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A Message from the Chair

The Section's Annual Meeting program in New York City this past January was both interesting and helpful. I want to thank our program co-chairs, Rich Zuckerman and Darrin Derosia, for all their hard work. Our Executive Committee bestowed upon them the onerous task of implementing a change in our usual Annual Meeting programming. We gave them a new day of the week—a Monday—and an additional event—an evening dinner at a local restaurant complete with guest speaker. The consensus is that we go back to Thursday and eat out, although whether the meal would be a lunch or a dinner has yet to be determined. (More on that decision in the following issue of the *Municipal Lawyer*.)

Our dinner speaker this year was the City of New York's Corporation Counsel, Michael A. Cardozo. He delivered an articulate and impassioned case for tort reform in New York State. Although he relied on New York City cases to illustrate his various points, he noted, and it was generally agreed, that any one of the scenarios he laid out could occur in any municipality in the State. For example, there was the jury verdict in a negligence case that apportioned fault 75% to the driver high on cocaine whose car hit and injured the plaintiffs and 25% to the City because it was their sanitation truck that was double-parked and caused the driver to swerve, ultimately hitting the plaintiffs. The total award for the plaintiffs was $20 million, the driver's share, $15 million, but the driver is judgment-proof and his share of the award is to be paid by the City, pursuant to the principle of joint and several liability. The City, therefore, will pay the whole award, despite a finding of only 25% liability. Self-insured municipalities feel the bite even more as they struggle to find the money to pay such judgments straight out of their budgets.

In another example, a municipal employee injured at work and who cannot work again receives a City-funded disability pension for life. The injured employee also sues the City and is awarded his lost wages for the rest of his life. The City may not reduce the award for wages by the amount the employee receives from his pension. In effect, the municipal employee or plaintiff gets twice the relief a plaintiff in the private sector would be entitled to. A private sector defendant would have been able to deduct the value of the pension from the award for damages. Mr. Cardozo argued that municipalities should be entitled to the same treatment.

The New York State Bar Association has studied tort reform since a coalition called "New Yorkers for Civil Justice Reform" first proposed such legislation in 1996. The NYSBA has a standing committee on the issue, the Committee on the Tort System, whose pur-

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pose is to assist the NYSBA in developing reasonable positions on the various proposals in an effort to encourage thoughtful debate on the issues. The Committee has the unenviable task of balancing the interests of the plaintiff's bar and the defense bar. (The defense bar also includes corporate counsel.)

The NYSBA opposes the elimination of the joint and several liability doctrine: "Doing so would effectively shift the cost of the injury from the wrongdoing defendants to either the innocent victims, or to society by way of public programs."[1] However, the NYSBA does support the proposal to equalize the treatment of collateral sources in tort actions against municipalities. The latter proposal is bill number S.622 (Volker)/ A.3483 (Weisenberg) and its purpose is to amend Civil Practice Law and Rules 4545, the statute that codifies the collateral source rule.

There was one proposal in this year's bill that piqued my personal interest and that was the expansion of the jurisdiction of the Court of Claims to include cases brought against the City of New York. The reason for the proposal is the theory that damage awards given by judges are generally more commensurate with the facts of a case than are damage awards given by juries. This proposition was studied by the NYSBA's Committee on the Tort System and the NYSBA is on record in opposition. However, inasmuch as this idea has been proposed before and will most likely be proposed again, I thought I would give you some basic information about the Court of Claims in the interest of educated discourse.

The Court of Claims was born out of the construction of the Erie Canal. The Erie Canal Act of 1817 authorized "Canal Commissioners" to award damages for the appropriation of lands taken by the State for the construction of our canal system. The State later expanded the Canal Commissioners' ability to hear and determine all claims related to the construction, use and management of the canals, including negligent acts or misconduct by State officers or any injury arising out of accidents related to the canals. In 1876, the Legislature created the State Board of Audit to hear claims against the State other than those heard by the Canal Commissioners and provided, for the first time, that the State's Attorney General attend every Board of Audit hearing. In 1883, the Board of Audit and the Board of Canal Appraisers were abolished and the Board of Claims was created. Fourteen years later, the Board of Claims became the "Court of Claims" and the commissioners became judges. In 1911, the Legislature abolished the Court of Claims and transferred jurisdiction to a restored Board of Claims. The Legislature reestablished the Court of Claims in 1915 and the former Board of Claims' members again were designated as judges. The first Court of Claims Act arrived on the scene in 1920, but it was not until 1950 that Article VI, Section 23 of the State Constitution became effective, establishing the Court of Claims as a constitutional court.[2]

Fast-forwarding to the present day, the New York State Court of Claims hears and determines civil lawsuits seeking monetary damages against the State and certain quasi-governmental entities. Actions against the State include appropriations, breach of contract and claims relating to the torts of its officers or employees.[3] The Legislature established 22 civil judgeships to hear these claims. The Act also provides for additional judges[4] who sit as acting Supreme Court judges around the State.

Pursuant to the Court of Claims Act, the Clerk of the Court reports each year to the Comptroller.[5] The report reviews developments in case law, case dispositions and sums expended. In 2003, the Court disposed of 1,516 claims; 1,437 were dismissed and the remaining 79 claims were given monetary awards. Focusing on the 79 claims in which awards were given, the total damages claimed were $194,792,654.67; the actual amount awarded was $32,640,373.18, or 17% of the amount claimed. In 2002, the Court disposed of 2,000 claims; 1,877 were dismissed and the remaining 123 were given monetary awards. The 123 claims where the awards were given had claimed damages totaling $276,606,404.96; the actual amount awarded was $51,222,387.92, or 19% of the amount claimed. In 2001, the Court disposed of 2,331 claims; 2,175 were dismissed and the remaining 156 were given monetary awards. The 156 claims where the awards were given had claimed damages totaling $220,662,774.12; the actual amount awarded was $34,255,934.49, or 16% of the amount claimed. Based on these figures, you can see why proponents of tort reform want to expand the jurisdiction of the Court; opponents have equally compelling arguments.

So, we continue to debate what is a balanced, fair and reasonable approach to tort reform, at least for the immediate future, and then, you get to be the judge.

Renee Forgensi Minarik

Endnotes

1. Excerpt on tort reform from "Current Legal Issues" by Ronald F. Kennedy. Go to www.nysba.org/tortreform for NYSBA's position on tort system reform.
2. A detailed history of the Court of Claims up to this time can be found in Breuer, *The New York State Court of Claims: Its History, Jurisdiction and Reports*, New York State Library Bibliography Bulletin 83 (1959). You can also read McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, XL St. John's Law Review (1965).
3. *See* Court of Claims Act § 9 for a full description of its jurisdiction and powers.
4. Court of Claims Act § 2(2).
5. Court of Claims Act § 7(3).

From the Editor

Land use litigation is becoming an increasingly greater burden on municipalities. State court dockets are replete with challenges brought by applicants, neighbors and abutting municipalities to subdivision, site plan, special permit and variance decisions by local planning boards, zoning boards of appeal and legislative bodies. Litigants have also sought relief in federal court by recasting their challenges as federal constitutional violations seeking damages for denials of due process or takings of property without just compensation. The cost to defend such litigation can severely tax municipal budgets.

Can local governments stop the bleeding? From my experience, the answer is yes.

In representing municipalities, as in the practice of medicine, "an ounce of prevention is worth a pound of cure." Having counsel attend land use board meetings (a) assures the preparation of a proper record which supports the municipality's decision; (b) guides board members concerning their responsibilities under applicable land use and environmental laws; and (c) promotes equity and fairness in decision making, considering the interest of the municipality, the applicant and other interested parties. Taking these steps will deter most litigation and facilitate the successful defense of the few hotly disputed cases that will inevitably be brought.

Underscoring the importance of providing timely legal assistance during the decision making process, the Court of Appeals has mandated judicial deference to land use decisions made by local boards where the board's determination is rational and supported by substantial evidence.[1] Moreover, courts must refrain from substituting their own judgment for that of the municipal board even where a contrary determination also would be supported by substantial evidence.[2] Thus, allowing applicants and their counsel to develop a record before a lay board which is acting without the benefit of legal advice from an experienced municipal attorney is a formula for disaster. Moreover, unlike litigation costs which generally cannot be recovered, local legislation can be adopted under home rule authority providing for reimbursement of legal fees incurred by the municipality in connection with the review of land use applications.

Therefore, both operational efficiency and cost effectiveness favor providing land use boards with access to legal counsel at their meetings. By being able to respond to legal issues as they arise, procedural obstacles to the expeditious processing of applications can be removed, concerns of neighbors and board members about the applications can be addressed and, being timely informed, the board can properly discharge its responsibilities in accordance with the time frames and legal standards established by state and local laws.

Illustrating the breadth and complexity of local land use litigation, Adam L. Wekstein, a partner in the law firm of Shamberg Marwell Hocherman Davis & Hollis, P.C. in Mount Kisco, has exhaustively summarized significant recent judicial decisions affecting planning and zoning and the application of the State Environmental Quality Review Act to the decision making process. Additionally, his article highlights high-profile issues that will be addressed by the Court of Appeals in 2004. Those issues include what constitutes a "protectable property interest" in the context of a constitutional taking or due process claim that a governmental entity has unlawfully denied a land use approval, and whether a zoning board of appeals is authorized to grant variances from special permit provisions in local zoning ordinances.

False arrest cases are also common to the municipal docket. Lalit K. Loomba, an associate in the firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP in White Plains, provides an overview of the scope of municipal liability for false arrest and examines the question of whether police should be entitled to rely upon computerized license and registration information to establish probable cause to make an arrest.

Municipal liability is also the subject of Section Chair Hon. Renee Forgensi Minarik's column. Judge Minarik's article explores the ongoing legislative battle over tort reform, including proposals (a) to eliminate the doctrine of joint and several liability; (b) to equalize the treatment of collateral sources in actions against local governments; and (c) to expand the jurisdiction of the Court of Claims to include cases brought against the City of New York.

Steven G. Leventhal, of Roslyn, New York, and Susan Ulrich, a law student at St. John's Law School, provide the next installment of our series on ethics in

government. Their article focuses on the question of whether advice and opinions rendered by a municipal ethics board are confidential in light of the provisions of the State's Freedom of Information Law and Open Meetings Law.

Steven M. Silverberg and Katherine Zalantis, partners in Wilson, Elser, Moskowitz, Edelman & Dicker, LLP in White Plains, describe their victory in the Court of Appeals in a case of first impression nationally involving the erection of a cell tower and the interplay between the Federal Telecommunications Act of 1996 and the rights of private landowners to enforce restrictive covenants.

Finally, Sharon N. Berlin and Richard K. Zuckerman of the law firm of Lamb & Barnosky in Melville succinctly summarize recent judicial and administrative decisions and legislative enactments relevant to the field of public sector labor law. Among the subjects addressed are the downfall of the "heightened risk" requirement for disability benefits under section 207-c of the General Municipal Law and the circumstances under which a union's duty of fair representation may extend to retirees.

Please do not hesitate to share your expertise by writing an article for the *Municipal Lawyer*.

Lester D. Steinman

Endnotes

1. *See P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Village of Pleasantville*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002); *Ifrah v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002); *Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead*, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002).
2. *Id.*

Land Use Law Update 2003—Case Law Posing Significant Questions and Providing Limited Answers

By Adam L. Wekstein

I. Introduction

Although in 2003 New York courts handed down no single land use decision with earth-shattering significance, the Court of Appeals and the Appellate Divisions were active in the field. Among other things, New York's highest court addressed, and made a little murkier, the questions of when a cause of action challenging a determination under the State Environmental Quality Review Act is ripe for adjudication and when the statute of limitations begins to run on such a claim, held that a municipality lacks the power to supercede the standards in the State enabling legislation for zoning variances (and in so doing confirmed the perilous nature of predicting when a municipality can employ the supersession authority afforded it under the Municipal Home Rule Law), considered the constitutional requirements for imposition of fees in lieu of reservation of park land and application processing fees charged in connection with subdivision approval, and upheld against a due process challenge the methodology used by the New York State Department of Environmental Conservation to give public notice of remapping of State wetlands.

Even at this early stage of the new year, it is apparent that the Court of Appeals will hear several land use cases (in which it has granted leave to appeal) that should be of significant interest to those who practice municipal law. In the coming months, the Court will speak to the question of what constitutes a "protectable property interest" which can be vindicated in the context of a takings or substantive due process claim alleging that a governmental entity has acted in an arbitrary and capricious or otherwise illegal manner in denying a land use permit or approval. It will also likely determine whether a zoning board of appeals is authorized to grant variances from standards imposed for special use permits in local zoning ordinances.

In 2003 the Appellate Divisions also issued opinions on land use law that merit discussion on topics such as the State Environmental Quality Review Act, subdivision approval, nonconforming uses, takings without just compensation, due process rights, the immunity of a mixed public/private use of State land from local zoning, the authority of municipalities to regulate hours of operations of businesses and identification of who constitutes a necessary party in actions challenging both permit decisions and the enactment of local zoning regulations.

II. SEQRA—The Muddled Question of Litigation Timing and Other Assorted Issues

In two cases, the Court of Appeals tackled questions about when a cause of action challenging a determination under the State Environmental Quality Review Act ("SEQRA")[1] is ripe for adjudication and when the claim accrues for statute of limitation purposes.[2] Prior to the decisions in these cases, the substantial weight of authority established that a challenge to a SEQRA determination is ripe when the agency takes a substantive action to approve or fund an activity, rather than when it makes a preliminary determination, such as issuing a positive or negative declaration or even adopting a findings statement.[3] *Stop-The-Barge* and *Gordon v. Rush* establish that, at least under certain circumstances, a cause of action under SEQRA may accrue on the adoption of a positive declaration, and also that issuance of a negative declaration can commence the running of the statute of limitations.

In *Gordon*, following a bout of severe beach erosion, a group of ocean-front property owners sought a permit from the Town of Southampton to install shore-hardening structures, a steel bulkhead, seaward of the dunes on the beach to prevent further erosion. To proceed with the proposed improvements the petitioners also needed to obtain a tidal wetlands permit from the New York State Department of Environmental Conservation (the "DEC"). In the first instance, the Town's agency with jurisdiction to issue the local permit declined to act as lead agency and actually requested that DEC assume that role. Ultimately, when the landowners agreed to implement certain mitigation measures suggested by DEC, that agency issued a negative declaration in August of 1993 and granted the requisite wetlands permit in September of that year.

Following receipt of the tidal wetlands permit, the property owners submitted amended applications to the municipality to reflect the modifications that had been incorporated in their plans to obtain the DEC permit. After a further litigation skirmish (not relevant to this discussion), in January 1995 the local administrative board declared itself lead agency to conduct its own *de novo* SEQRA review and issued a positive declaration requiring preparation of an environmental impact statement ("EIS"). In response, the landowners commenced an Article 78 proceeding

to annul the positive declaration. The Court of Appeals held that even though they challenged what has often been characterized as a preliminary step in the environmental review process, the claims were ripe for review. Relying on the discussion of finality in its earlier decision, *Essex County v. Zagata*,[4] the Court stated the following:

> [w]hether the agency action is ripe for review depends upon several considerations. First, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" . . . In other words, "a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" . . . Further, there must be a finding that the apparent harm inflicted by the action "may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party . . .'"[5]

Turning its focus to the facts at bar, the Court continued its analysis in the following passage:

> *[h]ere, the decision of the Board clearly imposes an obligation on petitioners because the issuance of the positive declaration requires them to prepare and submit a DEIS. Conducting a "pragmatic evaluation" of these facts and circumstances, the obligation to prepare a DEIS imposes an actual injury on petitioners as the process may require considerable time and expense.* The Board would like us to adopt a bright-line rule, adopted by some appellate courts, that a positive declaration requiring a DEIS is merely a step in the agency decisionmaking process, and as such is not final or ripe for review (see e.g. Matter of Rochester Tel. Mobile Communications v. Ober, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189 [4th Dept. 1998]). Here, the Board issued its own positive declaration for the project after the DEC had previously conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate. Certainly in this circumstance the bright-line rule advanced by the Board would be inappropriate. In addition, further proceedings would not improve the situation or lessen the injury to petitioners. *Even if the Board ultimately granted the variances, petitioners would have already spent the time and money to prepare the DEIS and would have no available remedy for the unnecessary and unauthorized expenditures.*[6]

Gordon is significant in at least two respects. First, as noted above, ample case law preceding *Gordon* held that a positive declaration is merely a preliminary step in the EIS process which is not ripe for judicial review.[7] *Gordon* declined to adopt such authority as establishing a fixed principle. Second, the decision recognized that a positive declaration, in and of itself, can inflict real and substantial injury by forcing an applicant to waste time and incur significant expense in the EIS review process.

Advocates for developers will undoubtedly attempt to use both of these aspects of *Gordon* to advance arguments challenging positive declarations issued during the SEQRA process. However, the circumstances in *Gordon* are somewhat unique, in that DEC, as lead agency, had already concluded the SEQRA review and the Town of Southampton essentially acted as a renegade by trying to begin the process anew, after having declined to serve as lead agency in the first instance. Whether *Gordon*'s holding will be extended beyond the confines of its facts remains to be seen.

In *Stop-The-Barge v. Cahill*, the Court relied on both *Essex County v. Zagata* and *Gordon* to determine that the issuance of a conditioned negative declaration ("CND") was a "final action" for the purposes of judicial review under SEQRA. As was the case in *Gordon*, *Stop-The-Barge* also considered a SEQRA review undertaken by two separate agencies. The New York City Department of Environmental Protection ("NYCDEP") acted as lead agency with respect to the installation of a power generating facility on a floating barge, while DEC was an involved agency with jurisdiction to issue an air permit pursuant to Article 19 of the Environmental Conservation Law. The last in a series of three CND's issued by NYCDEP became final on February 18, 2000.[8] After taking the requisite procedural steps, DEC issued the air permit on December 18, 2000, ten months to the day after the CND became final.

The petitioners, a group opposed to the power plant, commenced an Article 78 proceeding within four months of the December 18th issuance of the air permit, challenging both NYCDEP's adoption of the

CND and DEC's issuance of the permit, among other things, based on alleged violations of SEQRA. The respondents moved to dismiss the claim as untimely because the proceeding was commenced one year after the CND became final. The Court found that any challenge to the CND was time-barred by the four-month limitations period of CPLR 217(1).

In dismissing the SEQRA claims, the Court rejected the petitioners' argument that the CND was merely a preliminary step in the SEQRA process, and held that it was a final agency action for the purposes of judicial review. It explained this conclusion by stating that "the issuance of the CND resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement."[9] The Court also invoked policy considerations to support its holding. It observed that allowing the petitioners to wait the ten months between the adoption of the CND and the issuance of the air permit, without commencing suit, would contravene the policy of SEQRA of "resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning."[10]

Again, the holding in *Stop-The-Barge* stands in contrast to earlier cases indicating that a negative declaration is a preliminary step in the environmental review process—a step which can be challenged when the agency actually takes a final action with respect to the underlying substantive application.[11] Perhaps the Court's deviation from such earlier authority can be explained by the fact that two agencies were involved in *Stop-The-Barge* and NYCDEP's issuance of the CND was the final action to be taken by that agency. However, the case should at least trigger insecurity in the practitioner representing a party opposed to an action as to whether litigation can await an agency's determination to approve or deny an application or whether the suit must be commenced upon the issuance of the negative declaration itself.[12] Unfortunately, the suggestion in the title of the law review article cited above, "Sue Early and Often," may be the soundest advice an attorney can give his client until the courts interpret *Gordon* and *Stop-The-Barge*.

Two other Court of Appeals cases decided under SEQRA warrant mention. In *The New York City Coalition to End Lead Poisoning, Inc. v. Vallone*,[13] the Court invalidated a negative declaration issued with respect to the adoption of a local law regulating the abatement of lead paint conditions in New York City multiple dwellings. It did so based on the negative declaration's failure to set forth a sufficient reasoned elaboration of the basis for the City Council's decision. While the Court recognized the applicability of the "hard look" standard to judge substantive (as opposed to procedural) compliance with SEQRA, it nonetheless arguably applied the more rigorous "strict compliance" standard (normally reserved for determination of whether SEQRA's procedural requisites have been met) to invalidate the lead agency's findings. The Court recognized that "[j]udicial review of a lead agency's negative declaration is restricted to 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination.'"[14]

Although the Court stated that the City Council may have possessed sufficient information to render a determination that the proposed law would not have a significant environmental impact, it found that the text of the negative declaration failed to provide an adequate basis for a reviewing court to ascertain whether, in fact, this was the case; the Court found the mandated "reasoned elaboration" to be absent. What is interesting about the opinion is not the Court's holding, but that in annulling the negative declaration as insufficient, the decision appeared to treat the assessment of the sufficiency of an agency's explanation as an inquiry into the adequacy of the procedure employed. The Court stated the following:

> [a]s we stated in *Matter of King* [*v. Saratoga County Board of Supervisors*, 89 N.Y.2d 341, 653 N.Y.S.2d 233 (1996)] "[t]he mandate that agencies implement SEQRA's procedural mechanisms to the 'fullest extent possible' reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute" . . . Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action and insulates rational agency determinations from judicial second-guessing . . . [15]

It would seem, therefore, that while on the one hand the Court of Appeals has uniformly stated that judicial review of a lead agency's substantive determination is deferential, review of the sufficiency of the actual findings themselves may trigger the non-deferential strict compliance standard—propositions which may be hard to reconcile.

In *Spitzer v. Farrell*,[16] the Court of Appeals found that New York City's Department of Sanitation ("DOS") adequately studied the air quality impacts

of the diesel emissions from trucks that would be utilized to effect the closure of Staten Island's Fresh Kills landfill. Specifically, the Court found that the DOS had taken a hard look at the issue, notwithstanding the fact that it had only evaluated particulate matter of 10 microns in size, rather than smaller particles of 2.5 microns. While the federal Environmental Protection Agency's standards provided for analysis of the latter class of particles, evidence in the record showed that no available technology existed to measure the 2.5-micron emissions at the time the environmental determination was made. The Court found that it was reasonable for the DOS to have analyzed the emissions of the larger particles as a surrogate for smaller ones.

One curious case from the Appellate Division, Second Department, *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*,[17] appears to have extended a principle previously espoused by that court in the context of SEQRA review—e.g., that where an agency declines to take an action or denies a permit it need not undertake a SEQRA review[18]—to the entirely different question of the necessity of referral of certain zoning actions to the County Planning Board under section 239-m of the General Municipal Law. Based on analysis which can best be described as a non-sequitur, the Appellate Division upheld the denial of a special permit. The Court's entire substantive discussion reads as follows:

> [o]n remittitur [from the Court of Appeals, the petitioner] contends that the Board failed to comply with General Municipal Law §239-m which requires the Board to refer proposed planning and zoning actions to the Nassau County Planning Commission for review and recommendations. We disagree. Since the Board determined to deny the petitioner's application for a special permit, no action having a significant effect on the environment was undertaken. Accordingly, it was unnecessary for the Board, as lead agency, to comply with the requirements of the State Environmental Quality Review Act . . .[19]

It is not apparent that because there is no legal requirement to issue a determination under SEQRA when an agency denies an application (a principle which the author submits is questionable), the rule applies with equal vigor to eliminate the requirement for referral to the County Planning Board under section 239-m. SEQRA requires compliance with its regulations prior to the taking of an action. In contrast, section 239-m of the General Municipal Law requires referral of certain *proposed* planning and zoning actions, with the emphasis being on the word "proposed." In *Retail Property Trust*, the special permit was clearly "proposed." Furthermore, the purpose of section 239-m is to require a decision-making body to receive the recommendation of the County Planning Board before making a decision. It is submitted that the statute should be read to require an agency to receive this input (or allow expiration of the period within which such recommendation is required) prior to making either a positive or a negative decision.

In another Second Department case, *Levine v. Town of Clarkstown*,[20] the court upheld against a SEQRA challenge a local law which permitted residents of single-family homes to continue to occupy their residences during the construction of a new single-family house on the same lot as their existing home. The court held that the local law was a Type II action. It reasoned that as both the construction of a conforming single-family home and the replacement or reconstruction of a structure on the same site are Type II actions, the local law, which merely facilitated such activities, constitutes a Type II action itself.

III. Reaffirmance of Zoning Variance Standards—Creation of More Confusion as to Supersession Under the Municipal Home Rule Law

Authority handed down by New York's highest court in 2003 confirms that the provisions of the Town Law and the Village Law which set forth standards governing consideration of area and use variances by zoning boards (Town Law § 267-b(3) and Village Law § 7-712-b(3)) are not only uniformly applicable throughout New York State, but cannot be superceded by localities under the Municipal Home Rule Law. In *Cohen v. Board of Appeals of Village of Saddle Rock*,[21] the Court annulled the denial of variance applications filed in two villages which had enacted legislation purporting to supercede the standards set forth in the Village Law and substitute in their stead the old "practical difficulty" and "unnecessary hardship" standards. The Court held the attempted supersession was invalid.

The salutary practical consequence of *Cohen* is that practitioners will now be able to appear before a zoning board in any municipality in the State and be faced with the uniform standards. The less tangible, although perhaps more significant, consequence is that *Cohen* exemplifies and perhaps adds to the uncertainty of trying to predict when a municipality may supercede statewide zoning and land use legislation, and when it is powerless to do so.

Under Municipal Home Rule Law section 10(1)(ii)(e)(3), a Village or a Town is authorized to amend or supercede provisions of the Village and Town Law, respectively, relating to matters with respect to which the municipality is otherwise empowered to adopt local laws "unless the legislature expressly shall have prohibited the adoption of such a local law." Accordingly, when State legislation expressly states that it cannot be superceded, no issue is presented. Absent such an express proscription, it is difficult to discern a principled distinction between those instances in which supersession is permitted and those where the State has impliedly preempted an area of regulation requiring uniformity throughout the State. *Cohen* described the general principle of preemption as follows:

> [p]reemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field . . .
>
> The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt . . . This Court will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations . . .[22]

The Court continued its explanation by stating

> [i]nconsistency of a local zoning law with a state law of general application is, of course, insufficient to trigger the Legislature's preemption power for, if that were so, the supersession authority granted by the Municipal Home Rule Law would be meaningless . . . However, local authority to contravene laws of general application must yield to the superior interest of the Legislature when such interest has been demonstrated either by an express statutory prohibition or, more significantly in this case, by a finding of preemption . . .
>
> The 1991 amendments to both the Town Law and Village Law, setting forth a standard of review for area variance applications, evince an intent by the Legislature to occupy the field and bring a measure of statewide consistency to the variance application and review process . . .[23]

The Court's decision provoked a vigorous dissent from Judge Rosenblatt, whose rationale is best captured by his own language:

> Courts often are called upon to discern whether in a particular case the State has elected to preempt, and where the State has not made its intention clear, difficulties arise. As a result, we have at times concluded that the State has impliedly intended to preempt, even though it did not say so expressly. Here, however, there is not the slightest uncertainty. In the plainest possible terms, Municipal Home Rule Law § 10(1)(ii)(e)(3) provides that there will be no preemption "unless the legislature expressly shall have prohibited the adoption of such a local law" (emphasis added). Because the legislation flatly says "no," I cannot accept petitioners' argument that "no" means "yes" . . . or "maybe."[24]

Judge Rosenblatt went on to lament the lack of guidance provided by *Cohen* not only for courts, but for villages and their attorneys on the subject of when State laws can be superceded.

Perhaps the best wisdom, particularly following *Cohen*, is that to the extent possible municipalities should enact laws which are consistent with the State planning and zoning enabling acts, rather than attempt to supercede those acts, unless there is a compelling reason to do so.[25]

IV. Special Use Permit—Availability of Variances from the Permit Criteria

Prior to the enactment of Town Law § 274-b (and Village Law § 7-725-b) in 1992, which created explicit authority for municipalities to grant special permits (a land use tool which had already been in long use), settled law in New York State was that a zoning board of appeals was without authority to vary the dimensional (or other) requirements in local zoning regulations for a special use.[26] However, section 274-b(3) of the Town Law reads as follows:

> Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section two hundred-sixty-seven-b of this article, without the necessity of a decision or determination of an administrative official charged with enforcement of the zoning regulations.

On its face, this provision and its analogue in the Village Law authorize application for an area variance from dimensional requirements in a zoning ordinance in connection with an application for a special permit. Case law in the Second Department following the enactment of section 274-b seemed to establish the obvious, that a variance is available from general dimensional requirements imposed by a zoning ordinance,[27] but was less clear as to whether one can obtain a variance from the dimensional requirements of special permit standards themselves.[28] The Practice Commentaries to McKinney's Town Law have consistently stated as a matter of absolute fact that a zoning board cannot issue a variance from the specific dimensional criteria imposed by special permit regulations.[29] Last year, in the extremely brief decision in *Real Holding Corporation v. Lehigh*,[30] the Second Department ruled that section 274-b(3) authorizes variances from the special permit criteria themselves. The Court of Appeals has granted leave to appeal, apparently to determine whether the Second Department, which has vacillated to some extent on the question, or the practice commentaries, which have been steadfast in their view and simply characterized cases with which they disagree as "inaccurate," is correct as to the availability of area variances from special permit criteria.

V. Subdivision Approval—Necessity for Recording Conditions

Virtually all subdivision approvals contain conditions. A common one is the prohibition of further subdivision of the property for which the approval is granted. In *Ioannou v. Southhold Town Planning Board*,[31] the Court held that a condition proscribing further subdivision of property contained in the resolution of approval did not bind a subsequent owner of the property. The Court found that because the salient condition was not included in any instrument recorded in the County Clerk's Office, it was insufficient to provide future purchasers with notice of the restriction and did not foreclose such parties from applying to create additional lots.

Accordingly, municipal attorneys seeking to ensure that conditions of subdivision approval survive filing of the final subdivision plat and bind subsequent owners of property which has been subdivided, must insure that instruments memorializing the conditions are recorded in the County Clerk's Office, presumably in the form of a restrictive covenant or, at minimum, as a note on the filed subdivision plat.

VI. Non-Conforming Use—Expansion, Discontinuance and Amortization

A distinction which is always drawn, between an impermissible expansion of a legally pre-existing nonconforming use and the legal modernization of such a use, was once again the subject of Court of Appeals scrutiny in *550 Halstead Corp. v. Zoning Board of Appeals of the Town/Village of Harrison*.[32] Therein the Court held that substantial evidence supported a zoning board's determination that the replacement of a wooden pallet storage system for lumber, employed by a legally nonconforming lumberyard, with more extensive steel frame storage racks, was an impermissible expansion of that use. *550 Halstead* affirmed the determination of the Appellate Division, in which two dissenting justices would have held that the conversion from wooden pallets to the larger steel storage system did not constitute an increase in the intensity of the use or an impermissible extension or enlargement thereof.

In *149 Fifth Avenue Corp. v. Chin*,[33] the Appellate Division bucked the trend of deferring to zoning boards' interpretations. It annulled a zoning board's determination that a nonconforming use had been discontinued under New York City's Zoning Resolution. In *149 Fifth Avenue Corp.*, a large legally nonconforming advertising sign, which had been affixed to the facade of a building for many years, was removed for approximately 27 months to allow repairs to the building that were mandated by law. Notwithstanding the fact that the New York City Zoning Resolution provided that discontinuance of a nonconforming use for a period of two years may eliminate the statutory protection of that use, the Court held that the zoning board's determination that the use had been discontinued was erroneous. Relying, in part on public policy considerations, the Appellate Division stated:

> we hold that the Resolution may not be reasonably read to authorize termination of petitioner's protected nonconforming use under the particular circumstances presented. Where, as here, interruption of a protected nonconforming use is com-

> pelled by legally mandated, duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have been "discontinued" within the meaning of Zoning Resolution § 52-61 . . . A contrary reading of the subject Zoning Resolution, to permit or, indeed, require the termination of a valuable property interest, even where such termination is triggered solely by the owner's need temporarily to cease the nonconforming use in order to satisfy a legal mandate, would raise a most serious question as to whether the Zoning Resolution purports to authorize an unconstitutional taking.[34]

The Third Department dealt with a somewhat unusual variant of a local zoning provision with the potential to require amortization of legally nonconforming uses in *Cioppa v. Apostol*.[35] Under New York law, amortization provisions requiring the elimination of nonconforming uses after a specified time period are constitutional and legally sanctioned so long as the time period provided for the elimination of the use is reasonable.[36] In *Cioppa*, the Court considered a provision of the Albany City Code which required that if either 50 percent of the property owners within 200 feet of a nonconforming use or the Commissioner of Buildings made a proper application, the zoning board of appeals was required to hold a hearing on: (1) whether that nonconforming use constitutes a public nuisance warranting its discontinuance, and (2) what constitutes a reasonable amortization period in the event discontinuance is ordered.

When the zoning board, on an application by the Commissioner of Buildings, found that petitioner's bar (the Bottoms-Up Grill) was a general nuisance due to the occurrence of fights, public intoxication, drug dealing, urination, loud noise, illegally parked vehicles and threats to neighbors, the petitioner sought to annul the zoning board's determination, based, in particular, on absence of standards in the ordinance to guide the zoning board's deliberations. Among other things, even though the ordinance included no criteria as to what constitutes a public nuisance, the Court found that because a finding of nuisance would only trigger a constitutionally permissible amortization process, the Court did not need to decide whether the regulation's lack of standards would violate the Constitution if considered in isolation.

VII. Constitutional Issues in Land Use—Recreation Fees, Protectable Property Interests, Takings and Public Notice

After a respite of more than a decade, the Court of Appeals again grappled with the constitutionality of a recreation fee imposed as a condition of subdivision approval in *Twin Lakes Development Corp. v. Town of Monroe*.[37] In that case, the Court also analyzed the propriety of a local law requiring applicants for subdivision approval to reimburse the Town for consulting costs incurred in processing the application.

In *Twin Lakes,* the applicant claimed that a $1,500 per lot fee in lieu of reservation of parkland, imposed under section 277(4) of the Town Law as a condition of final subdivision approval, effected a deprivation of due process and a taking of property without just compensation. The crux of the landowner's claim was that absent an individualized determination in each case as to the appropriate amount of the fee, the imposition of the fee represents an unconstitutional taking, because the fee amount is not "roughly proportional" to the impact that the proposed subdivision would have on the community's need for park and recreation facilities.[38] New York's high court held in *Twin Lakes* that the plaintiff had failed to demonstrate that the recreation fee violated the rough proportionality test. It relied, among other things, on: (1) the explicit findings made by the Town Board, when it increased the amount of the fee, that the demand for recreational facilities exceeded the Town's existing resources and continued subdivision development, combined with increasing land costs, exacerbated the problem; and (2) the planning board's individualized findings that the proposed subdivision would contribute to the need for new parkland and that no land suitable for such use existed within the parcel being subdivided. Of more general significance, the Court found that nothing in Supreme Court case law "precludes municipalities from establishing fixed fees to insure adequate recreational facilities can be provided."[39] In short, the Court rejected the claim that a municipality must make an individualized evaluation of the appropriate amount of the fee for each subdivision application.

The Court of Appeals also held in *Twin Lakes* that the consulting fees charged to the applicant met the constitutional requirement "that the fees charged be reasonably necessary to the accomplishment of the regulatory program."[40] The Court found support for its conclusion in the provision of the Town's code requiring that the amount of the fees charged the applicant should be reasonably related to the costs attendant to the Town's review of the application. It

also cited uncontradicted proof in the record that the Town charged the applicant at the same rate for consulting services as it paid, that the planning board audited all vouchers submitted by the consultants, and that the applicants were free to inspect the consultants' invoices on request.[41]

Two recent cases from the Second Department, *Home Depot U.S.A., Inc. v. Dunn*,[42] and *Bower Associates v. Town of Pleasant Valley*,[43] pose an interesting issue which will likely be resolved by the Court of Appeals in coming months. Both addressed the question of what constitutes a protectable property interest for due process and takings claims under the federal Constitution. Both adhered to authority emanating from federal courts in the Second Circuit, specifically, *RRI Realty Corp. v. Incorporated Village of Southampton*,[44] and its progeny, which define such an interest quite narrowly. Each Second Department case held that a party has no protectable interest in a permit or approval it is seeking, unless the governmental agency with authority to issue the approval has no discretion to deny it or where that discretion is so narrowly circumscribed that the approval is virtually assured.[45]

In *Bower Associates*, despite the fact that in an earlier Article 78 proceeding the Second Department had (1) invalidated denial of an application for subdivision approval, (2) found that the applicant had met all requirements of the local ordinance, and (3) stated that the application had only been denied based on generalized community opposition, the Court found that the denial constituted neither a taking of property without just compensation, nor a denial of due process, because a planning board's review of an application for subdivision approval involves the exercise of discretion. The Court stated:

> [i]n the order appealed from, the Supreme Court acknowledged that the Planning Board "had the discretion to review the Bower application within the parameters of the Town Law and its own ordinance." In support of its claim of a protectable property interest, the Plaintiff relies upon the language of this Court in *Matter of Bower Associates v. Planning Board of Town of Pleasant Val.* [289 A.D.2d 575, 735 N.Y.S.2d 806 (2d Dep't 2001)], that "the petitioner met all the conditions needed for approval of its subdivision application in both this and the related Stratford Valley Subdivision" to demonstrate that subdivision approval was an entitlement. However, "[t]he presence of . . . discretion precludes any legitimate claim of entitlement. . . ."[46]

In the *Home Depot* case, the City of Rye's City Council refused to "sign off" on a county road widening permit, apparently despite its past practice of treating such applications as an administrative matter. In an earlier decision in an Article 78 proceeding, the Second Department affirmed the finding that the permit denial was arbitrary, capricious and irrational.[47] In *Home Depot v. Dunn*, the Second Department, without significant explanation, held that the plaintiff had failed to raise a triable issue of fact showing that it possessed a clearly established right to the permit.

Having granted leave to appeal in both *Bower Associates* and *Home Depot,* the Court of Appeals may decide what a party claiming a property interest in an approval must show in order to have a viable due process or takings claim. It likely will clarify whether the inquiry merely focuses on the degree of discretion the approving agency has to deny an approval or whether it is also dependent on the facts in a given case—e.g., whether the applicant had a high likelihood of obtaining a permit absent arbitrary conduct, and the nature of the applicant's reasonable investment-backed expectations.

The constitutional claims pursued by plaintiff in *Arrowsmith v. City of Rochester*[48] fared no better than those in *Bower* and *Home Depot*. In that case, the Fourth Department found that a law which required certificates of occupancy for residential rental units to be renewed every five years, while imposing no similar requirement on owner-occupied residences, had a rational basis.

The year 2003 also saw a State court inverse condemnation claim succeed in *Friedenburg v. New York State Department of Environmental Conservation*.[49] However, the case confirmed the extremely narrow scope of *per se* economic takings. In *Friedenburg*, the property at issue, which had been acquired prior to the enactment of wetlands regulations, was at the time of the litigation owned by the estate of the purchaser, and was located on Shinnecock Bay adjacent to a helicopter landing pad. Following eight years in the administrative review process, DEC denied an application for a tidal wetlands permit to authorize construction of a single-family residence, based, among other things, on the potential for discharge of sewage effluent into the bay. Based on DEC's permit denial, the local zoning board of appeals denied a wetlands permit under the local ordinance.

The estate commenced a proceeding seeking invalidation of the DEC's permit denial or, in the

alternative, an order compelling DEC to commence condemnation proceedings under section 25-0404 of the Environmental Conservation Law, in light of the alleged taking of its property without just compensation. DEC indicated that it would permit certain activities on the property, which it claimed would provide sufficient use to defeat the inverse condemnation claim. Among those uses was the installation of a four-foot-wide catwalk, pier and floating dock for mooring a boat, installation of a parking area of not more than 1,000 square feet, construction of a 225-square-foot deck, garage, gazebo, or storage shed, mooring of a single houseboat in the canal, or use of the site as parking or storage for the adjoining helicopter pad.

The landowner's proof showed that, absent the enforcement of tidal wetlands regulations, the fair market value of the property was $665,000 and that following their enforcement the property had no value or a nominal one. DEC's expert argued that the value of the property never exceeded $50,000. The Supreme Court, Suffolk County, found that with the wetlands regulations in place, the property had a value of $31,500.

The Second Department held that under such circumstances DEC's regulations did not effect a "*per se*" or "categorical" taking under the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,[50]—that is, a circumstance where "a regulation denies all economically beneficial or productive use of land." It stated that *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[51] limited the *per se* analysis of *Lucas* to the extraordinary circumstances where the government deprives the landowner of all economic uses and, in turn, found that the minimal value remaining in the property defeated such a claim. The Court stated the following:

> [i]n the instant case, it is conceded that the petitioners' property retains at least a 5% residuary value. In light of *Tahoe-Sierra*, a categorical or per se rule on a regulatory taking as applied in *Lucas* is not applicable here. Accordingly, we hold that the DEC's denial of a permit for a single family dwelling does not constitute a categorical or per se taking of the petitioners' property.[52]

Nonetheless, the Court held that under *ad hoc* analysis established by *Penn Central Transportation Co. v. New York City*,[53] DEC's wetlands regulations effected a taking. Under *Penn Central's ad hoc* factual inquiry courts typically analyze three factors: first, the economic impact of the regulation on the claimant; second, the extent to which the regulation interferes with the distinct investment-backed expectations of the property owner; and third, the character of the governmental action. In *Freidenburg*, the Appellate Division found that the reduction in the property's value of between 92½ and 95 percent caused by the application of the regulations and denial of the permit destroyed all but a "bare residue" of the economic value of the property. As to the character of the governmental action, the Court placed significant emphasis on its assessment that the regulation required the landowner to bear a disproportionate share of the burden associated with providing a benefit for the public generally.

The validity of a public notice in the context of procedural due process claim was reviewed by the Court of Appeals in *Zaccaro v. Cahill*.[54] The Court upheld the validity of notices issued in connection with the remapping of State wetlands by DEC. It found that DEC's methodology of sending notice to parties identified as the owners of potentially affected properties listed on the latest completed assessment rolls of the municipalities in which the parcels were located, afforded property owners all process they were due. The Court made this finding even though it recognized that the tax maps are only updated every four to five years and that the tax rolls on which the owners' names are listed only identify the owners of parcels at the end of the preceding year and contain no information regarding mid-year title changes.[55]

VIII. Immunity from Zoning of a Hybrid Public/Private Use of State Property

Not surprisingly, the State came out the winner when it came to the question of whether a system of antennas to be erected on its own land, which was to serve both its purposes and those of private interests, is required to adhere to local zoning regulations. In *Crown Communication New York, Inc. v. Department of Transportation of the State of New York*,[56] the New York State Police and Department of Transportation entered into an agreement pursuant to which a private party was granted a license to construct and operate telecommunication towers on State-owned properties within the rights-of-way of highways in the City of New Rochelle. Another private entity was given the right to license space on the towers to wireless telephone providers, with the State retaining the right to colocate its own communication equipment on the towers. The City of New Rochelle asserted that such a use required a special permit under its zoning ordinance. The Second Department rejected New Rochelle's position stating:

> [t]he Wireless Telephone Providers are not precluded from enjoying the

> State's immunity simply because they are private entities or because colocating on the DOT's towers will advance their financial interests . . . Thus, it is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case.
>
> Moreover, the fact that colocation on the DOT's towers will further the private interests of the Wireless Telephone Providers does not undermine the public purposes underlying the licenses granted by the State. The DOT has expressed its intention to locate its new transit communications system and Intelligent Traffic System on the towers, the State Police will have the opportunity to colocate its new communications equipment on the towers, the towers have the potential to become part of a statewide wireless network, and space on the towers has been offered to local public safety agencies. The goals of the DOT and the State Police to improve traffic flow, motorist safety, and emergency response along the Hutchinson River Parkway would be facilitated by, and partially financed by, the shared use of the towers.
>
> The shared use of the towers is integral to the State plan of improving its own telecommunications infrastructure and furthers the State's goal of reducing the proliferation of towers . . . allowing the City to enforce its zoning laws against the Wireless Telephone Providers under these circumstances would "foil the fulfillment of the greater public purpose" in constructing these facilities.[57]

IX. Necessary Parties in Zoning Litigation—Extension of the Requirement and the Strange Case of Constructive Denial

Consistently with all recent case law, in 2003 the courts held that where a litigant sues to invalidate a permit or approval, the recipient of the approval is a necessary party to the proceeding and failure to name the recipient prior to the expiration of the applicable statute of limitations generally mandates dismissal.[58] A logical extension of that principle was embodied by *Princess Building Corp. v. Zoning Board of Appeals of Town of Huntington*.[59] In *Princess Building Corp.*, the petitioner was a landowner who applied for a building permit to construct a single-family dwelling. The zoning board of appeals confirmed the building inspector's denial of the permit, finding that the petitioner's lot had merged with an adjoining lot owned by a third party. When the petitioner sued to invalidate the zoning board's determination, the Court dismissed the proceeding because the petitioner had failed to name the owner of that adjoining lot, holding that the latter's interests could be significantly affected by any decision reviewing the zoning board's action.

Basha Kill Area Association v. Town Board of Town of Mamakating[60] appears to extend the necessary party requirements in zoning and land use litigation even further. In *Basha Kill*, an environmental group sued to invalidate both a comprehensive plan and a new zoning law enacted by a Town, based on allegations that the Town had failed to adhere to SEQRA. The Court dismissed the proceeding because the petitioner failed to name, prior to the expiration of the statute of limitations, *all* property owners that had received approvals pursuant to the permitting provisions of the new zoning law. The Appellate Division held that all permit recipients were necessary parties, because "the repeal of a municipal ordinance wipes out the act for all purposes." It concluded that the property owners that had received approvals not only had an interest in the outcome of the litigation, but were indispensable parties whose interests might not be protected absent joinder.

The holding in *Basha Kill* has practical implications for those seeking to challenge a local law establishing a permitting scheme. Although in *Basha Kill* the Appellate Division observed that the number of parties who had received approval under the new ordinance was relatively small and that their identity was a matter of public record, in other circumstances the requirement to name all the parties who have received approvals under a challenged enactment could pose real mechanical difficulties for a petitioner.

In one of the more unusual factual patterns, in *Headriver, LLC v. Town Board of Riverhead*,[61] the Second Department addressed the esoteric question of who should be sued when there is a constructive denial of a special permit. In *Headriver*, in response to the required referral pursuant to General Municipal Law § 239-m and the Nassau County Administrative Code, the Nassau County Planning Board issued a negative recommendation with respect to a special

permit application pending before the Riverhead Town Board, thereby triggering the requirement that the application could only be approved by a supermajority vote. By a margin of three to two, the Town Board voted to approve the special permit, which, by operation of law, constituted a denial. It issued a resolution which included a comprehensive discussion supporting the grant of the application. Thus, the applicant was in the somewhat surreal position of bringing a suit claiming the Town Board's "denial" was arbitrary and capricious, when that board voted to grant the permit and issued favorable findings.

Notwithstanding that it had voted to grant the permit, the Town Board moved to dismiss the proceeding, claiming that the County Planning Board was a necessary party because, by operation of law, the planning board's recommendation effectively constituted the denial. The Second Department held that as the County Planning Board's decision was only an advisory recommendation, it was not subject to judicial review and the Town Board was the proper party. Justice Goldstein, in a vigorous dissent, asserted that because the Town Board "never rendered a 'decision' denying the petitioner's application" the County Planning Board, whose action effectuated the denial, was the party that should have been sued. As a result, the dissenting justice stated that the proceeding should have been dismissed.

X. Regulation of Hours of Operation—The Need for Empirical Support

It is not uncommon, either through conditions in a permit or provisions in a zoning ordinance itself, to control the hours of operation of a land use. *Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury*,[62] considered an ordinance which imposed such restrictions in both contexts, and confirmed the existence of constraints on the power of municipalities to restrict the hours during which businesses can operate. In *Westbury Trombo,* the petitioner challenged the enactment of a local law which made it unlawful to operate a business on land within commercial zoning districts that either abuts or is within 100 feet of property zoned for residential use, between the hours of 11:00 p.m. and 6:00 a.m. The local law also included a provision requiring landowners to obtain a special permit to operate any business or industrial use between the hours of 11:00 p.m. and 6:00 a.m., no matter where located. The Court held that there was insufficient evidence to uphold the restrictions under the Village Law, because the local law was not supported by evidence showing that the atmosphere of the surrounding area would be adversely affected by the presence of an overnight business and reiterated the oft-stated principle that generalized complaints of the community, uncorroborated by empirical data, do not establish detriment to the community. Likewise, the Court held that the local law could not be upheld even as an exercise of the municipality's general police power, again finding there was insufficient evidence to support the conclusion that a retail business operating 24 hours a day in the vicinity of a residential area has any detrimental impact on the health, safety, welfare or morals of the community.

Endnotes

1. SEQRA collectively refers to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.
2. *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 2003 WL 22844452 (December 2, 2003); *Gordon v. Rush*, 100 N.Y.2d 236, 762 N.Y.S.2d 168 (2003).
3. *See, e.g.*, M. Gerard, D. Ruzow & P. Weinberg, Environmental Impact Review in New York, § 7.02(1), p. 7-7 ("the general rule under SEQRA, as established by the case law, is that the moment of ripeness occurs only when an agency takes its final action approving or disapproving the underlying proposal."); D. Ward & M. Moore, *SEQRA Challenges and The Statute of Limitations: Sue "Early and Often,"* 6 Alb. L. Envtl. Outlook 89 (2002).
4. 91 N.Y.2d 447, 672 N.Y.S.2d 281 (1998).
5. *Gordon*, 100 N.Y.2d at 242, 762 N.Y.S.2d at 22 (citations and footnote omitted).
6. *Gordon*, 100 N.Y.2d at 242–243, 762 N.Y.S.2d at 23 (emphasis added).
7. *See, e.g., Brierwood Village, Inc. v. Town of Hamburg Planning Board*, 277 A.D.2d 1051, 715 N.Y.S.2d 351 (4th Dep't 2000); *Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation*; 260 A.D.2d 920, 688 N.Y.S.2d 842 (3d Dep't 1999); *lv. denied*, 93 N.Y.2d 815, 697 N.Y.S.2d 562 (1999); *PVS Chemicals, Inc. v. New York State Department of Environmental Conservation*, 256 A.D.2d 1241, 682 N.Y.S.2d 787 (4th Dep't 1998).
8. It became final following the conclusion of the 30-day comment period which began with the publication of the notice of the CND in DEC's Environmental Notice Bulletin. *See* 6 N.Y.C.R.R. § 617.7(d)(1).
9. *Stop-The-Barge*, 1 N.Y.3d at 4.
10. *Id.* at 4.
11. *See, e.g., Cold Spring Harbor Area Civic Association, Inc. v. Suffolk County Department of Health Services*, 305 A.D.2d 499, 762 N.Y.S.2d 406 (2d Dep't 2003) (dismissing as premature a SEQRA challenge, where a negative declaration had been issued and variances had been granted both by a local zoning board of appeals and by the Commissioner of the Suffolk County Department of Health Services to allow the installation of a sewage treatment system for a restaurant, because the Commissioner had not yet issued a permit for construction of the system); *Young v. Board of Trustees of Village of Blasdell*, 221 A.D.2d 975, 634 N.Y.S.2d 605 (4th Dep't 1995), *aff'd*, 89 N.Y.2d 846, 652 N.Y.S.2d 729 (1996).
12. The fact that in *Stop-The-Barge* NYCDEP had issued two prior CND's highlights the uncertainty left in the decision's wake. Arguably, under the *Stop-The-Barge* holding a potential petitioner would have had to commence a proceeding each time NYCDEP issued a CND in order to avoid the possibility that its SEQRA claim would be dismissed as time-barred.
13. 100 N.Y.2d 337, 763 N.Y.S.2d 530 (2003).

14. *New York City Coalition to End Lead Poisoning, Inc.*, 100 N.Y.2d at 348, 763 N.Y.S.2d at 535, quoting *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).
15. *New York City Coalition to End Lead Poisoning, Inc.*, 100 N.Y.2d at 350, 763 N.Y.S.2d at 537 (citations omitted).
16. 100 N.Y.2d 186, 761 N.Y.S.2d 137 (2003).
17. 301 A.D.2d 530, 753 N.Y.S.2d 527 (2d Dep't 2003).
18. *See Capelli Associates v. Meehan*, 247 A.D.2d 381, 667 N.Y.S.2d 914 (2d Dep't 1998); *Wade v. Kujawski*, 167 A.D.2d 409, 561 N.Y.S.2d 819 (2d Dep't 1990).
19. *Retail Property Trust*, 301 A.D.2d at 531–532, 753 N.Y.S.2d at 528 (citations omitted).
20. 307 A.D.2d 997, 763 N.Y.S.2d 661 (2d Dep't 2003).
21. 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003).
22. *Cohen*, 100 N.Y.2d at 400, 764 N.Y.S.2d at 67.
23. *Cohen*, 100 N.Y.2d at 401–402, 764 N.Y.S.2d at 68 (citations omitted).
24. *Cohen*, 100 N.Y.2d at 403, 764 N.Y.S.2d at 69.
25. A case of less significance on the topic of preemption of local zoning by state law is *People v. Amerada Hess Corp.*, 196 Misc. 2d 426, 765 N.Y.S.2d 202 (Dist. Ct., Nassau Co. 2003), which held that a restrictive covenant proscribing the sale of alcoholic beverages, agreed to by an applicant in the context of a development approval for a gasoline station, was invalid as it was preempted by the Alcoholic Beverage Control Law.
26. *See Jewish Reconstructionist Synagogue of North Shore, Inc, v. Levitan,* 34 N.Y.2d 827, 359 N.Y.S.2d 55 (1974); *Knadle v. Zoning Board of Appeals of Town of Huntington*, 121 A.D.2d 447, 503 N.Y.S.2d 141 (2d Dep't 1986).
27. *Sunrise Plaza Associates, L.P. v. Town Board of the Town of Babylon,* 250 A.D.2d 690, 673 N.Y.S.2d 165 (2d Dep't 1998), *lv. denied*, 92 N.Y.2d 810, 680 N.Y.S.2d 55 (1998).
28. *Compare Dost v. Chamberlain-Hellman,* 236 A.D.2d 471, 653 N.Y.S.2d 672 (2d Dep't 1997) *with Dennis v. Zoning Board of Appeals, Village of Briarcliff Manor*, 167 Misc. 2d 555, 637 N.Y.S.2d 266 (Sup. Ct., Westchester Co. 1995).
29. *See* 1998 Practice Commentaries to McKinney's Town Law § 274-b, supplement, p. 349 ("there is no question that an area variance cannot be granted from the specifically enumerated criteria for a particular special permit use as opposed to the general bulk requirements applicable to a use.").
30. 304 A.D.2d 583, 756 N.Y.S.2d 893 (2d Dep't 2003), *lv. granted,* 100 N.Y.2d 511, 766 N.Y.S.2d 165 (2003).
31. 304 A.D.2d 578, 758 N.Y.S.2d 358 (2d Dep't 2003).
32. __ N.Y.2d __, 2003 WL 22998505 (Dec. 23, 2003).
33. 305 A.D.2d 194, 759 N.Y.S.2d 455 (1st Dep't 2003).
34. *149 Fifth Avenue Corp.*, 305 A.D.2d at 194–195, 759 N.Y.S.2d at 455–456 (citation omitted).
35. 301 A.D.2d 987, 755 N.Y.S.2d 458 (3d Dep't 2003).
36. *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 562–563, 176 N.Y.S.2d 598, 605 (1958) ("[w]hen the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid").
37. 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003).
38. The rough proportionality requirement was established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held, in the context of land use exactions imposed as a condition of development approval, that the amount of an exaction must be roughly proportional—that is related both in nature and extent—to the impacts of the proposed development.
39. *Twin Lakes*, 1 N.Y.3d at 106.
40. *Id.* at 103.
41. The Court also noted that the Town interpreted its own code to allow the fees to be subject to an audit under the provisions of sections 118 and 119 of the Town Law.
42. 305 A.D.2d 459, 759 N.Y.S.2d 335 (2d Dep't 2003), *lv. granted*, 100 N.Y.2d 512, 767 N.Y.S.2d 393 (2003).
43. 304 A.D.2d 259, 761 N.Y.S.2d 64 (2d Dep't 2003), *lv. granted*, 100 N.Y.2d 512, 767 N.Y.S.2d 393 (2003).
44. 870 F.2d 911 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989).
45. The Second Circuit's approach, which is designed to ensure that the federal courts do not become "super zoning boards of appeals" flooded by state land use cases, was not only adopted in both cases, but in another decision in 2003, *Huntington Yacht Club v. Incorporated Village of Huntington Bay*, 1 A.D.3d 480, 767 N.Y.S.2d 132 (2d Dep't 2003).
46. *Bower Associates*, 304 A.D.2d at 263, 761 N.Y.S.2d at 68 (citation omitted).
47. *Home Depot, U.S.A., Inc. v. City of Rye*, 259 A.D.2d 547, 684 N.Y.S.2d 908 (2d Dep't 1999), *lv. denied*, 93 N.Y.2d 809, 694 N.Y.S.2d 631 (1999).
48. 309 A.D.2d 1201, 765 N.Y.S.2d 130 (4th Dep't 2003).
49. 3 A.D.2d 86, 767 N.Y.S.2d 451 (2d Dep't 2003).
50. 505 U.S. 1003 (1992).
51. 535 U.S. 302 (2002).
52. *Freidenburg*, 3 A.D.3d at __, 767 N.Y.S.2d at 458.
53. 438 U.S. 104, 124 (1978).
54. 100 N.Y.2d 884, 768 N.Y.S.2d 730 (2003).
55. *See also Green Harbour Homeowners' Association, Inc. v. Town of Lake George Planning Board,* 1 A.D.3d 744, 766 N.Y.S.2d 739 (3d Dep't 2003) (holding that notice given solely by publication in a local newspaper of hearings on applications for subdivision approval, which was the sole means of providing notice required either by the Town Law or the Town's subdivision regulations, accorded the petitioners sufficient notice to survive constitutional scrutiny).
56 309 A.D.2d 863, 765 N.Y.S.2d 898 (2d Dep't 2003).
57 *Crown Communication New York, Inc.*, 309 A.D.2d at ___, 765 N.Y.S.2d at 900–901 (citation omitted).
58 *See Chalian v. Malone,* 307 A.D.2d 619, 762 N.Y.S.2d 707 (3d Dep't 2003); *Cuyle v. Town Board of Town of Oxford*, 301 A.D.2d 838, 753 N.Y.S.2d 613 (3d Dep't 2003), *lv. denied,* 100 N.Y.2d 501, 760 N.Y.S.2d 764 (2003).
59. 307 A.D.2d 972, 763 N.Y.S.2d 660 (2d Dep't 2003).
60. 302 A.D.2d 662, 754 N.Y.S.2d 714 (3d Dep't 2003).
61. 307 A.D.2d 314, 762 N.Y.S.2d 808 (2d Dep't 2003).
62. 307 A.D.2d 1043, 763 N.Y.S.2d 674 (2d Dep't 2003).

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Police Reliance Upon Computerized License and Registration Information as a Basis for Probable Cause

By Lalit K. Loomba

Introduction

Corporation counsel and town and village attorneys throughout the state face false arrest cases on a regular basis. But a fact pattern arising with some frequency poses difficult and unresolved questions: A driver is pulled over for a minor traffic offense and the police, after running a standard computerized check of records maintained by the Department of Motor Vehicles (DMV), discover that his registration has been suspended because of a lapse in insurance coverage. The driver contends that he is insured, and even presents an insurance card recently issued by his insurer. But he is arrested for violating Section 512 of the New York Vehicle & Traffic Law,[1] taken to the stationhouse and booked. The driver posts bail, demonstrates to the DMV that he is insured (and that his registration should not have been suspended), and obtains from DMV a rescission of the suspension of his registration. The charges are thereafter dismissed. Now, perhaps understandably upset, the driver decides to bring an action against the municipality and the arresting officer, asserting that he was subject to a false arrest and that his constitutional rights were violated.

Once "probable cause" is established, the police have a complete defense to a claim for false arrest, whether brought under 42 U.S.C. § 1983 or as a common-law claim. But can probable cause be based on computer records that later turn out to be incorrect? Would the arresting officer be entitled to qualified immunity? As discussed below, some courts have allowed police officers to rely on computerized databases in establishing probable cause to arrest, even if a given record is later determined to be inaccurate. Other courts have determined that reliance upon such records may not establish probable cause, but will support the defense of qualified immunity. In either event, the extent to which courts will permit the police to rely upon computerized records for any purpose may well be limited by the overall accuracy and reliability of the database itself.

Civil Claims for False Arrest

To establish a common law claim for false arrest in New York, a plaintiff must prove that he was intentionally confined, that he was conscious of and did not consent to being confined, and that the confinement was not privileged.[2] These elements are the same regardless of whether the plaintiff brings his claim under the common law, or whether he seeks to assert a violation of his constitutional rights under 42 U.S.C. § 1983.[3]

There are two main factual scenarios in false arrest actions: shoplifting cases and police arrest cases. In a typical shoplifting case, a store security guard will detain someone on suspicion of having stolen property.[4] As codified by the General Business Law, these cases generally turn on whether the person was detained in an "unreasonable manner" or for more than a "reasonable time," and whether there were "reasonable grounds to believe" that a theft had taken place.[5]

As in shoplifting cases, the typical police arrest case will not involve the issues of intent to confine or consent to being confined. Instead, a false arrest claim against a police officer will turn on whether he had probable cause to make the arrest. In this context, probable cause exists when an officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime."[6] The existence of probable cause is a complete defense to a claim for false arrest.[7]

Plaintiff's Options

A plaintiff has several related options in deciding how to prosecute a claim for false arrest. One question is whether to bring the claim under common law or whether to posture the claim as a violation of constitutional rights guaranteed by the Fourth Amendment. Another is whether to bring the case in state or federal court. The plaintiff's choice of forum will dictate the kind of claim he can bring.

A federal district court, as opposed to the New York Supreme Court, is a court of limited jurisdiction. To bring a claim in federal court, a plaintiff

must establish an independent basis for federal subject matter jurisdiction. In the context of a false arrest claim, this is most typically accomplished by alleging a violation of the plaintiff's rights under the Fourth Amendment to the Constitution. Section 1983 creates a right of action for a violation of constitutional rights. A claim under Section 1983 therefore provides "federal question" jurisdiction under 28 U.S.C. § 1331. Once there is a basis for subject matter jurisdiction, a plaintiff could also bring a common-law false arrest claim under the federal court's supplemental jurisdiction provided in 28 U.S.C. § 1367. But absent diversity of citizenship, a plaintiff could not bring a common-law false arrest claim alone in federal court. In state court, on the other hand, a plaintiff has no similar subject matter restrictions and could bring a false arrest case under common law, under Section 1983 or under both theories.

One key advantage to alleging a violation of constitutional rights through a Section 1983 claim is the possibility of recovering attorney's fees. If the plaintiff prevails in a Section 1983 action, he is entitled to attorney's fees under 42 U.S.C. § 1988(b). Moreover, under Section 1988(c), a court has discretion to include expert witness fees in the award of attorney's fees. Under the "American rule," on the other hand, the prevailing party in a common-law claim for false arrest is not entitled to recover attorney's fees.[8]

Another interesting consequence of the choice between a common-law claim and a claim under Section 1983 is the applicability of the defense of qualified immunity. Under federal law, a police officer is entitled to qualified immunity from suit for the deprivation of a constitutional right if (a) the right in question was not "clearly established" at the time of the assumed deprivation or (b) if either (i) it was objectively reasonable for the officer to believe that his conduct did not violate any constitutional rights, or (ii) officers of reasonable competence could disagree on whether the conduct in question violated constitutional rights.[9] Although constitutional rights must be assessed in the context of specific factual scenarios, not all of which have been addressed by the courts, for the most part the right not to be subject to an unreasonable seizure is clearly established.[10] Thus, in false arrest cases, the qualified immunity defense will turn on whether it was objectively reasonable for the officer to believe he had probable cause to make the arrest, or "whether officers of reasonable competence could disagree on whether the probable cause test was met."[11]

There is a full and detailed development of the qualified immunity defense in federal Section 1983 cases,[12] and state courts entertaining Section 1983 claims make reference to that body of case law in evaluating qualified immunity.[13] By contrast, in actions involving only a common-law claim for false arrest, the case law on qualified immunity is much less developed. While some cases suggest that a court applying qualified immunity to a common-law false arrest claim would apply a defense that essentially parallels the qualified immunity defense established under Section 1983 cases,[14] a definitive answer to this issue has not yet been rendered.

Another issue that should be considered is the question of *respondeat superior* liability. In a constitutional claim brought under Section 1983, a municipality cannot be responsible under the doctrine of *respondeat superior* for constitutional deprivations caused by its police officers.[15] Instead, a plaintiff must establish that the violation of his rights was proximately caused by a "municipal policy," a factual issue that can be difficult to prove. In a common-law claim for false arrest, on the other hand, a municipality can be responsible under the doctrine of *respondeat superior* for the torts of a police officer committed while the officer is acting within the scope of his official duties.[16]

Computerized License and Registration Information

As mandated by provisions of the Vehicle & Traffic Law, the New York State Department of Motor Vehicles maintains a computerized database of license and registration information.[17] Information contained in the DMV database is regularly accessed by police statewide in enforcement of the Vehicle & Traffic Law. As one court described it:

> the DMV and the police work hand-in-hand to ensure that the traffic laws are enforced, and in the process of enforcement many documents move back and forth between the police and the DMV, e.g., speeding citations, parking citations, etc. The police rely heavily on the routine, systematic, and continuous record-keeping ability of the DMV for information.[18]

Police departments utilize a computer network known as the New York State Police Information Network (NYSPIN) to access DMV records. NYSPIN is "a statewide computer database that contains outstanding warrants and other information relevant to law enforcement."[19] In addition to maintaining a database of information, NYSPIN interfaces with other agencies, such as the DMV and the National

Criminal Information Center (NCIC), to quickly gather and disseminate information to police stations and police officers in the field.

But what happens when a police officer relies upon DMV records obtained through the NYSPIN database, and the information later turns out to be inaccurate? Is the information obtained through NYSPIN "reasonably trustworthy" and thus a proper basis to establish probable cause? Is reliance on such information "objectively reasonable" and thus a basis to establish a qualified immunity defense?

Recent Decisions

Recent decisions from the Southern District of New York shed some light on these questions. In *Vasquez v. McPherson*,[20] the plaintiff brought Section 1983 claims against New York State troopers, alleging she was subject to false arrest, excessive force and malicious prosecution. Plaintiff was driving on Interstate 287 in Westchester County when she pulled over to the shoulder because she had something in her eye. A New York State Trooper noticed her stopped car and pulled behind her to investigate. The officer asked for her license and registration, and then radioed headquarters and requested a standard DMV inquiry.[21] Headquarters advised him that a person with the plaintiff's name and date of birth had an outstanding warrant for immigration violations issued by the United States Border Patrol in Texas. The officer tried to question the plaintiff to determine whether she was in fact the person with the outstanding warrant, but plaintiff did not cooperate. He arrested her, although it was later learned that the plaintiff was *not* the person actually described in the warrant. On these facts, the Court held that the officer had probable cause to rely on the NYSPIN and DMV records, describing those records as "critical . . . highly probative [and] determinative evidence."[22] In reaching this conclusion, the Court cited decisions from federal circuit courts noting that information contained in the NCIC database provides a reasonable basis for probable cause to arrest.[23]

While *Vasquez* holds that reliance on NYSPIN and NCIC information is a reasonable basis to establish probable cause, the information in that case was not inaccurate—there actually was a valid outstanding immigration warrant issued for a person who happened to have the same name and date of birth as the plaintiff. A more difficult question arises when the information relied upon turns out to be wrong. This situation was recently addressed in *Mayer v. City of New Rochelle*.[24]

In *Mayer,* the plaintiff was driving his car within the City of New Rochelle when he was struck by another car. Police arrived and ran standard license and registration checks on all of the drivers and cars involved in the accident. The NYSPIN report showed that the registration on plaintiff's car had been suspended due to a lapse in insurance coverage. The plaintiff protested, showing an insurance card issued by his new insurer. However, the police arrested plaintiff because he could not produce documentation issued by DMV, as opposed to his insurer, demonstrating that he had a valid insurance policy.[25]

Plaintiff posted bail and the next day went to an office of the DMV. He was told that his registration was in fact suspended, and that to rescind the suspension DMV required a letter from his carrier confirming that a valid policy was in place. Plaintiff had such a letter faxed to DMV that same day proving that he had acquired insurance, whereupon DMV issued a "Receipt of Satisfactory Proof/Rescission of Reg. Suspension."[26] All charges against the plaintiff were thereafter dismissed, and plaintiff filed an action asserting false arrest and false imprisonment claims under 42 U.S.C. § 1983, as well as additional constitutional claims against the City of New Rochelle and members of its police department.

The defendants moved for summary judgment, asserting that they had probable cause to arrest plaintiff because they properly relied on DMV records obtained through the NYSPIN database. The court granted summary judgment, but interestingly did so on the basis of qualified immunity, not probable cause. With regard to probable cause, the Court stated, in *dicta,* that the plaintiff might have avoided summary judgment if he could "establish that the information in the NYSPIN records was 'inapplicable' at the time of his arrest and 'was retained after it became inapplicable through fault of the system.'"[27] But the Court held that it need not decide whether the arresting officers had probable cause to make the arrest because they were "plainly entitled to qualified immunity."[28]

In the context of qualified immunity, the Court in *Mayer* found that "it was objectively reasonable for [the arresting officers] to believe, based on the NYSPIN record, that probable cause existed for [plaintiff's] arrest."[29] The plaintiff argued that NYSPIN records were unreliable, citing to the deposition testimony of one of the officers in which he said he was aware of one prior occasion where there had been a failure to communicate between an insurer and the DMV resulting in an error in DMV's records. But the Court held that this one instance was

"insufficient to show that [the officer's] reliance on the NYSPIN records to establish probable cause for [plaintiff's] arrest was unreasonable."[30] Accordingly, the Court granted summary judgment on the false arrest claim on qualified immunity grounds.

There is a subtle, but important, distinction between the existence of probable cause—which would be a direct and complete defense to a claim of false arrest—and a finding that it was "objectively reasonable" to believe there was probable cause—which supports the defense of qualified immunity. The Second Circuit has referred to the former case as "actual probable cause," and the latter as "arguable probable cause."[31] If actual probable cause is established, there is no liability on the claim, and no basis for *respondeat superior* liability on common-law claims against the municipality. If only arguable probable cause is established, the individual officer is immune from suit, but the plaintiff would still be entitled to demonstrate the lack of *actual* probable cause to make the arrest, and thus subject the municipality, as opposed to the individual officer, to possible liability on common-law claims.

In *Mayer,* the Court held that there was arguable probable cause, thus leaving open the question of whether reliance on an inaccurate NYSPIN record would establish actual probable cause to make the arrest. Hence, if the plaintiff in *Mayer* had alleged a common-law claim for false arrest, in theory he could have re-filed his action in state court and continued to pursue such a claim against the municipality on the basis of *respondeat superior*.[32]

Errors in the System vs. Systematic Errors

As noted above, in *Mayer,* the Court suggested that the plaintiff could defeat a probable cause defense if he could "establish that the information in the NYSPIN records was 'inapplicable' at the time of his arrest and 'was retained after it became inapplicable through fault of the system.'"[33] The Court in *Mayer* adopted this formulation from the New York Supreme Court Appellate Division's decision in *Moscatelli v. City of Middletown.*[34] Thus, according to *Moscatelli*, and as suggested by *Mayer,* an arrestee could successfully challenge probable cause by demonstrating that the computerized information leading to his arrest was inaccurate at the time of his arrest.

But the existence of an error in a DMV record available to the police through NYSPIN should not affect the existence of probable cause. As the United States Supreme Court stated, the probable cause "standard allows some room for mistakes, provided those mistakes are those of reasonable men, acting on facts leading sensibly to their conclusions of probability."[35] In *United States v. Towne,*[36] the Second Circuit upheld the validity of probable cause based on an out-of-state arrest warrant, even where the warrant was later found to be inactive. And in *Johnson v. Harron,*[37] the District Court found that it was reasonable to base probable cause to arrest on information contained in the DMV database, even though the information later turned out to be erroneous.

While an inaccuracy in any given record in the DMV database arguably should not affect probable cause, reliance on computerized information to establish probable cause could be unreasonable if error pervades the computerized database. This distinction was recognized by Justice O'Connor in *Arizona v. Evans.*[38] In *Evans,* the United States Supreme Court created an exception to the exclusionary rule where a police officer relies on police records containing inaccurate information resulting from clerical errors of court employees. But in a concurring decision, Justice O'Connor wrote that it would not be reasonable for police to rely on a record-keeping system that had no internal mechanism to ensure accuracy and that routinely led to false arrests.[39]

Justice O'Connor's gloss on the exception to the exclusionary rule created by *Evans* was applied by the Second Circuit in *United States v. Santa.*[40] In *Santa,* a criminal defendant was arrested on an outstanding warrant posted in NYSPIN, which was later determined to have been vacated seventeen months prior to his arrest. The Second Circuit affirmed the conviction on the basis of *Arizona v. Evans,* but in doing so the Court noted that the officers had no reason to specifically doubt the accuracy of the warrant and no reason to "doubt the accuracy of the NYSPIN system generally."[41] The implication for false arrest cases is that if the NYSPIN system was generally inaccurate and officers had reason to doubt the reliability of records obtained through the system, reliance upon such records may not be proper to establish probable cause.

Conclusion

The police should be entitled to rely on computerized license and registration information to establish probable cause to arrest regardless of whether a given record later turns out to be inaccurate; and the cases are generally consistent with that position. However, reliance on such records will be limited by the overall accuracy and reliability of the computerized database itself. The open question is how many errors in the system must be demonstrated before a court will determine that reliance upon a computerized database will not support a defense to a claim for false arrest.

Endnotes

1. Section 512 of the Vehicle & Traffic Law is entitled "Operation while registration or privilege is suspended or revoked." A violation of Section 512 is a misdemeanor. Under Section 140.10 of the New York Criminal Procedure Law, a police officer is authorized to make a warrantless arrest of a person he has probable cause to believe has committed a crime, including a misdemeanor. N.Y. Crim. Proc. Law § 140.10.
2. *Broughton v. State of New York*, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87, 93 (1975).
3. *See Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).
4. *See, e.g., Malanga v. Sears, Roebuck & Co.*, 109 A.D.2d 1054, 1055, 487 N.Y.S.2d 194, 196 (4th Dep't 1985).
5. N.Y. Gen. Bus. Law § 218.
6. *Weyant*, 101 F.3d at 852.
7. *Weyant*, 101 F.3d at 852 (citing cases).
8. *See, e.g., Pruitt v. Carney*, 54 F. Supp. 2d 169, 170 (E.D.N.Y. 1999).
9. *See Weyant v. Okst*, 101 F.3d 845, 857 (2d Cir. 1996).
10. *See Cook v. Sheldon*, 41 F.3d 73, 78 (2d Cir. 1994).
11. *Golino v. City of New Haven*, 950 F.2d 864, 879 (2d Cir. 1991).
12. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48 (2d Cir. 2003); *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003).
13. *See, e.g., Liu v. New York City Police Dep't*, 216 A.D.2d 67, 627 N.Y.S.2d 683 (1st Dep't 1995).
14. *See Arteaga v. State of New York*, 72 N.Y.2d 212, 226, 532 N.Y.S.2d 57, 65 (1988); *Baez v. City of Amsterdam*, 245 A.D.2d 705, 707, 666 N.Y.S.2d 312, 313 (3d Dep't 1997).
15. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).
16. *See Raysor v. Port Auth. of N.Y. & N.J.*, 768 F.2d 34, 38 (2d Cir. 1985); *Greenfield v. City of New York*, 2000 U.S. Dist. LEXIS 1164, at *33–34 (Feb. 3, 2000).
17. *See* N.Y. Veh. & Traf. L. § 401[2] (registrations) and §§ 354, 514[1][a] (licenses).
18. *People v. Etienne*, 192 Misc. 2d 90, 745 N.Y.S.2d 867 (Dist. Ct., Nassau Co. 2002).
19. *United States v. Santa*, 180 F.3d 20, 23 (2d Cir. 1999).
20. 285 F. Supp. 2d 334 (S.D.N.Y. 2003).
21. *Id*. at 337.
22. *Id*. at 338.
23. *Id*. at 341.
24. 2003 U.S. Dist. LEXIS 8761 (May 27, 2003).
25. *Id*. at *3–4.
26. *Id*. at *5–6.
27. *Id*. at *14 (quoting *Moscatelli v. City of Middletown*, 252 A.D.2d 547, 675 N.Y.S.2d 639 (2d Dep't 1998)).
28. *Id*. at *15.
29. *Id*. at *18.
30. *Id*. at *21–22.
31. *Coons v. Casabella*, 284 F.3d 437, 442 (2d Cir. 2002).
32. The six-month tolling provision in CPLR 205 would apply to the timeliness of any such action.
33. *Mayer* at *14 (quoting *Moscatelli v. City of Middletown*, 252 A.D.2d 547, 675 N.Y.S.2d 639 (2d Dep't 1998)).
34. 252 A.D.2d 547, 675 N.Y.S.2d (2d Dep't 1998).
35. *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (internal quotes omitted).
36. 870 F.2d 880, 884–85 (2d Cir. 1989).
37. 1995 U.S. Dist. LEXIS 7328 (N.D.N.Y. 1995).
38. 514 U.S. 1 (1995).
39. *Id*. at 17 (O'Connor, J., concurring).
40. 180 F.3d 20 (2d Cir. 1999).
41. *Id*. at 27 (citing *Evans*, 514 U.S. at 17 (O'Connor, J., concurring)).

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Running a Local Municipal Ethics Board: Is Ethics Advice Confidential?

By Steven G. Leventhal and Susan Ulrich

The laws regulating government ethics are designed to encourage high standards of conduct among public officials, and to promote public confidence in government. To help achieve these purposes, section 808 of New York's General Municipal Law authorizes counties and other local governments to establish their own ethics boards. Among the most important functions of a government ethics board is the rendering of ethics advice to public officials within its jurisdiction.

For example, a corrections officer employed at a local jail might ask the municipal ethics board whether his secondary employment as a private security guard would conflict with his official duties. Or a legislator might ask whether she may vote in matters affecting her relative's employer.

Most officials, like most people, are honest and want to do the right thing. But many ethical issues are ambiguous, and must be decided under intense and competing pressures. A municipal work force typically includes men and women of varied educational backgrounds and work experience. Even the most sophisticated public official may need ethics advice. But many government workers are unsophisticated, and have neither the ability to interpret ambiguous laws, nor the resources to freely consult with a lawyer.

Free and accessible ethics advice helps to guide honest officials, and serves to protect them from unwarranted allegations of misconduct. Courts give great deference to the advisory opinions of government ethics boards.[1]

Logic and experience indicate that public officials are more likely to seek ethics advice when their inquiries are treated as confidential. A degree of privacy is implicit in the advisory function of local municipal ethics boards. The boards may render advice only to government officers and employees, and not to the general public.[2]

In drafting advisory opinions, many local ethics boards omit the identity of the inquiring official. But this practice may not always preserve the inquiring official's anonymity, particularly in small municipalities where a statement of the facts may be enough to make the identity of the inquiring official self-evident.

There is a clear public policy justification for confidentiality in the exercise of a board's advisory function. By protecting the privacy of inquiring officers and employees, ethics boards encourage officials to seek ethics advice, and further the statutory purpose of fostering high standards of conduct.

"Free and accessible ethics advice helps to guide honest officials, and serves to protect them from unwarranted allegations of misconduct."

However, there is also a strong and growing policy against secrecy in government. Even the confidential communications between an attorney and a client are less apt to be treated as privileged if they occur in a government setting.[3]

Taken together, the Freedom of Information Law ("FOIL")[4] and the Open Meetings Law ("OML")[5] are a powerful legislative declaration that public policy disfavors government secrecy.

In section 84 of FOIL, the legislature declared that:

> the people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

In section 100 of OML, the legislature declared that:

> It is essential to the maintenance of a democratic society that the public business be performed in an open

> and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Application of FOIL to the Advisory Function of a Local Ethics Board

FOIL expressly includes boards and commissions among the agencies that are required to make records available for public inspection.[6] A local municipality may not exempt its ethics board from compliance with FOIL.[7] But not all records must be disclosed. An agency may withhold records when disclosure would result in an unwarranted invasion of personal privacy.[8] Generally, public officials have a reduced expectation of privacy in records that relate to the performance of their official duties, and a greater expectation of privacy in records that do not.[9]

Also, an agency may withhold inter-agency or intra-agency records, except those that are statistical data, staff instructions that affect the public, final agency policy or determinations, or external audits.[10] In particular, an agency may deny access to documents that consist only of "opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions, or recommendations" because their disclosure would hinder the agency's deliberative functions.[11] For example, the records of an advisory panel designated to review the unsatisfactory rating of a teacher were deemed to be non-binding recommendations prepared to assist the decision maker, and were exempt from disclosure.[12]

Applying these principles, the New York Committee on Open Government concluded that the advisory opinion of a town ethics board would be exempt from disclosure unless the town board adopted the opinion as its own (thereby making it a final determination), and found that the subject officer or employee engaged in official misconduct.[13]

Application of OML to the Advisory Function of a Local Ethics Board

OML generally applies to a board or commission, even where the entity is advisory and without binding authority.[14] As in the case of FOIL, a local municipality may not exempt its ethics board from compliance with OML.[15] Any local enactment that restricts public access more than OML is expressly superceded by section 110(1) of OML.

OML does not apply to quasi-judicial proceedings.[16] A quasi-judicial proceeding is one in which there is an opportunity to be heard, evidence is presented, and a decision is made.[17] The authority to make a final determination in a controversy is an essential element of a quasi-judicial proceeding.[18] Many ethics boards are empowered to investigate complaints, conduct hearings, make determinations, and impose sanctions. But while the investigatory function of a local ethics board may be quasi-judicial and thus exempt from OML, the advisory function does not normally result in a final determination and thus would not be exempt from OML.

OML section 105(1) specifies the grounds on which a government body may exclude the public by entering into executive session. The grounds for conducting an executive session under OML are limited, however, and they are not identical to the justifications for withholding documents from disclosure under FOIL.

The grounds for conducting an executive session are "narrowly scrutinized."[19] Among the matters that may be considered in executive session are those that relate to a current or future investigation or criminal prosecution; "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation. . . ."[20] If the inquiry before the board of ethics involves a particular person and relates to one or more of these issues, the board may consider the matter in executive session.[21] While many inquiries will certainly present such issues, some may not.

The confidentiality of an ethics board's advisory function may ultimately depend on how the board frames the issue under consideration. If the issue is framed narrowly, and the advice applies only to the inquiring official, the board's opinion is more likely to be exempt from disclosure under FOIL; and it is more likely that the board's deliberations may be conducted in executive session under OML. But issues that are framed in broad policy terms may result in determinations that must be disclosed under FOIL, and proceedings that must be conducted in public under OML. Because public officials are more likely to seek ethics advice when their inquiries are treated as confidential, local municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of inquiring officials.

Endnotes

1. *Byer v. Town of Poestenkill,* 232 A.D.2d 851, 853, 648 N.Y.S.2d 768 (3d Dep't 1996).
2. N.Y. Gen. Mun. Law § 808; Op. State Compt. 74-583; 24 Op. State Compt. 125, 1968.
3. *See* Salkin, *The Erosion of Government Lawyer-Client Confidentiality*, THE URBAN LAWYER, Spring 2003.
4. N.Y. Pub. Off. Law, art. 6.
5. N.Y. Pub. Off. Law, art. 7.
6 N.Y. Pub. Off. Law § 86(3).
7. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).
8. N.Y. Pub. Off. Law § 87(2)(b).
9. *Id*. (Adv. Op. 8922), citing, *inter alia*, *Farrell v. Village. Bd. of Trustees of Village of Johnson City*, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct., Broome Co. 1975); *Gannett Co., Inc. v. Monroe County,* 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954, 411 N.Y.S.2d 557 (1978); *Sinicropi v. County of Nassau,* 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980); *In re Wool,* Sup. Ct., Nassau Co., N.Y.L.J., Nov. 22, 1977.
10. N.Y. Pub. Off. Law § 87(2)(g)(i)-(v).
11. *Town of Oyster Bay v. Williams,* 134 A.D.2d 267, 520 N.Y.S.2d 599 (2d Dep't 1987). *But see Syracuse United Neighbors v. City of Syracuse,* 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *app. dismissed*, 55 N.Y.2d 995, 449 N.Y.S.2d 201 (1982) (granting access to the documents of two advisory committees where the records were kept and held by the municipality).
12. *McAulay v. Bd. of Education of City of New York.*, 61 A.D.2d 1048, 403 N.Y.S.2d 116, *aff'd*, 48 N.Y. 2d 659, 421 N.Y.S.2d 560 (1978).
13. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 8922 (1995).
14. N.Y. Comm. on Pub. Acc. Rec., Adv. Op. 836.
15. N.Y. Comm. on Open Gov't, OML Adv. Ops. 2269 (1993); 2805 (1997).
16. N.Y. Pub. Off. Law § 108(a).
17. *Hammer v. Veteran,* 86 Misc. 2d 1056, 1058, 306 N.Y.S.2d 170, 171 (Sup. Ct., Westchester Co. 1975), *aff'd*, 53 A.D.2d 629, 385 N.Y.S.2d 1017 (2d Dep't 1976).
18. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 2917.
19. *Weatherwax v. Town of Stony Point,* 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983).
20. N.Y. Pub. Off. Law §§ 105(1)(c), 105(1)(f).
21. N.Y. Comm. on Open Gov't, OML Adv. Ops. 2269 (1993); 2805 (1997).

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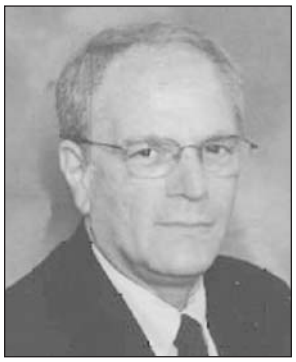
Chambers v. Old Stone Hill: Court of Appeals Rejects Public Policy Argument and Declines to Extinguish Private Contractual Rights

By Steven M. Silverberg and Katherine Zalantis



In a case of first impression, the Court of Appeals in *Chambers v. Old Stone Hill Road Associates*[1] recently established that the Telecommunications Act of 1996[2] does not trump the rights of private landowners to enforce restrictive covenants. At issue was the construction of a wireless telecommunications facility consisting of a 120-foot monopole (along with a 660-square-foot two-story equipment building and commercial parking lot) (the "Facility") in the middle of a rural section of the Town of Pound Ridge, New York, surrounded by single-family homes. The Supreme Court determined,[3] as affirmed by the Appellate Division,[4] that the restrictive covenant at issue prohibited the Facility's construction. And in a six-to-one decision, the Court of Appeals affirmed both lower court decisions.[5]

Factual and Procedural Background

The restrictive covenant at issue, which burdens the defendant-developer Old Stone Hill's land, restricted use of the property to single-family homes. Plaintiffs are landowners and homeowners whose property is benefited by the restrictive covenant. Old Stone Hill subdivided and developed a larger parcel for single-family residential use and actually sold one parcel of land to two of the plaintiffs (the Chambers). Thereafter, Old Stone Hill abandoned the development of single-family homes and entered into a lease with defendant Verizon to place the Facility in close proximity to Plaintiffs' homes.

As ultimately determined by the courts, Old Stone Hill's action violated the restrictive covenant, which restricted development to single-family homes and limited the use to residential purposes. The restrictive covenant provided that grantee shall:

> not erect or permit upon any portion of the said premises any building except detached residential dwelling houses each for occupancy and use of one family . . . excepting, however, the garages or other private buildings used in connection with such occupancy. . . .

And further specifically prohibited any commercial enterprises as it barred:

> any trade or business **whatsoever**, or any boarding house, vacation resort, hospital or convalescence home, restaurant, or any establishment for the sale or consumption of liquor, or for any other purpose which might be characterized or deemed by other residents of the locality to be a nuisance.

In assessing Verizon's application to construct the Facility, the Town Board of the Town of Pound Ridge considered various sites, including the Old Stone Hill's parcel of land, as well as land owned by the Town's Department of Public Works. The Town ultimately approved the Facility's construction on Old Stone Hill's land, finding that this site was the most likely to result in a "single site solution" for wireless service in the Town. But before the issuance of any permit to Verizon (including both the special permit and the building permit), Plaintiffs commenced this action against the defendants Old Stone Hill and Verizon to enforce the restrictive covenant.[6] In addition, once the special permit was issued, Chambers (and two other plaintiffs) commenced a separate Article 78 proceeding against the Town of Pound Ridge seeking to overturn the Town Board's decision granting Verizon the special permit.[7]

The parties cross-moved for summary judgment in this action. Plaintiffs claimed there was no issue of fact as to the applicability of the restrictive covenant to Old Stone Hill's property. Defendants claimed that since the Facility was now constructed, Plaintiffs were guilty of laches. Further, Defendants claimed

that the restrictive covenant did not apply to Old Stone Hill's property and was vague. Alternatively, Defendants argued that the restrictive covenant provided no substantial benefit to Plaintiffs and therefore, should be extinguished under the provision of Real Property Actions and Proceedings Law § 1951 ("RPAPL").

The Supreme Court granted Plaintiffs' motion on two of its causes of action. The Court issued an injunction finding that Plaintiffs' lands were benefited by the restrictive covenant and that the restrictive covenant clearly prohibited the Facility. The Court found that Defendants were put on notice in this action as well as in the Article 78 proceeding, that Plaintiffs were seeking to prohibit the Facility, but Defendants nonetheless, proceeded "at their own peril" and constructed the Facility while the action was pending. Noting that the action was commenced before any permits were issued, the Court found the Plaintiffs were not guilty of laches. Further, the Court found that Defendants' actions were committed with knowledge that they were acting in violation of the restrictive covenant, and the Court ruled that Defendants' position "does not appeal to the equitable conscience." Finally, the Court held that the Facility had a potential impact on the value of the Plaintiffs' property and therefore the restrictive covenant was of sufficient benefit to the Plaintiffs to avoid extinguishing the restrictive covenant under RPAPL § 1951. Thus, the Supreme Court issued a permanent injunction against the violation of the restrictive covenant and ordered the Facility's removal.

In a companion decision issued that same day, however, the Supreme Court denied the Article 78 petition.[8] The Court ruled that the Town Board's decision was not arbitrary and capricious in approving the special permit and that the decision had a rational basis. No appeal was taken from this determination.

The Defendants appealed from the Supreme Court's decision ordering the Facility's removal. Although the Defendants abandoned many of the arguments made before the Supreme Court, they raised for the first time on appeal to the Appellate Division, Second Department, that the restrictive covenant's enforcement violates the Telecommunications Act of 1996[9] ("TCA"). But in upholding the Supreme Court's decision, the Second Department concluded that the TCA did not "expressly or impliedly preempt" private citizens from enforcing restrictive covenants.[10]

Defendants sought leave to appeal from the Court of Appeals, which the Court granted.[11]

Court of Appeals' Decision

The Court of Appeals considered this matter of first impression—whether the TCA preempted Plaintiffs from enforcing the restrictive covenant—and in so doing, explained and reaffirmed two of its previous decisions. The restrictive covenant's intent was to preserve the neighborhood's residential character, which the Court of Appeals ruled was a reasonable limitation. In upholding the restrictive covenant, the Court rejected Defendants' two challenges to its enforcement: (i) that the restrictive covenant offends public policy and therefore, Plaintiffs' contractual rights should yield to public policy; and (ii) that the restrictive covenant should be extinguished under RPAPL § 1951.

Public Policy: the TCA

The Defendants argued that the enforcement of the restrictive covenant was tantamount to a prohibition of service in violation of the TCA, because enforcement of the restrictive covenant would eliminate the only wireless site in the Town. The TCA provides that a state's or local government's regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[12] Defendants claimed that enforcing the restrictive covenant would effectively prohibit wireless service in the Town of Pound Ridge.

The Court of Appeals explained that the Town Board's finding that Old Stone Hill's site "might be the best single site solution"[13] did not mean that Old Stone Hill's site was the *only site* capable of providing wireless coverage in Pound Ridge. Even though Old Stone Hill's site may have had the best chance of being the only site necessary to meet the telecommunication needs of Pound Ridge and another site may have required additional antennas, citing *Sitetech Group Ltd. v. Board of Zoning Appeals of the Town of Brookhaven*,[14] the Court ruled that Old Stone Hill's site was *not* the only site in Pound Ridge that could accommodate a wireless facility. In *Sitetech*, the United States District Court, Eastern District of New York upheld a zoning board's denial of a special use permit on the grounds that there were alternate sites even though the alternate sites would not have completely closed the gaps and would have required the erection of additional antennas. The Court of Appeals also noted that the Town itself conceded that there were alternate sites and that during the review process, Verizon was alternatively considering and applied for another site (on land owned by the Town). Thus, the Court held that Plaintiff's contractual right (the restrictive covenant) "in no way

denies wireless telecommunications services in the Town of Pound Ridge."[15]

Further, the majority of the Court addressed the dissent's purported reliance upon a leading Second Circuit TCA case, S*print Spectrum, L.P. v. Willoth*[16] and ruled that *Willoth* was inapposite for three reasons. First, unlike in *Willoth*, the issue in this case was the enforceability of the restrictive covenant and not the Town's "separate and distinct" authority to grant the permit.[17] Second, the TCA's ban against the prohibition of wireless service applies to "State or local government(s) or instrumentalit(ies)," not individual citizens' efforts to enforce their rights. Third, *Willoth* did not involve private contract rights as that case involved a municipality's rejection of a wireless service application. Further, the Court of Appeals noted that the Second Circuit declined to place the TCA's public policy over all other considerations, as the Second Circuit held that: "[w]e do not read the TCA to allow the goals of increased competition and rapid deployment to trump all other important considerations, including the preservation of the autonomy of the states and municipalities."[18]

Public Policy: *Knowlton* and *Crane*

The Court also rejected Defendants' policy argument that the Town Board's granting of the special permit negated the restrictive covenant and that the decision in the companion Article 78 proceeding upholding the issuance of the special permit precluded Plaintiffs from enforcing the restrictive covenant. The Court relied on its decision in *Friends of the Shawangunks, Inc. v. Knowlton*,[19] where the Court held that "a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance."[20] Conversely, the *Knowlton* Court held that a permit for a use allowed by a zoning ordinance "may not be denied because the proposed use would be in violation of a restrictive covenant."[21] Thus, the Town Board's issuance of the special permit to construct the Facility is wholly "separate and distinct" from Plaintiffs' right to enforce the restrictive covenant. The Court specifically relied upon *Knowlton's* pronouncement that:

> the use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of a private agreement.[22]

The Court held the Town Board, therefore, could not consider the restrictive covenant nor deny Verizon's application based upon the restrictive covenant. In addition, the Town Board could not enforce the restrictive covenant—only Plaintiffs could enforce that private right. By separately dismissing the Article 78 proceeding challenging the issuance of the Special Permit in one decision and on the same day issuing a decision enforcing the restrictive covenant, the Court determined that the Supreme Court correctly refused to allow the Town Board's decision to override Plaintiffs' contractual rights. In conclusion, the Court of Appeals determined that the Defendants and the Town could not negate the restrictive covenant by simply ignoring it and proceeding with the permit process and construction.[23]

The Court also rejected Defendants' interpretation of its decision in *Crane Neck Ass'n, Inc. v. City of New York City/Long Island County Services Group*[24] to support their argument that the restrictive covenant violates public policy. In *Crane*, there was a specific legislative enactment precluding or curtailing even local municipal input and selection of appropriate locations for certain facilities.[25] In that decision, the Court extended the statute's reach by voiding a restrictive covenant that prohibited such a facility, holding that the statute could not have intended to grant private parties greater authority than municipalities in locating these facilities. But the Court of Appeals found that no analogy could be made between the legislative enactment in *Crane* (the Mental Hygiene Law) and the TCA. Unlike the Mental Hygiene Law, the TCA expressly preserves local authority over the location and placement of wireless communications towers and therefore, specifically permits municipalities to restrict the use at particular sites.

In ruling that the enforcement of the restrictive covenant in that case would be contrary to public policy, the *Crane* Court extended the Mental Hygiene Law to private contracts. There, the restrictive covenant limited the use of the premises to a "single family dwelling," and therefore, necessarily prohibited a group home for eight mentally disabled individuals who were in need of uninterrupted supervision. The relevant statute in *Crane*—the Mental Hygiene Law—was enacted to provide for the fair distribution of community residences for the mentally disabled and to prevent "legal battles that had impeded the community residence program."[26]

Unlike the TCA, the Mental Hygiene Law does not give municipalities approval authority—only the

right to object. Mental Hygiene Law § 41.34, entitled "site selection of community residential facilities," removed from local government the discretion to plan the location of community residential facilities for the mentally disabled. Specifically, once a site has been proposed for a residential facility for the disabled, a municipality must, within forty (40) days, either: (i) approve the proposed site; (ii) "suggest one or more suitable sites" within its jurisdiction which could accommodate such a facility; or (iii) object to the facility on the basis that there will be a "concentration" of community residential facilities for the mentally disabled.[27] In the event a municipality objects to a site on the basis of a concentration of facilities, Mental Hygiene Law § 41.34 provides for an expedited resolution as the statute: (i) gives the sponsoring agency the right to request an "immediate hearing;"[28] (ii) requires that a hearing be conducted within fifteen days of the request;[29] and (iii) mandates that a decision be rendered within thirty (30) days of the hearing.[30] In reviewing an objection, a reviewing authority under the Mental Hygiene Law may only consider the need for facilities and the "existing concentration"[31] of such facilities. A municipality's objection may only be sustained if "the nature and character of the area in which the facility is to be based would be substantially altered as a result of the establishment of the facility."

The *Crane* Court in extending the Mental Hygiene Law's reach to private contracts noted that if municipalities were not permitted to regulate the location of such facilities, the legislature clearly did not intend to grant private individuals greater authority. Accordingly, in noting the state's ability to impair private contracts to protect the general good of the public, the *Crane* Court held that the state's interest "in protecting the welfare of mentally and developmentally disabled individuals" trumped private contract rights. Thus, that Court ruled that the restrictive covenant could not be equitably enforced.

Here, the Court of Appeals held that in contrast to the Mental Hygiene Law in *Crane*, Congress expressly recognized the importance of local land use authority under the TCA and the TCA specifically preserves local planning and zoning. Congress in the TCA preempted jurisdiction over wireless telecommunications facilities except that it also specifically chose to "preserve *all local zoning authority* 'over decisions regarding the placement, construction, and modification of personal wireless service facilities.'"[32] Thus, the Court held that "there is no comparable public policy being transgressed, indeed no preemption that might motivate the Court to extend a statutory mandate to extinguish private rights."[33]

RPAPL § 1951

In addition, the Court rejected Defendants' argument that the restrictive covenant should be extinguished under RPAPL § 1951. The Court reiterated the standard it established in *Orange and Rockland Utilities, Inc. v. Philwold Estates, Inc*,[34] to extinguish a restrictive covenant under RPAPL § 1951: "[t]he issue is not whether [the party seeking the enforcement of the restriction] obtains any benefit from the existence of the restriction but whether in a balancing of the equities it can be, in the wording of the statute, 'of *no* actual and *substantial benefit*.'"[35] The Court noted that both lower courts found that Defendants failed to demonstrate that Plaintiffs did not derive a benefit from the restrictive covenant and "given the ample support in the record" for this conclusion, this affirmed factual finding was beyond the scope of the Court's review.

Further, the Court also ruled that the lower courts properly balanced the equities finding that the lower courts discounted Verizon's alleged hardship. The Appellate Division determined that the Defendants' hardships are "largely self-created,"[36] because they proceeded to construct the cellular tower even though they had knowledge of the restrictive covenant and Defendants' intent to enforce the covenant. Again, the Court held that these affirmed factual findings were supported by the record and beyond the scope of its review.

Conclusion

The Court's ruling is important from a general perspective in that it clarifies the Court of Appeals' position on several significant land use issues.

First, it makes clear that the provision of wireless services, while important, does not override all other considerations. The availability of alternative sites, even when the result may be to require more than one site, removes any claim that the inability to construct a wireless facility at a specific site, in and of itself, constitutes a prohibition of wireless service.

Second, private restrictive covenants, when they are clear and provide a benefit, are enforceable against the erection of wireless facilities.

Third, it limited the application of the *Crane* case to situations where there is a clear restriction on municipal authority.

Last, the Court reaffirmed, in the clearest language, that there is a separation between the obligations of a municipality to grant permits and the right to enforce private agreements restricting the use of land as established by the Court in *Knowlton*.

Endnotes

1. 2004 WL 330080 (February 24, 2004).
2. 47 USC § 151 *et seq.*
3. *Chambers v. Old Stone Hill Road Assoc.* (Sup. Ct., Westchester Co., Index No. 00-044475, Cowhey, J., November 14, 2001).
4. *Chambers v. Old Stone Hill Road Assoc.*, 303 A.D.2d 536, 757 N.Y.S.2d 70 (2d Dep't 2003).
5. *Chambers v. Old Stone Hill Road Assoc.*, 2004 WL 330080 (February 24, 2004).
6. *Chambers v. Old Stone Hill Road Assoc.* (Sup. Ct., Westchester Co., Index No. 00-044475, Cowhey, J., November 14, 2001).
7. *Sorkin v. Simkins* (Sup. Ct., Westchester Co., Index No. 7498/00, Cowhey, J., November 14, 2001).
8. *Id*.
9. 47 USC §§ 151 *et seq.*
10. *Chambers v. Old Stone Hill Road Assoc.*, 303 A.D.2d 536, 538, 757 N.Y.S.2d 70, 71 (2d Dep't 2003).
11. *Chambers v. Old Stone Hill Road Assoc.*, 100 N.Y.2d 506, 763 N.Y.S.2d 812 (2003).
12. 47 USC § 332(c)(7)(B)(i)(II).
13. *Chambers* at 2 *(unofficial page cite)*.
14. 140 F. Supp. 2d 255 (E.D.N.Y. 2001).
15. *Chambers* at 2 *(unofficial page cite).*
16. 176 F.3d 630 (2d Cir. 1999).
17. *Chambers* at 4 *(unofficial page cite), relying upon Knowlton, see infra.*
18. *Chambers* at 4 *(unofficial page cite), relying upon Willoth* at 639.
19. 64 N.Y.2d 387, 487 N.Y.S.2d 543 (1985).
20. *Id*. at 392.
21. *Id*.
22. *Id*.
23. *Chambers* at 4 (*unofficial page reference*).
24. 61 N.Y.2d 154, 472 N.Y.S.2d 901 (1984), *cert denied*, 469 U.S. 804 (1984).
25. Mental Hygiene Law § 41.34.
26. *Crane* at 163.
27. Mental Hygiene Law § 41.34(c)(1).
28. Mental Hygiene Law § 41.34(c)(5).
29. *Id*.
30. *Id*.
31. *Id*.
32. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) (emphasis added); 47 U.S.C. § 332(c)(7).
33. *Chambers* at 3 *(unofficial page cite)*.
34. 52 N.Y.2d 253, 418 N.E.2d 1310, 437 N.Y.S.2d 291 (1981).
35. *Chambers* at 3 *(unofficial page cite), relying upon Orange & Rockland Util. v. Philwold Estates*, 52 N.Y.2d 253 (1981) (emphasis in original).
36. *Chambers* at 3 *(unofficial page cite), relying upon Chambers v. Old Stone Hill Road Assoc.*, 303 A.D.2d 536, 537, 757 N.Y.S.2d 70 (2d Dep't 2003).

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Public Sector Labor and Employment Law Update

By Sharon N. Berlin and Richard K. Zuckerman

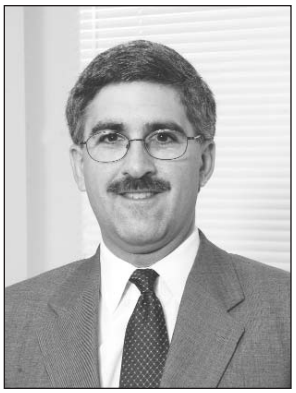
I. Recent Court Decisions

A. Employee Benefits May Favor Older Workers

In *General Dynamics Land Systems, Inc. v. Cline*,[1] the United States Supreme Court upheld provisions in a collective bargaining agreement that limited the company's obligation to provide health benefits for subsequent retirees to then-current workers who were at least 50 years old, and rejected claims that the provisions violated the Age Discrimination in Employment Act and state law. Employees who were at the time between age 40 and 50 had claimed that the agreement unlawfully discriminated against them based on their age. The EEOC agreed and Cline subsequently sued for age discrimination. The District Court dismissed, reasoning that there was no cause of action for reverse age discrimination and holding that the ADEA did not protect younger workers from discrimination in favor of older workers. The Sixth Circuit Court of Appeals reversed, reasoning that the ADEA's prohibition on discrimination was clear and that, had the Act been intended to protect only older workers against younger workers, it would have so specified. The Supreme Court held that the ADEA's text, structure, purpose, history and relationship to other statutes showed that the statute was not intended to stop an employer from favoring older employees over younger ones.

B. General Municipal Law § 207-c Does Not Require a Heightened Risk Standard

General Municipal Law § 207-c governs work-related disability benefits for police officers, correction officers and deputy sheriffs. In *Theroux v. Reilly*,[2] the Court of Appeals reversed Appellate Division orders in three separate Article 78 proceedings in which the lower courts had upheld denials of applications for General Municipal Law § 207-c benefits after applying a "heightened risk" requirement. The *Theroux* Court found that, in order to be eligible for § 207-c benefits, a covered employee need only prove a "direct causal relationship between job duties and the resulting illness or injury."



In so doing, the Court's decision effectively returned the state of the law on General Municipal Law § 207-c to its pre-*Balcerak* condition. In 1999, the Court of Appeals had issued a decision in *Balcerak v. County of Nassau*,[3] which was subsequently interpreted by the lower courts to require municipal employees to prove that they had been injured while performing a task related to the heightened risks and duties in law enforcement in order to receive § 207-c benefits.

C. Firing a Teacher for Being a Member of the North American Man/Boy Love Association Does Not Violate the Teacher's First Amendment Rights

Melzer v. Bd. of Educ. of the City Sch. Dist. of the City of New York[4] involved an action pursuant to 42 U.S.C. § 1983, brought by a former high school teacher who was a member of the North American Man/Boy Love Association (NAMBLA), a group that advocates sexual relations between men and boys. The teacher alleged that his termination for belonging to NAMBLA violated the First Amendment's protection of unpopular speech and association rights.

In order to determine whether the teacher's First Amendment rights were violated, the Second Circuit Court of Appeals applied the *Pickering*[5] balancing test, which requires a court to "balance the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[6]

The Court held that, although the teacher's freedom to associate with and advocate for NAMBLA is protected by the First Amendment, the City Board of Education met its burden under *Pickering* by demonstrating that the teacher's association, and degree of involvement, with NAMBLA caused disruption to the school's mission and operations justifying the Board's actions in terminating him. In so doing, the court reasoned as follows:

> Melzer's position as a school teacher is central to our review. He acts *in loco parentis* for a group of students that includes adolescent boys. *See Vermonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). At the same time, he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators. The Board contends as well that parental concern would compromise the competitive position of this high school vis-à-vis other elite high schools in New York City. While not a central concern, this also matters.[7]

The teacher argued that this amounts to a "heckler's veto" and that community reaction could not dictate whether his constitutional rights were protected. The Court disagreed:

> Yet, Melzer's position as a teacher leaves him somewhat beholden to the views of parents in the community. Parents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights. In consequence, we do not perceive an impermissible heckler's veto implicated in this case.[8]

D. District Did Not Conduct an Unlawful Search and Seizure of Items in Suspended Teacher's Classroom

In *Shaul v. Cherry Valley-Springfield Central School District*,[9] the Second Circuit affirmed a finding of the District Court for the Northern District of New York that dismissed a teacher's claim that his Fourth Amendment rights had been violated by an illegal search and seizure of items in his classroom. The Court found that the teacher had no reasonable expectation of privacy once he: (1) had been suspended and barred from his classroom; (2) surrendered his keys to the classroom at the same time he declined to retrieve his personal property from the classroom; and (3) had been afforded a second opportunity to remove personal items from the classroom.

E. Union's Duty of Fair Representation Extends to Retired Teachers Who Retire During the Term of an Expired Collective Bargaining Agreement

In *Baker v. Bd. of Educ., Hoosick Falls Central Sch. Dist.*,[10] the Appellate Division, Third Department upheld a denial of a motion to dismiss a complaint. In so doing, the Court found that the teachers' association had breached its duty of fair representation when it failed to represent retired teachers in negotiations for a collective bargaining agreement that applied retroactively to include time while the teachers were still employed. The collective bargaining agreement included retroactive pay increases only for current employees. The Court held that there is a continuing nexus between a retiree's former employment and negotiations over terms and conditions that will be retroactively applied to those periods of active employment. As a result, the union had a continuing duty to represent the retirees in negotiations for the new retroactive collective bargaining agreement. In so doing, the Appellate Division did not take heed of an amicus brief filed by the Public Employment Relations Board ("PERB"), in which PERB argued that there is no duty to bargain for the same level of benefits for retirees as for active employees.

F. Paid Leave for Religious Observances Upheld

In *Maine-Endwell Teachers' Assoc. v. Bd. of Educ. of the Maine-Endwell Central Sch. Dist.*,[11] the Appellate Division, Third Department found constitutional a collective bargaining agreement's provision of paid days off for religious observances. The contract provided teachers with up to three paid days for religious observances, yet the district denied two teachers' requests for paid leave. The Appellate Division held that the paid leave provision did not offend the Establishment Clause because the provision did not advance religion by forcing members of the union to profess a religious belief. Since the provision did not state which religious holidays could be invoked, the

Court found the clause to be a reasonable accommodation of religious beliefs.

G. Court Nullifies Stipulation Requiring Teacher to Retire

In *Cohen v. Klein*,[12] the Court held that a stipulation signed by a teacher pursuant to which the teacher agreed to retire instead of facing Education Law § 3020-a disciplinary charges had no effect where the teacher rescinded it before it was signed by all the parties. The Court found that, even if the stipulation was an executory accord, it was not enforceable because the teacher signed it under the mistaken belief that it was revocable and the district would not suffer any prejudice if the stipulation was not enforced.

H. Public Policy Exception Applied to Vacate Arbitration Award

In *Dowleyne v. New York City Transit Authority,*[13] the Appellate Division, First Department applied the public policy exception and vacated an arbitration award. Dowleyne had worked as a bus driver for the Transit Authority for 14 months when she was required to undergo a random drug test pursuant to federal Department of Transportation requirements. Dowleyne was unable to produce an adequate amount of specimen and had no causal medical condition. The Transit Authority deemed this as a refusal to take the test in violation of the applicable regulations, imposed a pre-disciplinary suspension and informed Dowleyne that it intended to fire her. An arbitration panel refused to allow the Transit Authority to discipline her.

The Appellate Division, First Department applied the public policy exception to the general rule prohibiting judicial interference with an arbitration award and vacated it. The Court found that strong public policy considerations, embodied in the express terms of Department of Transportation regulations, militate against allowing anyone who does not comply with random drug testing procedures from performing safety sensitive functions.

I. Suspended Principal's Rights Not Violated When He Was Banned From School Property

Pearlman v. Cooperstown Central School District,[14] School principal was suspended and banned from school property pending a disciplinary hearing on charges that he had an inappropriate relationship with a student. Principal brought suit claiming the suspension violated his right to due process. The District Court for the Northern District of New York ruled that the school district did not violate the principal's due process or First Amendment rights when it suspended him prior to the Education Law § 3020-a disciplinary hearing and forbade him from entering onto school property without the superintendent's permission. The Court pointed out that Education Law § 3020-a specifically provides for suspension with pay during the pendency of a hearing. The Court also held that there is no state law that provides anyone unfettered access to school property.

II. PERB Update

Managerial/Confidential: Anticipated Duties

***Town of Ulster*[15]**

Designation of employee as confidential is proper if the relevant duties are part of the employee's job description, even if the employee has not yet performed any confidential duties because the employee has not yet had a chance to do so.

Subjects of Bargaining

***Poughkeepsie Professional Fire Fighters' Ass'n*[16]**

The question of whether it is a mandatory subject of bargaining to demand submission of an initial determination of eligibility for General Municipal Law § 207-a benefits to arbitration was held by PERB to be non-mandatory. On review, the Supreme Court vacated PERB's decision and found the demand to be a mandatory subject of negotiation. An appeal is pending in the Third Department.

Discrimination: Relevant Evidence

***County of Erie and Erie County Community College.*[17]**

A county violated its duty to bargain when a non-unit employee assumed the supervisory duties of unit employees who were temporarily transferred to other shifts.

The county also violated Civil Service Law §§ 209-a.1(a) and (c) when a supervisor threatened an employee with loss of his job for filing an improper practice charge and the county's director of labor relations threatened to end a scheduling accommodation for another employee, stating "we don't accommodate people who bring us to PERB." The comments were made at the conclusion of a PERB pre-hearing conference. Since PERB policy normally makes statements and settlement discussions at a prehearing conference inadmissible in a hearing, the county argued, unsuccessfully, that these comments could not form the basis for an anti-union charge. PERB found that the comments were not protected by this policy, as they were not in the nature of settlement discussions but rather at the conclusion of the conference and outside of the presence of the ALJ.

Duty to Bargain

County of Erie[18]

A public employer has a duty to provide information relevant and necessary to a union's administration of a collective bargaining agreement, including the investigation of grievances. This duty includes complaints against an employee, upon which an employer bases its decision to discipline or discharge the employee, even though the complaints are considered confidential. Thus, the Board ordered disclosure of an EEO report and those parts of an internal affairs report that summarized the background of the complaint against the employee and his statements to the investigator.

International Union of Operating Engineers, Local 409[19]

Union had duty to disclose to employer information about salaries of workers that the unit employees hired to clean the employer's physical plant, when information requested was not covered by the collective bargaining agreement and was reasonably necessary for negotiations.

III. Recent Legislation

The Fair and Accurate Credit Transactions ("FACT") Act was signed into law by President Bush on December 4, 2003. Under the Act, an employer who uses a third party to conduct a workplace investigation no longer needs to follow the consent and disclosure requirements of the Federal Fair Credit Reporting Act if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of any pre-existing written policies of the employer.

Chapter 696 of the Laws of 2003 was signed by Governor Pataki on November 5, 2003. Chapter 696 authorizes public employers to enter into written agreements to extend Civil Service Law § 209(4) compulsory interest arbitration provisions to deputy sheriffs, except as to issues relating to disciplinary procedures and investigations, or eligibility and assignment to details and positions.

Chapter 90 of the Laws of 2003 extends until June 30, 2005, Civil Service Law §§ 209-a(4) and (5)'s injunctive relief provisions in improper practice cases.

Endnotes

1. __ U.S. __, 124 S. Ct. 1236 (2004).
2. 1 N.Y.3d 232, 771 N.Y.S.2d 43 (2003).
3. 94 N.Y.2d 253, 701 N.Y.S.2d 700 (1999).
4. 336 F.3d 185 (2d Cir. 2003), *cert. denied,* 2004 WL 323395 (Feb. 23, 2004).
5. *Pickering v. Board of Ed. of Township High School Dist. 205, Will County*, 391 U.S. 563 (1968).
6. *Id.* at 568.
7. 336 F.3d at 199.
8. *Id.*
9. 2004 WL 585764 (2d Cir.).
10. 3 A.D.3d 678, 770 N.Y.S.2d 782 (3d Dep't 2004).
11. 3 A.D.3d 685, 771 N.Y.S.2d 246 (3d Dep't 2004).
12. Supreme Court, New York County, July 9, 2003, N.Y.L.J., July 10, 2003, 19 (col. 2).
13. 309 A.D.2d 583, 765 N.Y.S.2d 361 (1st Dep't 2003) *leave to appeal granted,* (Feb. 24, 2004).
14. N.D.N.Y., August 2003.
15. 36 PERB ¶ 3001 (2003).
16. 36 PERB ¶ 3014 (2003), *annulled,* 36 PERB ¶ 7016 (Alb. Co. Sup. Ct. 2003), *appeal pending.*
17. 36 PERB ¶ 3035 (2003).
18. 36 PERB ¶ 3021 (2003).
19. 6 PERB ¶ 3034 (2003), *appeal pending.*

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