to provide guidance to other public officials, advisory opinions may sometimes be released to the public in a version that does not reveal the identity of the inquiring municipal officer or employee.

Annual Financial Disclosure[1]

Written statement of personal financial information filed by policymakers and other specified officers and employees in municipalities having populations of 50,000 or more, or as otherwise required by local law. Intended as a check on transactional disclosure and as a reminder to the officials of where their potential conflicts of interest lie.

"Appear" or "Appear Before"[2]

Communication in any form, including, personally, through another person, by letter, telephone, or otherwise.

Appearance of Impropriety[3]

Conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated.

Applicant Disclosure[4]

Written statement filed by applicants in land use matters in which a municipal officer or employee, or a relative of the municipal officer or employee, has an interest in the application, is the applicant, works for the applicant, has stock in the applicant, is a partner or associate of the applicant, or has an agreement with the applicant to receive any benefit if the application is approved.

Board of Ethics[5]

Municipal board established to administer the local government ethics program by providing training and confidential ethics advice to municipal officers and employees, investigating complaints, imposing sanctions, and administering the annual financial disclosure program.

"Case Law" or "Common Law"

Law made by judges in their published opinions.

Code of Ethics[6]

Standards of conduct set forth in Article 18 of the General Municipal Law, and in laws adopted by municipalities in local laws (in counties, cities, towns or villages) or in resolutions (in other municipalities). Intended to foster integrity in government, promote public confidence, and help municipal officers and employees to discharge their official duties without fear of unwarranted accusations of unethical conduct.

Confidential Information

Information in any format that is either: (i) prohibited by federal or state law from disclosure to the public; or (ii) prohibited from disclosure by local law, ordinance, or resolution of the municipality, and exempt from mandatory disclosure under the New York State Freedom of Information Law ("FOIL") and the New York State Open Meetings Law.

Conflict of Interest

An actual or potential conflict between the private interests of a municipal officer or employee, and his or her public duties, either by virtue of his or her

official job description, or by virtue of the powers and duties he or she actually performs, if different.

Contingency Fee

A fee for services that is based on the outcome of the engagement, rather than on the value of the services rendered.

"Contract" With The Municipality[7]

Any claim, account or demand against the municipality, or any agreement with the municipality, whether express or implied.

"Control" over a Contract with the Municipality[8]

The power or duty, either as an individual or as a member of a board, to negotiate, prepare, or approve the contract, or to approve payment or audit bills under the contract, or to appoint anyone who does.

Freedom of Information Law ("FOIL")[9]

New York State law enacted to promote transparency in government by providing the public with a right of access to most government documents.

General Municipal Law, Article 18

New York State law pertaining to conflicts of interest of municipal officers and employees.

"Gift" or "Financial Benefit"[10]

Money, services, licenses, permits, contracts, authorizations, loans, travel, entertainment, hospitality, gratuity, or any promise thereof received by a municipal officer or employee on terms that are not available to the general public, including any gain or advantage to a third person at the request or with the consent of the municipal officer or employee.

"Incompatible" Offices[11]

Two public offices that may not be held by the same municipal officer or employee because: (i) holding the two particular offices is prohibited by the constitution or by statute, (ii) one office is subordinate to the other, or (iii) the respective duties of the two offices are inherently inconsistent.

"Interest" in a Contract with the Municipality[12]

Direct or indirect financial benefit, or other material benefit accruing to a municipal officer or employee, as the result of a contract with the municipality, or accruing to his or her spouse, minor child, dependent, outside business or employer, or to a corporation in which the municipal officer or employee owns more than five percent of the corporate stock.

Lawyer-Client Privilege[13]

Legal doctrine developed to promote freedom of consultation between a client and his or her attorney by protecting some, but not all, of their confidential communications from disclosure.

Ministerial Act[14]

An action performed in a prescribed manner without the exercise of substantial independent judgment by the municipal officer or employee.

Municipal Officer or Employee[15]

An officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission, or other municipal agency.

Open Meetings Law[16]

New York State law enacted to promote transparency in government by providing the public with a right of access to most meetings of public bodies.

Outside Employer or Business[17]

Any compensated activity, other than service to the municipality; any entity, other than the municipality, from which the municipal officer or employee receives compensation for services rendered or goods sold; or any entity in which the municipal officer or employee has an ownership interest, except a corporation of which the municipal officer or employee owns less than five percent of the outstanding stock.

Policy Maker[18]

A person who either by virtue of his or her official job description, or by virtue of the powers and duties he or she actually performs if different, exercises responsibility of a broad scope in the formulation of plans for the implementation of goals or policy for a local agency or acts as an advisor to an individual in such a position.

Recusal

Abstention from deliberating, deciding, or participating in an official matter in which the municipal officer or employee may have a conflict of interest. An abstention from voting will normally function as

a "nay" vote since under New York law a municipal body must usually take action by an affirmative vote of a majority of the entire body, including absent members, abstentions, and vacancies.[19]

Relative[20]

A spouse, child, step-child, sibling, or parent of the municipal officer or employee, or a person claimed as a dependent on his or her latest individual state income tax return.

Sanctions

The penalties that a board of ethics may be authorized to impose upon a municipal officer or employee, or other individual or firm, upon a finding that the code of ethics was violated, including fines, restitution, disgorgement of profits, or debarment from doing further business with the municipality.

Statute

A law enacted by the federal, state or local legislature.

Transactional Disclosure[21]

Written statement filed by a municipal officer or employee to record a conflict of interest when it arises; usually accompanied by his or her recusal.

Waiver

Exercise of discretion by a board of ethics, where authorized by local law, to waive application of the local code of ethics in particular cases where its application would frustrate rather than advance the interests of the municipality.

Endnotes

1. *See* Gen. Mun. Law § 812.
2. *See* Program Bill #29, An Act To Amend The General Municipal Law, In Relation to Municipal Ethics, March 29, 1999 ("Program Bill") § 804-A-1.
3. *See, e.g., Tuxedo Conservation & Taxpayer Assoc. v. Town Bd. of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
4. *See* Gen. Mun. Law § 809.
5. *See* Gen. Mun. Law § 808.
6. *See* Gen. Mun. Law §§ 800–805-b.
7. *See* Gen. Mun. Law §§ 800-2, 802.
8. *See* Gen. Mun. Law § 801.
9. Pub. Off. Law, Art. 6.
10. *See* Gen. Mun. Law § 805-a; Program Bill § 804-A-5.
11. *See People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874), and its progeny.
12. *See* Gen. Mun. Law § 800-3.
13. *See* Salkin, *The Erosion of Government Lawyer-Client Confidentiality*, *The Urban Lawyer*, Spring 2003; *In re Grand Jury Investigation v. John Doe*, 399 F.3d 527 (2d Cir. 2005).
14. *See* Program Bill § 804-A-8.
15. *See* Gen. Mun. Law § 800-5.
16. NY Pub. Off. Law, Art. 7.
17. *See* Program Bill § 804-A-13.
18. *See* "Guidelines for Determination of Persons in Policymaking Positions," promulgated by the Temporary State Commission on Local Government Ethics, reproduced in Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform,* 11 Pace L. Rev. 243, 273 (1991).
19. *See* Gen. Construction Law § 41.
20. *See* Program Bill § 804-A-15.
21. *See* Gen. Mun. Law § 803.

Steven G. Leventhal is an attorney/CPA practicing in Roslyn, New York. He served as chair of the Nassau County Board of Ethics, and as counsel to the Board.

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