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Municipal Lawyer

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A Message from the Chair

2012 is shaping up to be another interesting year to be involved in government law and practice whether you represent local government or private clients interacting with local governments. Zero-based budgeting, new SEQRA Assessment forms from DEC (yes, they are coming), a NYS Mandate Relief Council, FEMA disaster grants and negotiations, and local governments trying to do more with less. Recent changes to § 103 of the General Municipal Law now permit a local government to use the Best Value standard in conjunction with the lowest responsible bidder standard. Land Banks may become a new tool for economic revitalization at the same time that Local Development Corporations are coming under greater scrutiny for their own economic development activities. Dealing with an aging infrastructure during this time of economic constraint is made more difficult by property tax burdens which in themselves make some properties unmarketable except to the very wealthiest of our citizens.

These new realities create a greater opportunity for, and challenge to, municipal attorneys in facilitating government innovation in the delivery of services. At the same time, attorneys representing private parties in dealing with local government must keep abreast of the opportunities and impediments to private initiative. Attorneys who stay active in the Municipal Law Section are in a better position to understand the broad legal framework in which all of these issues and opportunities arise.

Our Fall meeting was held on October 12-14, 2012, at the Otesaga in Cooperstown, New York. Thank you to our Program Co-Chairs Adam Wekstein, Owen

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NYSBA

Walsh and Tom Wassel who created a timely program which included:

- FOIL and Open Meetings Law Update, including the recent White Plains case involving a Board of Ethics compliance obligations;
- Public Authorities Accountability Act and the Office of the State Comptroller's newly aggressive approach to the use of Local Development Corporations;
- Dealing with the impacts of the tax cap on collective bargaining and other municipal functions—one year in;
- Potential impacts on municipalities resulting from consolidation of state agencies and analysis of the Sage Commission report due in June;
- Update on legislation and court decisions, including new municipal procurement legislation;
- Intra-municipal conflicts and the use of alternative dispute resolution strategies to resolve.

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

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

Howard Protter

From the Editor

Change is afoot. Many of you already know that at the end of the July I left Albany and took the helm as the fifth dean of Touro Law Center. The move from upstate New York to Central Islip on Long Island at first seemed daunting, but then I quickly began to realize that in addition to a fantastic opportunity to lead one of New York's outstanding law schools, I was also moving to an area of the State rich with municipal law issues and opportunities. With more than 100 towns, cities and villages in Nassau and Suffolk counties, more than 100 school districts, more than 100 fire districts, and more than 300 special improvement districts—I think have found municipal law heaven. Not to mention that the majority of reported appellate level land use decisions come from the Second Department. Therefore, with the consent of Section Chair Howard Protter, we have decided to move the production of the *Municipal Lawyer* to Touro Law Center.

In the next issue of the *Municipal Lawyer* you will be introduced to our two new student editors, both of whom have been named Municipal Law Fellows at Touro Law Center. I hope they will both be in attendance at our January 2013 meeting to meet you. On behalf of the Section, special thanks to our former Associate Editor, Daniel Gross, Esq., who recently left the Government Law Center for Rochester, NY to assume a new post as Assistant District Attorney in Monroe County.

As with the Spring issue, this Summer issue contains a wealth of practical information for municipal attorneys. Karen Richards has authored two articles: the first examines municipal liability for injuries at municipally owned water sites, specifically how a plaintiff's conduct may relieve municipalities from liability for injuries incurred at naturally occurring water sites; and the second article outlines the pitfalls that a party may encounter when contracting with a municipality, explaining the exceptions to the general rule that a contract with a municipality is valid only when the party strictly complies with statutory procedure. G. Brian Morgan's article provides an overview on a municipality's implied right to counsel to when litigation between municipal boards may result in a potential conflicted-out municipal attorney. Reviewing prior case law on the issue, Mr. Morgan outlines the current court-imposed rule for these situations and further advocates for a legislative solution instead. On the ethics front, Julia Davis outlines both the types and procedure for reviews of annual disclosure reports that municipal agencies should conduct when administering their municipal disclosure program for their public officials. Mark Davies shares remarks he recently delivered at a conference where he focused on developing a values-based conflicts of interest compliance system. Noelle Crisalli Wolfson provides her popular quarterly land use case law update, and Harvey Randall offers Section members descriptions and links to blogs of interest to municipal attorneys.

As always, we welcome submissions for all issues of the *Municipal Lawyer* from Section members and from your office colleagues. If you cannot write, but are interested in reading about particular issues, please do not hesitate to forward to me your suggestions as well.

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Beware the Pitfalls: Contracting With a Municipality

By Karen M. Richards

A municipality acting in its corporate capacity is generally held accountable for its contractual obligations in the same manner as a private person.[1] However, in New York, to create a valid contract with a municipality, there are prescribed statutory procedures that must be strictly complied with and followed. A municipal contract which does not comply with the requisite statutory requirements is invalid and unenforceable and results in no obligation or liability on the municipality.[2] Moreover, the "equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions."[3]

Behind this general rule is an important public policy which recognizes that without statutory restrictions, any municipal official, regardless of his or her position, could dispose of public assets.[4] The Court of Appeals and all four appellate departments recognize that statutory requirements are not mere technicalities, but rather are fundamental statutory restrictions that serve the purpose of protecting public assets.[5]

The burden of determining compliance with those statutory requirements rests upon those who deal with a municipality.[6] The scope of a municipality's authority is a matter of public record, and therefore, there is a conclusive presumption that the party dealing with a municipality is aware of the extent of that authority.[7]

> Although application of this rule results in occasional hardship, it has been held that the loss should be ascribed to the negligence of the person who failed to ascertain the authority vested in the public agency with whom he dealt and statutes designed to protect the public should not be annulled for his benefit. Common sense dictates this course of action since statutory requirements could otherwise be nullified at the will of public officials to the detriment of the taxpaying public, and funds derived from public taxation could be subjected to waste and dissipation.[8]

Ordinarily, to create an express contract with a municipality, a written proposition or offer to contract with the plaintiff must have been made to the proper municipal authorities, the terms of the written proposition or offer to contract with the plaintiff must have been accepted by an ordinance or local law, and the ordinance or local law must have been further acted upon by the signing of the proper municipal authorities of an actual contract.[9] New York courts have long recognized that an ordinance or resolution enacted by a municipality, without more, does not create an express contract with the municipality.[10] Many plaintiffs have found, to their surprise, that their reliance on ordinances or resolutions passed by a municipality did not create a legal obligation upon the municipality.

For example, in *H & R Project Associates, Inc. v. City of Syracuse*, the plaintiff sued for breach of contract, breach of implied contract, and detrimental reliance, claiming that it had reached an agreement with the city of Syracuse based on ordinances and a local law passed by the city's Common Council.[11] In reliance upon these ordinances and the local law, the plaintiff, a building renovator, purchased and began renovating buildings for an art redevelopment project. The court rejected the plaintiff's claims that the ordinances and local law created an agreement between the parties. The Syracuse City Charter provided that only the mayor, the commissioner of purchase, or any officer designated by the council could sign contracts, and it further provided that no contract was valid unless signed by an authorized officer and sealed by the official seal of the city. Since there was no compliance with these provisions of the City Charter, there was no valid contract, and the plaintiff's lawsuit was dismissed.

As evidenced by the court's decision in *H & R Project Associates, Inc.*, a plaintiff's claim of breach of implied contract is likely to fail because there was no compliance with the municipality's statutory requirements.[12] Again, the important public policy of safeguarding the public's interest against "extravagance and collusion on the part of public officials" lies behind the rule against holding municipalities liable on an implied contract theory.[13] Thus, even where a municipality accepted the benefits of a plaintiff's services and knew that the plaintiff expected to be paid for the services provided to the municipality, no liability can result unless the prescribed statutory procedures were strictly followed.[14]

For example, in *City of Zanesville, Ohio v. Mohawk Data Sciences Corporation*, the city's director of administration signed a contract for the lease of computer hardware from Mohawk, and for over one year, the city made monthly payments pursuant to the contract.[15]

The city later withheld future payments. Mohawk argued that the city should be estopped from challenging the validity of the contract since Mohawk satisfactorily performed its obligations and the city accepted the benefits of Mohawk's performance. The court found this argument was without merit because the city council never authorized the contract as required by statute. The failure of the city council to approve the contract "was not mere irregularity, but went to the heart of the contract's validity."[16] As the court noted:

> In New York, the mere acceptance of benefits by the city under a contract made without authority does not estop a municipal corporation from challenging the validity of the contract and from denying liability for materials furnished or services rendered under a contract not made or ratified by a board or officer acting under authority conferred by law and in the manner prescribed by law.[17]

The court therefore found that the contract between the parties was invalid and void.

In another case, the parties had entered into two contracts, one in 1967 and the other in 1977, which provided that the defendant could use the plaintiff's solid waste landfill upon payment of a proportionate share of the operating costs.[18] Although the defendant had paid 80% of the landfill costs during the ten years following the expiration of the 1977 contract, the court found that this conduct did not create an implied contract to share in the costs associated with closing the landfill.[19]

Also, as a general rule, a claim against a municipality in quantum meruit is void as contrary to statute.[20] However, narrowly circumscribed exceptions exist to that general rule. One exception to the general rule is where the State orders the municipality to perform certain work.[21]

In *Vrooman v. Village of Middleville, Herkimer County,* the village was ordered by the State to construct a sewage treatment plant and to cease the discharge of sewage into State waters. The village entered into an agreement with the plaintiff to provide engineering services in the design and planning of the sewage treatment plant. After performing the services and obtaining State approval of its plans, the plaintiff submitted a bill to the village. When the village failed to pay the bill, the plaintiff brought an action against the village. The court found that even though the contract was void because the statutory appropriation process was not strictly followed in granting the contract, recovery based upon quantum meruit would not be contrary to the policy underlying the general rule because the project had been ordered by the State, the services provided by the plaintiff were essential to the project, and the village benefitted from the plaintiff's services. "A plaintiff is entitled to recover from a municipality where, as here, he has entered in a contract in good faith, the municipality possesses the authority to enter into the contract, the contract is not violative of public policy and the circumstances indicate that if plaintiff is not compensated, the municipality would be unjustly enriched."[22]

Recovery under the above exception has been limited to applying only where there was a requirement that the municipality engage in the project. For example, when an engineering firm sought to recover services provided under contract to Onondaga County in connection with its resources recovery project, the firm's claim was dismissed because there was no requirement that the county undertake such a project.[23] The Onondaga County Charter provided that "[n]o payment shall be authorized or made and no obligation incurred against the County except in accordance with appropriations duly made, or except as permitted otherwise by the local finance law."[24] It was undisputed that no appropriation was made and no borrowing was authorized for the plaintiff's services. According to the court, permitting the plaintiff to recover for its services without an appropriation would contravene the policy underlying the adoption of the Onondaga County Charter. "Although it may seem harsh to deny plaintiff payment for services rendered at the request of the municipal officials, plaintiff, in the absence of an appropriation, undertook the work at its own risk."[25]

Another exception to the general rule is where a construction contract was awarded to a contractor (the original contractor) through a competitive bidding process and another contractor (a completion contractor) had to complete the work left unfinished by the original contractor. In *Aniero Concrete Co., Inc. v. New York City Construction Authority*, the city claimed that the completion contractor could not recover under a theory of quantum meruit because its involvement was not authorized by the competitive bidding process.[26] The court was not persuaded by the city's argument, noting that the original contract had been awarded through a competitive bidding process and the completion contractor was merely stepping in to complete the work left unfinished by the original contractor. The court allowed the plaintiff to proceed with an unjust enrichment claim because there was nothing to suggest that the procurement of either contractors' services involved dishonesty or improper behavior which would implicate the integrity of the process of awarding public construction contracts.

In conclusion, although some exceptions exist to the general rule that a contract with a municipality is valid only where there is strict compliance with statutory procedures, those exceptions are very narrow. A

party entering into an agreement with a municipality is presumed to have knowledge of the statutes which regulate the municipality's contracting powers and bears the risk of not receiving payment for its services if there was a failure to follow the requisite statutory procedures.

Endnotes

1. *Housing Works, Inc. v. Turner*, 179 F.Supp.2d 177 (S.D.N.Y. 2001), *aff'd by, Housing Works, Inc. v. Giuliani*, 56 Fed.Appx. 530 (2nd Cir. 2008).

2. *Genesco Entertainment v. Koch*, 593 F.Supp. 743 (S.D.N.Y. 1984); *Parsa v. State of New York*, 64 N.Y. 2d 143 (1941); *Walentas v. New York City Dept. of Ports*, 167 A.D.2d 211 (1st Dept. 1990), *appeal denied*, 78 N.Y.2d 857 (1991); *Mid-Atlantic Perfusion Associates v. Westchester County Health Care Corporation*, 54 A.D.3d 831 (2nd Dept. 2008); *Village of Lake George v. Town of Caldwell*, 3 A.D.2d 550 (3rd Dept. 1957), *aff'd*, 5 N.Y.2d 727 (1958); *H & R Project Associates, Inc. v. City of Syracuse*, 289 A.D.2d 967 (4th Dept. 2001).

   A municipality can later ratify a contract that it entered into without following the requisite statutory requirements. *Imburgia v. City of New Rochelle*, 223 A.D.2d 44 (3rd Dept.), *leave to appeal denied*, 88 N.Y.2d 815 (1996).

3. *Lutzken v. City of Rochester*, 7 A.D.2d 498, 501 (4th Dept. 1959).

4. *Genesco Entertainment*, 593 F.Supp. 743.

5. *See e.g., Parsa*, 64 N.Y.2d 143; *Walentas*, 167 A.D.2d 211; *Mid-Atlantic Perfusion Associates*, 54 A.D.3d 831; *Village of Lake George*, 3 A.D.2d 550; *H & R Project Associates, Inc.*, 289 A.D.2d 967.

6. *Genesco Entertainment*, 593 F.Supp. at 749; *Syracuse Orthopedic Associates v. City of Syracuse and County of Onondaga*, 136 A.D.2d 923 (4th Dept. 1988); *Parsa*, 64 N.Y.2d 142.

7. *Walentas*, 167 A.D.2d 211.

8. *City of Zanesville v. Mohawk Data Sciences Corp.*, 97 A.D.2d 64, 67 (4th Dept. 1983).

9. *Shepherd v. Whispering Pines, Inc.*, 188 A.D.2d 786 (3rd Dept. 1992); *Village of Lake George v. Town of Caldwell*, 3 A.D.2d 550 (3rd Dept. 1957), *aff'd*, 5 N.Y.2d 727 (1958).

10. *Seif v. City of Long Beach*, 286 N.Y. 382 (1941); *Shepherd.*, 188 A.D.2d 786; *Pelham Commons Joint Venture v. Village of Pelham*, 308 A.D.2d 520 (2nd Dept. 2003); *RB Hempstead LLC v. Incorporated Village of Hempstead*, 2005 WL 119738 (Sup. Ct., Nassau Co. 2005).

11. 289 A.D.2d 967 (4th Dept. 2001). Ms. Richards represented the City of Syracuse in *H&R Project Associates, Inc. v. City of Syracuse*.

12. *Genesco Entertainment*, 593 F.Supp. at 750; *Seif*, 286 N.Y. at 387 (1941) (finding no obligation to pay for services requested by the mayor and tacitly approved by four of five council members where the statutory requirements necessary to bind the city were not strictly complied with).

13. *Vrooman v. Village of Middleville, Herkimer County*, 91 A.D.2d 833, 834 (4th Dept. 1982), *appeal denied*, 58 N.Y.2d 610 (1983); *Parsa*, 64 N.Y.2d at 148 (1984) ("Even though a promise to pay may be spelled out from the parties' conduct, a contract between them may not be implied to provide 'rough justice' and faste[n] liability on [the municipality] when applicable statutes expressly prohibit it."); *Lutzken v. City of Rochester*, 7 A.D.2d 498, 499 (4th Dept. 1959) ("The doctrine of implied contract cannot be invoked to do rough justice and fasten liability where the legally requirements specifically prohibit.").

14. *Seif*, 286 N.Y. 382; *City of Zanesville, Ohio v. Mohawk Data Sciences Corp.*, 97 A.D.2d 64 (4th Dept. 1983); *Mid-Atlantic Perfusion Associates v. Westchester County Health Care Corporation*, 54 A.D.3d 831 (2nd Dept. 2008); *JRP Old Riverhead Ltd. v. Town of Southampton*, 44 A.D.3d 905, 909 (2nd Dept. 2007) (noting that "the doctrine of estoppel may be applied against a municipality in the case of extraordinary circumstances where the municipality acts wrongfully or negligently.").

15. 97 A.D.2d 64 (4th Dept. 1983).

16. *Id.* at 67.

17. *Id.*

18. *Town of Oneonta*, 191 A.D.2d 891.

19. *Id.*; see *also Syracuse Orthopedic Associates v. City of Syracuse*, 136 A.D.2d 923 (4th Dept. 1988) (finding that the city was not estopped from challenging the validity of an oral contract to reserve parking spaces for the plaintiff in a municipal parking garage because the city's charter provided that contracts were valid only if signed by an authorized officer); *M/A-Com, Inc. v. State of New York*, 78 A.D.3d 1293, 1294 (3rd Dept. 2010) (finding that the State's acceptance of benefits furnished under a contract made without the State Comptroller's approval did not estop the State from challenging the validity of the contract or from denying liability pursuant to it).

20. *Vrooman v. Village of Middleville, Herkimer County*, 91 A.D.2d 833 (4th Dept. 1982), *appeal denied*, 58 N.Y.2d 610 (1983).

21. *Id.* at 834.

22. *Id.*

23. *Gill, Korff and Associate, Architects and Engineer, P.C. v. County of Onondaga*, 152 A.D.2d 912 (4th Dept. 1989).

24. Section 610 of the Onondaga County Charter.

25. *Gill*, 152 A.D.2d at 914.

26. 2000 WL 863208 (S.D.N.Y. 2000); *see also Bianchi Industrial Services, LLC v. Village of Malone*, 41 A.D.3d 999 (3rd Dept. 2007); *Housing Works, Inc. v. Turner*, 179 F.Supp.2d 177 (S.D.N.Y. 2001) (finding that the plaintiff could not bring a claim of unjust enrichment against the city because neither the *Vrooman* nor *Aniero* exceptions applied where the plaintiff did not provide services at the behest of a higher State authority and where it could not be said that the plaintiff was merely stepping in mid-project to complete a contract that had previously been approved and registered by another party).

Ms. Richards received her Juris Doctor, *magna cum laude*, from Syracuse University College of Law in 1995. She is as Associate Counsel, Office of University Counsel, The State University of New York. The views expressed are her own and do not necessarily represent the views of The State University of New York or any other institution with which she is or has been affiliated.

Water, Water Everywhere: Is a Municipality Liable for Damages Caused by a Leak in Its Water Supply System?

By Karen M. Richards

In many communities, water supply systems are provided by a municipality. Leaking water supply systems can cause various types of property damages. This article explores a municipality's liability for such damages.

Governmental/ Proprietary Functions

In determining a municipality's liability for damages, courts have examined "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred."[1] In other words, was the municipality acting in a governmental or proprietary capacity when it engaged in the allegedly negligent activity?

A proprietary function "is undertaken when governmental activities essentially substitute for or supplement traditionally private enterprises."[2] When acting in a proprietary capacity, a municipality is held to the same duty of care as private individuals and institutions engaging in the same activity.[3] A municipality is not entitled to the defense of governmental immunity when it is engaging in a proprietary function, and accordingly, a plaintiff does not have to establish a "special relationship" with it in order to successfully commence an action against the municipality.[4]

In claims for damages caused by a municipality's water supply system, courts generally have found that the "maintenance and repair of water mains is traditionally performed by private businesses, such as water companies, and thus, where a municipality maintains a water system to provide water to private customers, it constitutes a proprietary function."[5] This is illustrated in *D & D of Delhi, Inc. v. Village of Delhi*, where a village employee turned a shutoff valve believing it would stop the flow of water through the main line and help isolate the water break.[6] Instead, the water flowed into the plaintiff's store causing substantial property damage. The court rejected the village's contention that the complaint should be dismissed on the basis of governmental immunity because it found that the village's maintenance and repair of water mains constituted a proprietary function.

The same finding of a proprietary function occurred in *K & S Realty Co. v. City of New York*, where a city crew had inspected the main for leaks months before a 48-inch water main broke and flooded nearby properties.[7] The inspection for leaks "was prompted principally by the desire to avoid waste of a commodity, i.e. water."[8] The court found the plaintiff's claim was actionable, even in the absence of a special duty running from the City to the plaintiffs, since the decision made by the City to inspect for leaks "was conducted by the City acting proprietarily as a water vendor rather than in its governmental capacity as a protector of the public health and safety."[9]

On the other hand, the protection and safety of the general public pursuant to the general police powers is a governmental rather than a proprietary function.[10] When a municipality acts in a governmental capacity, it will only be held liable for injuries resulting from its negligent performance when a "special relationship" exists between it and the injured party.[11]

A municipality's construction, installation, and extension of a water system have been found to be governmental actions because these functions are necessary for the preservation of public health and safety.[12] Therefore, where it is alleged that negligence occurred during the construction, installation, or extension of a water system, liability can only attach if the plaintiff can establish a special relationship with the municipality.[13]

Continuing to utilize the governmental / proprietary distinction in claims involving a municipal water supply system has come under criticism. While supplying water may have historically been undertaken by private agencies,

> [i]n this day and age, municipal water corporations have flourished to the relative exclusion of private utilities. Moreover, in our modern, complex urban civilization, it is readily apparent that the supplying of water by a municipality is as immediately and directly related to the health, safety and welfare of its inhabitants as is the construction of sewers which are all but universally regarded as governmental.[14]

Despite this criticism, New York courts have yet to abolish this distinction in actions involving a munici-

pal water supply system, although the governmental/proprietary distinction has been abolished in other areas of the law, such as zoning.[15]

Reasonable Care

Although the distinction between governmental and proprietary functions has been questioned, there is no question that courts in New York have long recognized that a municipality is not an insurer of its water system. A municipality, therefore, cannot be held liable for injury unless it is shown that the injury was caused by negligent construction or subsequent maintenance.[16] All that is required of a municipality in the construction or maintenance of its water system is reasonable care.[17]

Reasonable care was exercised in *Biancaniello v. Town of Colonie*. The plaintiff alleged that the town, despite notice of a leak, had negligently permitted a leak in a water main to continue for three months, causing water to accumulate in the cellar of the plaintiff's house.[18] In response to first being told of a leak, the town's employees inspected a hydrant and the surface of the ground adjacent to the premises above the pipe leading into the house, which was the usual and customary method of examination. If a leak existed, it would ordinarily appear on the surface of the ground, but no evidence of a leak was visible. When the employees made another inspection a few weeks later, they excavated around the hydrant down to the bottom of the line. Again, no leak was detected. The court found that the town employees responded whenever notice was given and employed the usual tests to discover a leak, and "[t]hey were not required to do more in the exercise of reasonable care."[19] To hold otherwise and "require them to excavate to a point where the leak was finally discovered when the application of customary tests failed to show any evidence of a leak" would have impermissibly made the town an insurer of its water system.[20]

In the exercise of reasonable care, a municipality is not expected or required to regularly unearth its entire system to detect a leak or inspect its system because imposing such a duty upon a municipality "is obviously impractical and would undoubtedly create new hazards."[21] There is, however, an obligation to exercise reasonable care when there is some warning of a possible defect. Often, upon being notified of a leak, a municipality's liability for damage caused by its water supply system is predicated on its response to the notice. Failure to act promptly and efficiently can result in liability for damages caused by a municipality's inaction, which is what occurred in *Rochester Gas and Electric Corp. v. City of Rochester*.[22] When the utility's contractor noticed significant water seepage from three places along the city's water main, which was exposed by the utility while placing its electrical conduits in the ground, it reported the leaks to the city. Despite this actual knowledge, the city took no action, made no inspection, and undertook no program of watchfulness or monitoring. Its failure to act promptly and efficiently after being notified of the leak resulted in liability for damages to the plaintiff's water conduits.[23]

By contrast, in *Malfatti v. 13 Gramercy Park S. Corp.*, upon being notified of a leak, the city employees promptly responded and immediately commenced work to stop the leak.[24] Since the plaintiffs could not demonstrate how the actions of the city employees were deficient or that the leak could have been stopped sooner, there was no basis for liability against the city.

In another case, although there was no indication of actual notice to the city, there was some evidence that for several weeks prior to the breaking of the water main there were depressions in the pavement of the street that became filled with water.[25] There were also other indications that there was a leak in the water main at that point. Although the city may not have been formally notified of a possible leak, the court found that there was a question of fact as to the existence of wetness and depressions in the street prior to the break. If these conditions did indeed exist, they may have been sufficient to put the city on inquiry as to their cause, and accordingly, a jury might find the city was negligent in failing to make an investigation.[26]

Res Ipsa Loquitur and Third Parties

The doctrine of *res ipsa loquitur* is commonly applicable in cases where a water main breaks and causes damages, as it can be difficult to ascertain what caused a pipe buried deep in the earth to break.[27]

> The theory is that water mains do not ordinarily break if they are properly installed and maintained, and that any break in the main was probably caused by the owner's neglect of its duty, since the owner is generally in exclusive possession and control. In such a case it is unnecessary to prove the exact cause of the injury in order to hold the owner liable since the circumstances show that the owner is responsible for all reasonably probable causes to which the event can be attributed.[28]

In New York, to establish a permissible inference of negligence based on this doctrine, a plaintiff must establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[29] "[P]roof that third parties have had access

to the instrumentality generally destroys the premise [of *res ipsa loquitur*], and the owner's negligence cannot be inferred unless there is sufficient evidence that the third parties probably did nothing to cause the injury."[30]

Often a water main rupture is caused by activity of a third party that was permitted by a municipality to excavate a public street or sidewalk, and therefore, the doctrine of *res ipsa loquitur* may not be applicable because the area where the leak occurred was not in the exclusive control of the municipality. The presence of a third party has led to allegations that a municipality was liable to a plaintiff for failing to inspect the third party's work. Generally, courts have rejected these allegations. For example, in *DeWitt Properties, Inc. v. City of New York*, a landowner sued the city and a gas company to recover for damage to its premises as the result of a burst water main under a street.[31] The plaintiff alleged that the utility's negligent installation of a gas pipe on top of the city's water main caused it to burst. The plaintiff also alleged that the city was negligent in inspecting the work to ascertain whether the utility's work may have damaged the water main and flooded the adjoining properties. However, the duty to inspect the activity of a third party, such as a utility, has only been imposed on a municipality when it permitted dangerous or imminently dangerous activities in its thoroughfares and

> it can hardly be said that the actual installation of the [gas] pipes, by trained utility employees, ordinarily poses an obvious risk to existing water mains. Thus there is generally no reason to expect the city to inspect the utility's installation, and no duty to do so.[32]

Thus, the mere grant of authorization to a third party to perform work near a water main does not create a duty in a municipality to inspect the party's work.[33] If, however, the application for a permit "indicates that conditions at the work site or the methods to be employed might pose a special risk to the [municipality's] water system," the municipality may have a duty to inspect the third party's work because it is actually aware of and has notice of the potential risk.[34] If the utility's plans or application for a permit did not note the presence of a water main at the site, a municipality has been held not to be actually aware of the danger created by the utility.[35]

Conclusion

The applicability of the governmental / proprietary test to water leak claims is archaic, as today it is generally municipalities, rather than private utility companies, that provide water. Although it is "a concededly artificial and illogical distinction," it is nevertheless utilized by many courts in claims brought against a municipality for injuries caused by a water leak.[36] Whether the governmental / proprietary test is abolished in this area of law remains to be seen.

It also remains to be seen whether the standard of reasonable care evolves as newer methods of construction and maintenance are developed. Although tearing up streets to inspect pipes and performing extensive excavation to detect a leak is without question impractical, as less intrusive and destructive methods of inspection and detection are developed, a municipality may need to employ those methods to avoid liability especially if those methods become customary in the industry.

Endnotes

1. *K & S Realty Co. v. City of New York*, 304 A.D.2d 349, 350 (1st Dept. 2003) (citations omitted).
2. *Carter v. City of New York*, 2004 WL 3078698 at *11 (Sup. Ct., Kings County 2004), *aff'd*, 38 A.D.3d 702 (2nd Dept. 2007), *leave to appeal denied*, 9 N.Y.3d 994 (2007).
3. *Carter*, 2004 WL 3078698 at *11; *DeWitt Properties, Inc. v. City of New York*, 44 N.Y.2d 417 (1978).
4. *D &D Delhi, Inc. v. Village of Delhi*, 47 A.D.3d 1117, 1118; *Rochester Gas and Electric Corp. v. City of Rochester*, 118 Misc.2d 420 (City Ct., City of Rochester 1983) ("Water supply systems are not governmental functions, and when municipalities operate such systems, they are not privileged under the limited immunities from tort liability granted to them in the exercise of their police power.").
5. *D & D of Delhi, Inc. v. Village of Delhi*, 47 A.D.3d 1117 (3rd Dept. 2008); *K & S Realty Co., v. City of New York*, 304 A.D.2d 349, 350 (1st Dept. 2003).
6. *D & D of Delhi, Inc. v. Village of Delhi*, 47 A.D.3d 1117 (3rd Dept. 2008).
7. *K & S Realty Co., v. City of New York*, 304 A.D.2d 349, 350 (1st Dept. 2003).
8. *Id.* at 350. Although it was equipped with ground microphones capable of detecting leaks, the crew did not use them, which was a discretionary and not a ministerial decision.
9. *Id.*
10. *Carter v. City of New York*, 2004 WL 3078698 at *11 (Sup. Ct., Kings County 2004), *aff'd*, 38 A.D.3d 702 (2nd Dept. 2007), *leave to appeal denied*, 9 N.Y.3d 994 (2007).
11. *Id.* at *11.
12. *Id.* at *12; *Jamaica Water Supply Co. v. City of New York*, 180 A.D. 834 (2nd Dept. 1952), *aff'd*, 304 N.Y. 917 (1953); *reargument denied, remittitur amended by* 305 N.Y. 560 (1953), *cert denied*, 346 U.S. 821 (1953).
13. *Carter*, 2004 WL 3078698 at *13.
14. *Id.*, *citing*, Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 Va. L. Rev., pp. 914-916; *County of Nassau v. South Farmingdale Water Dist.*, 62 A.D.2d 380, 395 (2nd Dept. 1978), *aff'd*, 46 N.Y.2d 794 (1978)(recognizing "that the question of whether the water district is performing a governmental or proprietary function is not free from doubt").
15. See *Matter of County of Monroe*, 72 N.Y.2d 338 (1988) (abolishing the governmental / proprietary test in zoning cases).
16. *DeWitt Properties, Inc.*, 44 N.Y.2d at 423; *Biancaniello v. Town of Colonie*, 261 A.D. 161 (3rd Dept. 1941).

17. *DeWitt Properties, Inc.*, 44 N.Y.2d at 424; *Kusnir v. City of Yonkers*, 131 Misc.2d 25, 29 (City Ct., City of Yonkers 1985).

18. *Biancaniello v. Town of Colonie*, 261 A.D. 161 (3rd Dept. 1941); *see also Olympia v. Town of Poughkeepsie*, 23 A.D.3d 445 (2nd Dept. 2005) (finding "[t]he Town established its prima facie entitlement to judgment as a matter of law as to the negligence cause of action by demonstrating that it had inspected the plaintiffs' flooded property on several occasions, using two separate tests to search for a municipal water leak, and found none").

19. *Biancaniello v. Town of Colonie*, 261 A.D. at 162.

20. *Id.*.

21. *Gillette Shoe Co., Inc. v. City of New York*, 86 A.D.2d 522, 524 (1st Dept. 1982), *motion to dismissed appeal denied*, 56 N.Y.2d 711 (1982), *order aff'd*, 58 N.Y.2d 853 (1983) (where the plaintiff's expert contended that the water main break was caused by an attack of anaerobic bacteria upon the pipe material).

22. *Rochester Gas and Electric Corp. v. City of Rochester*, 118 Misc.2d 420 (City Ct., City of Rochester 1983).

23. The damage to the plaintiff's conduits occurred in April when a road collapsed due to a water main break. The city knew that the road had previously collapsed in March because of a water main break. The city argued that the damages caused by the April break were too distant from the March break (the April break was 300 feet farther north from the March break) to consider the March break as notice of where the April break would occur. The court stated that "[w]hile distance is a factor in evaluating the scope of the notice, and while it is true the plaintiff's letter did not pinpoint the spot of the April break, 300 feet is sufficiently close, as a matter of law, to hold the city on notice to the risk of collapse of Culver Road at the site of the April break." *Id.* at 423.

24. *Malfatti v. 13 Gramercy Park S. Corp.*, 259 A.D.2d 420 (1st Dept. 1999), *leave to appeal denied*, 94 N.Y.2d 752 (1999).

25. *Lauer v. City of New York*, 216 A.D. 468 (Sup. Ct., New York County 1943).

26. *Id.* at 470.

    Whether prior written notice statutes, which are in derogation of the common law and strictly construed by the courts, are applicable to water breaks depends on the language in the statute, but generally, they have been found to be inapplicable. *See McKinnis v. City of Schenectady*, 234 A.D.2d 760 (3rd Dept. 1996) (since the city code made no reference to latent defects or conditions and referred to actual physical defects in the surface of a street or highway the court determined that the notice statute was inapplicable because the leaking water pipe was subsurface and not visible); *Windsor Court Associates, LP v. Village of New Paltz*, 27 A.D.3d 814 (3rd Dept. 2006) (finding prior written notice laws did not apply to subsurface structures such as water mains).

27. *DeWitt Properties, Inc.*, 44 N.Y.2d at 426.

28. *Id.* (citations omitted).

29. *Pickersgill v. City of New York*, 168 Misc.2d 768, 770 (City Ct., City of New York 1996).

30. *DeWitt Properties, Inc.*, 44 N.Y.2d at 426 (citations omitted); *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 115 (1941) (*Res ipsa loquitur* "has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to— draw the permissible inference." It is a rule of evidence which does not provide a presumption of negligence but rather provides merely a permissive inference of negligence. However, where this doctrine is applied in water break cases, although a plaintiff is relieved from the burden of producing direct evidence of negligence, "it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault.").

31. *DeWitt Properties, Inc. v. City of New York*, 44 N.Y.2d 417 (1978).

32. *Id.* at 424.

33. *Id.*; *accord Gillette Shoe Co., Inc. v. City of New York*, 86 A.D.2d 522, 524 (1st Dept. 1982), *motion to dismissed appeal denied*, 56 N.Y.2d 711 (1982), *order aff'd*, 58 N.Y.2d 853 (1983).

34. *DeWitt Properties, Inc.*, 44 N.Y.2d at 425.

35. *Gillette Shoe Co., Inc.*, 86 A.D.2d at 524.

36. *County of Nassau v. South Farmingdale Water Dist.*, 62 A.D.2d 380, 385 (2nd Dept. 1978), *aff'd*, 46 N.Y.2d 794 (1978).

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A Limited Right to Independent Counsel for Local Agencies

By G. Brian Morgan

Practitioners of municipal law learn early it is hazardous duty for a single law office or a single attorney to represent all of the boards and officials who comprise a "municipality." There are so many officials and so many boards to contend with, each having more or less independent will, as often as not in a state of conflict with each other.

Governing boards, planning boards and zoning boards in particular clash with each other on issues of policy, politics and philosophy.

While some planning boards and zoning boards employ different counsel than the municipality's governing board, it is not the rule and may become less commonplace as cash-strapped municipalities cut discretionary contracted costs of outside counsel services.[1] In the State of New York, cities, towns and villages typically employ general counsel by resolution of the governing board of the municipality.[2] Local practices differ among municipalities relative to the scope of counsel's responsibilities. Town attorneys, village attorneys and city corporation counsel are commonly responsible for all legal matters involving their client municipality, with specific exceptions that may be made from time to time by the governing board in the form of special counsel appointments for temporary and limited services.

It is accordingly inevitable that municipal attorneys will find themselves caught between feuding client boards and agencies. Given the fiscal difficulties generally afflicting local governments, and increasingly volatile voting patterns that result in high rates of turnover of elected governing board majorities, municipal counsel often face clashes in their own municipalities that occasionally escalate to litigation between governing board, subordinate boards and individual public officials.

When municipal counsel lands in a situation where the boards and officials of the client municipality are clashing with each other, counsel's duties and the clients' respective options must be evaluated by the municipal attorney.[3]

I. A Clear Signal to Conflicted Counsel

In 1972, the Court of Appeals decided *Cahn v. Town of Huntington*,[4] making an instant impact on municipal law and the functioning of agencies within local government.

The *Cahn* decision created an implied authority for a town planning board to engage outside counsel at the town's expense to defend itself in a legal proceeding brought by the town board against the planning board. In so doing, the Court of Appeals limited the express statutory authority of a town board to engage the services of counsel.

The Town Law § 65(1) provides, in sum and substance, that the town board of a town may employ legal counsel, but no other officer of the town may employ counsel unless authorized by the town board.[5]

The *Cahn* Court could not rely on any specific statutory authority that permits municipal boards and officers to engage counsel absent authorization of the town board. Notwithstanding the lack of statutory authority, the Court created an implied right of municipal boards and officers, in this case a planning board, "to employ counsel in the good faith prosecution in the public interest, and in conjunction with its or his official duties where the municipal attorney refused to act, or was incapable of, or was disqualified from, acting."[6]

The specific facts of the dispute that led to the *Cahn* decision clearly represent an extreme example of local dysfunction deserving of judicial relief. The town board and planning board had been feuding for a year, and in 1969 the town board commenced an Article 78 proceeding to require the planning board to recognize a new appointee as chairman of the planning board. The planning board had appointed its own chairman previously. The town's attorney represented the town board in this litigation. The planning board concluded that it would require an attorney to appear on its behalf in the litigation and that under the circumstances, the town attorney should not.[7] The planning board adopted a resolution retaining an attorney to appear in the proceeding brought by the town board.[8]

In addition to its answer, the planning board filed a counterclaim against the town board alleging that the town board was usurping the planning board's authority over the planning staff. The trial court upheld the town board's authority to appoint the planning board chairman and to manage the planning board's staff.[9]

The planning board's counsel submitted a bill for litigation services to the planning board. The planning board approved payment by resolution. The town failed to pay the bill, and Cahn commenced an action for payment, and was awarded judgment for $3,462.00.[10] The Appellate Division affirmed.[11]

The *Cahn* decision is not an example of lavish legal analysis. The Court of Appeals identified the result that it desired, and the shortest, straightest path to reach it. Of section 65(1) of the Town Law, authorizing only the town board to engage counsel, the Court of Appeals observed that "The statute certainly does not apply to litigation between two town officers or boards concerning the proper performance of their duties. If it did, a situation would be created in which the town board could prevent the board it sued from engaging counsel. We should not, of course, ascribe to the legislature an intent to have such a result ensue."[12]

The Court justified the limitation of section 65(1) "to enable the board to effect the purposes of its creation and to allow it to properly function."[13]

On balance, the implied right of a board or official to engage independent counsel in limited circumstances is a practical judicial solution that seems to have performed adequately over the years. Town Law Section 65(1) is clearly incomplete without a legislatively defined authority for local boards and officers to engage independent counsel, and should be amended to provide such authority.

II. Extending the Implied Right Recognized in *Cahn*

Just ten years after the Court of Appeals settled the feud between the Town Board and the Planning Board of the Town of Huntington, another battle boiled over in the same town between the Town Board and the Zoning Board of Appeals, leading again to the Court of Appeals, which extended the implied right of counsel to zoning boards of appeal.[14]

Commco v. Amelkin involved a dispute that threatened the exclusive statutory jurisdiction of an administrative board in a way that the *Cahn* dispute had not.[15]

Commco, Inc. applied to the Town of Huntington Zoning Board of Appeals (ZBA) for a use variance to permit conversion of an abandoned school building into senior citizen residences. The ZBA denied the application. Commco commenced an Article 78 proceeding against the ZBA. The trial court annulled the ZBA's determination, and the ZBA filed a Notice of Appeal. The town attorney happened to be representing the ZBA in Supreme Court, and filed the Notice of Appeal on its behalf.

The Town Board engaged its own special counsel to initiate settlement discussions with Commco. The Zoning Board of Appeals then appointed special counsel to perfect the appeal.[16]

The Town Board, which was not a party to Commco's Article 78 proceeding, entered into a stipulation of settlement with Commco providing for withdrawal of the ZBA's appeal and an amended judgment in the Article 78 proceeding granting the use variance to Commco. The settlement stipulation was signed by the Town Board's attorney, stating that the Town Board directed that the litigation be settled in the interests of the Town.[17] The Appellate Division dismissed the ZBA's appeal based on the stipulation between the Town Board and Commco. Neither the Zoning Board of Appeals nor its counsel were parties to the stipulation or the Town Board's motion to withdraw the Notice of Appeal.[18]

This fact pattern cries out for judicial intervention. The Town Board hijacked the ZBA's appeal of the lower court's decision annulling the denial of the use variance. The Town Board's stipulation purported to grant the disputed use variance without the ZBA's consent. The Town Board's conduct strikes at the heart of the ZBA's statutory jurisdiction over variances. The Town Board members must not have paid attention to the Court of Appeals' view about the independence of local administrative boards as established in *Cahn* ten years before.

The justification claimed by the Town Board in the litigation against the ZBA was the statutory authority of a town board to settle litigation. The Court of Appeals rejected the Town Board's view that such power includes the power to settle variance litigation on behalf of a zoning board of appeals.[19] The *Commco* decision states that "A town board is empowered to compromise or settle an action or proceeding with the approval of the court in which the action is pending, but this power only refers to an action 'against the Town.'"[20]

The Court points out that the Town of Huntington was never served with papers concerning the Commco proceeding, nor was it named as a party; it never filed pleadings, intervened or was substituted as a party.[21] The Zoning Board of Appeals was the only necessary party to litigate the status of the ZBA resolution concerning the use variance. A town board is a necessary party to litigate the constitutionality or validity of the zoning law.[22] Accordingly, the town board may not "appear in the name of the Zoning Board."[23]

In contrast to the *Cahn* decision, which built an implied right to independent counsel in order to enable the board "to effect the purposes of its creation" in a dispute involving routine administrative control over the budget and staff assigned to the planning board,[24] *Commco* truly does involve an attack by a town board against the core statutory jurisdiction of a ZBA. The

Commco decision forcefully asserts that a zoning board of appeals is a creature of Town Law § 267, and is exclusively empowered to act on variances of the zoning law.[25] In *Commco*, there is a clear and compelling principle that zoning boards "possess an independent and direct interest in the litigation [of variances] as a representative of the public interest…"[26]

A town board is not powerless to contest an action of the ZBA. The *Commco* decision points out that a town board may commence an Article 78 proceeding to contest a ZBA determination[27] and may amend the zoning law.[28]

The *Commco* decision confirms the Court's previous holding in *Cahn* that a zoning board is "impliedly vested with the power to retain its own counsel" when the town attorney "can no longer adequately represent the interests of a ZBA because of a conflict between itself and the Town Board,"[29] and extends the holding to town attorney conflicts of interest "that may exist although there is not a direct suit by the town board or one of its members against the ZBA."[30]

III. Growth of the Implied Right to Engage Counsel

Cahn and *Commco* together encompass a variety of conflicts that municipal counsel may encounter between a governing board and a planning board or ZBA. In researching this article, it became apparent that there are few authorities that apply the implied right to counsel to circumstances where the disputants are not planning boards or zoning boards.

There is a Supreme Court decision from Dutchess County where a town attorney was disqualified from representing a town board against the ZBA that he also represented as town attorney. The decision is unpublished, but nevertheless merits discussion.

In 1992, the Zoning Board of Appeals of the Town of Hyde Park granted area variances to accommodate the expansion of the parking area of an existing shopping center. Shortly after a new town board majority took office, the Town Board commenced an Article 78 proceeding against the Zoning Board of Appeals to annul the variances. The town attorney commenced the suit on behalf of the newly elected town board. My firm was engaged by the town's ZBA to defend the ZBA. The ZBA moved to disqualify the town attorney from representing the Town Board in the matter, and initiated an Article 78 to challenge the Town Board's refusal to appropriate funds to pay for the ZBA's counsel.

The Supreme Court disqualified the town attorney and his firm from representing the Town Board in the proceedings. The analysis in the Decision and Judgment of Justice Joseph Jiudice is set forth below:

> The record indicates that the present town attorney has represented the Town Board as well as the Zoning Board of Appeals…
>
> It is also indicated that there is another Article 78 proceeding pending in the Supreme Court of Dutchess County in which the town attorney is representing the Zoning Board of Appeals.
>
> A town attorney represents all agencies of a town including the Zoning Board of Appeals. The fact that a Zoning Board of Appeals is a separate entity created pursuant to Town Law Section 267 does not alter its position as an agency of the municipality. [*citing Commco v. Amelkin*
>
> …The town attorney and his law firm have chosen to represent the Town Board against the Zoning Board of Appeals which is also its client. In such a situation, the town attorney can no longer represent the interest of the Zoning Board of Appeals since there would be an obvious conflict. Therefore, based upon the authority of *Matter of Commco, Inc. v. Amelkin, supra,* the Zoning Board would be justified in retaining its own counsel […]
>
> As noted above, the present town attorney is also the attorney for the Zoning Board of Appeals as an agency of the Town of Hyde Park. ***The issue, therefore, is whether undertaking litigation against an existing client presents a conflict of interest and is prima facie improper. […] If the town attorney and his law firm are permitted to remain in this case, the implications with regard to the Zoning Board of Appeals are obvious*** *(Narel Apparel, Ltd., Inc. v. American Utex International,* 92 A.D.2d 913, (2nd Dep't 1983) […] (emphasis added).
>
> The motion of the Zoning Board of Appeals for an order of disqualification is granted…[31]

The decision also annulled the Town Board's denial of the ZBA's request for funding of the ZBA's special counsel and orders the Town Board to approve payment.

The Hyde Park decision is discussed in this article to encourage reflection about how common it is to see newly elected governing board majorities and their

newly appointed municipal counsel taking office, and in the name of reform, moving at times in excess of the limits of their jurisdiction, and use the public assets of the municipality engaging in battles with other boards and officials.[32] Given that such conflicts between elected officials and appointed office holders are commonplace, the practical necessity of planning boards and ZBAs being authorized to engage independent counsel for their own protection and to preserve their lawful jurisdiction from unlawful encroachment by governing boards is readily apparent.[33] That is not to say that all newly elected governing board majorities are rogue, but even where reform is necessary to be imposed in a community, it is better to impose it with the protection of counsel rather than with a blunt instrument.

IV. Extension of the Rule to Individual Officials

The discussion above has concentrated on the authority of planning boards and zoning boards to engage independent counsel pursuant to *Cahn* and *Commco*.

There is little in either of the decisions to inform municipal counsel about the authority of individual officials to engage independent counsel absent the governing authority's approval.

A. Election Officials

Several decisions involve election officials.

In 1994, the Second Department decided *Matter of Board of Elections of The County of Westchester v. O'Rourke*.[34] Holding for the Board of Elections that it could not be compelled by Westchester County to be governed by certain collective bargaining agreements between the County and certain bargaining units of County employees due to the statutory control of the Election Commissioners over Board of Elections employees, the Court affirmed the judgment of the trial court that the Commissioners of Election were entitled to reasonable counsel fees. In the words of the Appellate Division:

> In bringing this action and proceeding, the Commissioners of the Board of Elections were acting in conjunction with their official duties and in good faith on a controversy of public interest, and the services of outside counsel were necessary insofar as the County Attorney could not represent both the Board of Elections and the County.[35] [*citing Cahn v. Town of Huntington*].[36]

The New York State Court of Appeals has construed the powers of election commissioners in a manner that could limit the authority of individual election commissioners to engage outside counsel. In *Matter of Graziano v. County of Albany*,[37] Albany County Election Commissioner Graziano brought an Article 78 proceeding contesting certain actions by the County relating to staffing and budget of the elections office.[38] The other election commissioner did not consent to Commissioner Graziano's Article 78 proceeding against the County. Of Graziano's two claims, the Court dismissed one and upheld the second.

Graziano was held to not have capacity to sue the County for his claim that the County's hiring freeze and spending freeze impaired the ability of the staff to prepare for upcoming elections. The lack of capacity to sue was the consequence of the other election commissioner not a voting to commence the litigation, as generally required by Election Law 3-212(2).

Graziano's remaining claim was that the County was singling out the Republican election staff for interference by not filling vacancies in the Republican division of the Board of Elections as promptly as vacancies on the Democrat side of the election department, creating a political imbalance between the Democrat election staff and the Republican election staff.[39] The Court found that Graziano possessed implied authority to individually bring suit against the County as an individual commissioner arising out of the constitutional and statutory mandate that Boards of Election be maintained in balance. The decision provides that "As an individual Election Commissioner, [Graziano] therefore performs two distinct statutory functions—he assists his Co-Commissioner in the administration of the Board and he safeguards the equal representation rights of his party. ***When fulfilling the latter function, …petitioner may act alone to challenge the actions of the County."***[40] (emphasis added)

Curiously, this decision does not expressly cite *Cahn* or *Commco* for the implied right to engage counsel.

Nevertheless, it appears probable that *Graziano* is progeny of *Cahn*.

The following statement in the *Graziano* decision seems drawn from *Cahn*: "Petitioner's capacity to sue to vindicate political interests grounded in the language of the Constitution and the Election Law is inherent in petitioner's unique role as guardian of the rights of his party and must be implied from the constitutional and statutory requirement of equal representation."[41]

Moreover, the *Graziano* decision states that "when the statutory balance is not maintained, the public interest is affected."[42] This refers to the "public interest" test in *Cahn*.

Accordingly, the requirement of the public interest that is stated in *Cahn* to justify imposition of the implied right to counsel is present in the *Graziano* decision, despite *Cahn* not being expressly cited.[43]

B. County Comptroller

An implied right to representation by independent counsel has been recognized for county comptrollers.

The Erie County Comptroller sued the County Executive to compel the filling of staff vacancies for the Comptroller's office.[44] The funds for the positions were in the budget, but the County Executive would not certify the necessity of filling the vacancies given fiscal constraints faced by the County. The appellate court ultimately dismissed Slominsky's petition, finding that the County Executive possessed authority to certify or not certify the positions pursuant to the County Charter and Code. Significantly, the Court held that the petitioner was entitled to reimbursement for the cost of attorney fees notwithstanding the dismissal of her proceeding on the merits. The decision provides:

> [Petitioner] has concededly brought the petition in her official capacity, and we have held that it involves "substantial questions of public interest which are likely to recur." The case does not involve an internal dispute between lower echelon officials (…) Moreover, petitioner's good faith is unquestioned [*citing Cahn*]. Under the circumstances presented, where the respondents include the highest officials in Erie County government, it would (…) have been pointless that petitioner go through the motions of requesting representation from the county attorney.[45]

Two features are significant relative to *Slominsky*. Petitioner's entitlement to paid counsel is not contingent on winning on the merits, nor is it dependent on the county attorney's actual refusal to represent the petitioner. Given that the duties of county comptrollers vary from county to county depending on the specific provisions of county charters and administrative codes, the measure of "independence" that a comptroller's office should maintain from other county officials is variable. Obviously, comptrollers who possess authority to audit other county departments should enjoy the implied authority to engage outside counsel to protect the Comptroller's independence in effecting that duty. Where a comptroller is in a dispute with other senior county officials, as where a comptroller conducts an investigation of other departments, or where enforcement by the comptroller against other officials is necessary, resorting to the county attorney staff for counsel is not a "best practice for a county comptroller who is vested with oversight authority within county government," and is not necessary.[46]

C. County Treasurer

The Appellate Division of the Third Department has upheld the implied right to counsel of a county treasurer who brought suit against Delaware County for moving six staff members of the County Treasurer to a newly created Department of Fiscal Affairs, and transferring the financial accounting system from the Treasurer's jurisdiction to the new department.[47] The petitioner lost the litigation on the merits, and the Appellate Division affirmed the determination of the lower court that plaintiff's action was brought in her official capacity, in good faith, and in the public interest, citing *Cahn v. Town of Huntington*, notwithstanding her loss on the merits.

D. Receiver of Taxes

An individual receiver of taxes was denied counsel fees in a suit that he brought against the Town of Elma to challenge the Town's elimination of the Office of Receiver of Taxes to which he was duly elected. The court simply concluded that there was nothing presented by the petitioner to establish that the petitioner was acting "in conjunction with…his official duties" in challenging the elimination of his office.[48]

E. Legislators

An opinion of the Attorney General of the State of New York provides that an individual member of a city council does not possess any special authority to enforce Open Meetings Law requirements on the city council beyond the rights shared by any member of the public.[49] The Attorney General opined that a legislator's core responsibility is to cast meaningful votes, but enforcement of statutes is not among a legislator's core duties. Unlike the fact pattern in *Cahn v. Town of Huntington*, where the planning board's official duties were under attack by the town board, the functioning of the City Council of Batavia was not at risk by reason of possible Open Meetings Law violations, and the lone litigating council member was not "effect[ing] the purposes of [the City Council's] creation to allow it to properly function by prosecuting such claims."[50]

F. Dissolution of Planning Board

The Second Department has held that where a town board adopts a resolution dissolving the planning board, the former members of the dissolved board who brought suit to annul the dissolution were acting individually and were not entitled to counsel fees.[51]

G. A Closer Look at Planning Boards

Planning boards and zoning boards are familiar to experienced municipal counsel as incubators for future candidates for elective offices. The term of office of

planning board members is five or seven years, meaning that planning boards often maintain a stable membership even after elections sweep in new majorities of the governing body. The opportunity for conflict between the old guard members of the planning board and the new guard on the governing board along political and ideological lines is apparent. In fact, it is not unusual for the new guard to campaign for office making a campaign issue of decisions of planning and zoning boards, setting the table for confrontations in the new administration.

However the conflicts between governing boards and planning boards arise, planning boards have some limited tools for securing counsel that other municipal officials do not possess, that municipal counsel must understand.

The courts have largely maintained the implied right to counsel arising from *Cahn* and *Commco* as a litigation mechanism. In other words, with some exceptions, outside counsel is not available to a board or official without authority of the governing board for activities that are not the subject of a specific pending lawsuit.

From time to time, planning boards express the desire to be permitted by the governing board to appoint their own attorney, forgoing municipal counsel's service for any number of possible reasons. It is overly simplistic to conclude that planning boards may not engage counsel without the consent of the governing board simply because the judicial decisions limit the implied right to counsel to litigation scenarios. Planning boards are authorized by statute and often by local law to engage "experts" not exceeding their budgeted allocations.[52] May a planning board engage an attorney as an "expert" to assist the board to process land use applications? It is not entirely settled that attorneys are "experts" and may be engaged by a planning board pursuant to Town Law Section 271 (2). Attorneys may be expert for limited engagements. Since most municipalities in the upstate regions that I am familiar with do not typically allocate enough funds for a planning board to retain an attorney for routine consultations, whether an attorney may be engaged as an "expert" is not particularly relevant if funding is insufficient to pay for independent attorney services out of the municipal budget.

With the enactment of the State Environmental Quality Review Act in 1976, it became possible for planning boards and other agencies to charge applicants for the cost of conducting the environmental review process.[53] Many local governments have enacted local laws expanding the "SEQRA fee" to apply to consultant services that are outside the SEQRA review process. Since such fees are generally collected in advance from each applicant for land use permits, and placed in escrow or in a trust and agency account, the local government does not typically encounter appropriation limitations such as imposed by Town Law § 271 (2). These so-called "consultant reimbursement laws" certainly have included attorney fees in their scope by long-standing practice if not by careful definition. Planning boards are often able to engage environmental counsel at the expense of applicants, which may relieve the municipal attorney of that responsibility in some municipalities. Yet these applicant-based fees are not likely to fund routine legal services that do not relate to specific land use applications, so consultant reimbursement laws are not regarded as a reliable source of funding for special counsel for planning boards and zoning boards for services to planning and zoning boards beyond the basic assistance an attorney may render to such boards in relation to individual land use applicants.[54]

H. Legislative Postscript

While experience in the municipal skunk works may leave municipal counsel with the view that *Cahn* and *Commco* have effectively provided a rough mechanism to resolve intramural disputes among local agencies, there are missing parts and gaps in the mechanism that the state legislature is in the best position to correct.

The cost to a municipality of an award of counsel fees against it is potentially devastating, especially so for smaller towns and villages where the tax rolls are thin and reserve funds are depleted. Compounded by the state limit on the tax levy, court-awarded attorney fees can easily reach six figures. In the municipal world of tax levy caps, awards of counsel fees against municipalities virtually guarantee that local legislative budget choices by the elected governing board will be displaced, when a court orders a special counsel to be paid, due to the necessity of complying with the tax levy limitation. This is a significant impact that the state legislature should correct. A meaningful correction should be amendment of the tax levy limitation to exempt from the tax levy limit the expense of complying with a court order for counsel fees.

The state legislature should restate the *Cahn* rule in the state's Town Law, Village Law and General City Law. In doing so, it should be made clear that no board or official is entitled to special counsel unless general municipal counsel is actually disqualified or unavailable to provide representation service to a subordinate official or board, whether municipal counsel is a public officer or a contracted private attorney or firm. The statute should expressly provide that contractual municipal attorneys, i.e. those who are not appointed public officials under state law, should be engaged by resolution of the governing board that specifies the agencies that will be represented, if not all, by counsel. Such a scope of engagement should become the critical first step to consider bearing on the necessity of a

subordinate board or official to have its own counsel and the availability of general municipal counsel to provide the service. The governing board's choice of counsel should not be set aside casually.

V. Conclusion

The *Cahn* and *Commco* decisions are functioning well since their introduction decades ago. That being the case, fiscal uncertainties, the tax levy limitation that does not exempt ordinary litigation expenses from the cap, and local government that is growing ever more litigious should prompt the state legislature to better define the implied right to counsel and introduce tools to better control the costs to the public treasury of permitting unelected boards and officials to litigate at public expense.

For municipal counsel advising clients about the occasions when the implied right to counsel will adhere, knowledge of the local charter, code of ordinances and state enabling statutes is essential to developing an opinion regarding whether the objective of a board or official to be achieved is within their authority, affects the public interest and is prosecuted in good faith as required by the *Cahn* decision and its progeny.

First and foremost, the analysis must begin with the question: Is municipal counsel ready, willing and able to represent subordinate boards or officials who have requested their own counsel? If municipal counsel is not disqualified by conflict or ethics regulation from providing representation to the administrative board or official, the implied right to counsel will likely not apply, except if a court rules as it did in the *Slominsky* decision that it would be pointless for a county comptroller to request representation by the county attorney where the comptroller's adversary would be the county executive and other senior county officials who are also represented by the county attorney.

As effective as this court-imposed rule has been over the decades, recognition of it in the form of a statute is long overdue, considering that the original *Cahn* decision created an implied exception to the Town Law by limiting the authority of a town board to approve engagements of counsel by subordinate boards and officials. In doing so, this important judicial tool can be strengthened and adapted to be a manageable tool that works within the governing board's budgetary authority, not around it.

Endnotes

1. Sharing and consolidation of services of municipalities are current public policy initiatives that permit local governments to reduce operating costs by imposing more responsibilities on fewer officials and agencies, and for multiple agencies to share the costs of specific government functions. See, e.g., Hudson Valley Pattern for Progress, Government Efficiency in The Hudson Valley, Creating a Positive Approach to Change, available at http://pattern-for-progress.org/sites/default/files/whitepaperGOVEFFICIENCY_1.PDF (accessed March 14, 2012).
2. Town Law Section 20(2); Village Law Section 4-400(1) (c); cities are governed by charters that may provide for the governing board to appoint municipal counsel or to confirm counsel's appointment by the mayor or other city official.
3. This article is not intended to review the law concerning professional conduct and recognition of conflicts of interest. It will often be a conflict of interest that triggers the procedures and rules that this article discusses *infra*. However, conflicts of interest are but one of multiple circumstances that may trigger the procedures and rules discussed below. For a recent and pertinent discussion of conflicts affecting municipal counsel, see Michael D. Zarin, *Ethical Problems in Everyday Environmental and Municipal Practice*, 25 NYSBA Municipal Lawyer, Fall, 2011, p. 5. Also see Salkin, *Ethical Consideration for Town Attorneys*: *Avoiding Conflicts of Interest and Other Potential "Land Mines,"* 19 NYSBA Municipal Lawyer, Spring 2005, p. 9.
4. *Cahn v. Town of Huntington*, 29 N.Y.2d 451 (1972).
5. § 65 Town Law, actions and proceedings by and against towns

   > (1)[…] The town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, […] for the benefit and protection of the town, in any of its rights or property. It should be the duty of any officer or officers so authorized and directed to institute said action or legal proceeding or to defend or appear therein, and the reasonable and necessary expense of such action or proceeding, or defense or appearance shall be a town charge. No such officer or officers, however, shall employ legal counsel except as directed by the town board.

6. *Cahn*, 29 N.Y.2d at 455.
7. There is no indication in the decision that the planning board contended that the town attorney should be disqualified from representing the town board in a legal proceeding against the planning board, whom he also represented.
8. The planning board appointed Richard C. Cahn, who is the plaintiff in *Cahn v. Town of Huntington.*
9. *Cahn*, 29 N.Y.2d at 453.
10. *Id.*
11. *Cahn*, 36 A.D.2d 737 (2nd Dep't 1971).
12. *Cahn*, 29 N.Y.2d at 456.
13. *Cahn*, 29 N.Y.2d at 455.
14. *Commco v. Amelkin*, 62 N.Y.2d 260 (1984).
15. The Court of Appeals in *Cahn* not very convincingly contended that the town board's effort to control the planning board's finances and deployment of staff was a "usurpation" of the planning board's authority. Municipal counsel well understand that governing boards typically control the budgets and personnel of subordinate agencies. In *Commco*, the town board indeed interfered with the very heart of the zoning board's jurisdiction: it's exclusive authority under state law to approve and disapprove use variances.
16. The decision is not clear if the town attorney was relieved by the Town Board of his representation of the zoning board of appeals. It appears that such was the case; the opinion states that the zoning board "realized that the town attorney was no longer representing it on the appeal…" *Commco*, 62 N.Y.2d at 264.
17. *Commco*, 62 N.Y.2d at p. 264.
18. *Id.*
19. Town Law § 68(1).

20. *Commco*, 62 N.Y.2d at p. 264.
21. *Commco*, 62 N.Y.2d at p. 265.
22. *Id.*
23. *Id.*
24. *Cahn*, 29 N.Y.2d at 455.
25. *Commco*, 62 N.Y.2d at p. 266.
26. The decision cites to Town Law § 261 and 267 subdivision 2 for the exclusive power of the zoning board. *Commco*, 62 N.Y.2d at p. 266.
27. See Town Law Sections 65, 267 subdv. 7.
28. *Commco*, 62 N.Y.2d at p. 267.
29. *Id.* at p. 368.
30. *Commco*, 62 N.Y.2d at p. 268. Curiously, the *Commco* decision does not anywhere include the analytic framework from *Cahn* that a municipal board possesses implied authority to employ counsel "in the good faith prosecution or defense of an action undertaken in the public interest, and in conjunction with its or his official duties where the municipal attorney refused to act, or was incapable of, or was disqualified from acting."
31. In *Matter of The Application of the Zoning Board of Appeals of the Town of Hyde Park v. Town Board of Town of Hyde Park, et al.*, Index No. 1569/1992 (Sup Ct, Dutchess County, November 8, 1993).
32. The record of the Hyde Park Zoning Board of Appeals litigation alleges that the Town Board's Article 78 was commenced shortly after the newly elected Democrat majority took office in January of 1992, and was an outgrowth of a hotly contested election of the entire town board in 1991. It is noteworthy that the judge did not render his decision disqualifying the town attorney until after the Democrat majority of the town board who rode the wave into office in 1992 lost their re-election bid in November, 1993, 18 months after the motion to disqualify the town attorney was filed.
33. Before becoming inextricably entangled in a dispute between the governing board and a subordinate administrative board, municipal counsel may well consider whether putting a judge in the position of having to disqualify a municipal attorney from representing the elected governing board against a planning board or zoning board of appeals is lacking the sense of judgment and discretion to avoid such entanglements that should be present in such officials.
34. 210 A.D.2d 402 (2d Dep't 1994).
35. 210 A.D.2d at p. 402. It is noteworthy that both election commissioners were acting together in the litigation against the County.
36. The decision cites Election Law Section 3-300 as vesting boards of election with exclusive and complete control over their personnel.
37. 3 N.Y.3d 475 (2004).
38. Election Law Section 3-212(2) requires "all actions of the Board [of Elections] shall require a majority vote of the commissioners…".
39. The Court states that New York Constitution Article III, section 8 mandates that all laws affecting the administration of boards of elections "shall secure equal representation of the major political parties," and Election Law Section 3-300 requires "equal representation of the major political parties" on boards of elections.
40. *Graziano v. County of Albany*, 3 N.Y.3d at p. 480.
41. *Id.*
42. *Id.* at p. 481.
43. *Cahn v. Town of Hutington*, 29 N.Y.2d at p. 456: "a municipal board or officer possesses implied authority to employ counsel in the good faith prosecution or defense of an action undertaken in the public interest; and in conjunction with its or his official duties, where the municipal attorney refused to act; or was incapable of, or was disqualified from, acting."
44. *Matter of Slominsky v. Rutkowski*, 91 A.D.2d 202 (4th Dep't 1983).
45. *Matter of Slominsky v. Rutkowski*, 91 A.D.2d at p. 212.
46. *See Caputo v. County of Suffolk*, 275 A.D.2d 294 (2nd Dep't 2000) (a county comptroller sued to annul the county legislature's determination waiving interest and penalties for parcels of land occupied by a community hospital in the amount exceeding $300,000. The Appellate Division acknowledged the county comptroller's standing and capacity to sue, and his entitlement to counsel fees in view of the conflict of interest of the county attorney who represents the county and the comptroller.).
47. *Shields v. County of Delaware*, 35 A.D.2d 1001 (3rd Dep't 2006).
48. *Kester v. Nolan*, 48 A.D.3d 1113 (4th Dep't 2008).
49. A city council member commenced an Article 78 proceeding against the City of Batavia relative to alleged violations of the Open Meetings Law. The Attorney General opinion states:

> The ability of a legislator to cast a meaningful vote is at the core of his or her job. By contrast, while it is part of a public official's functional responsibility to obey the Open Meetings Law, [a legislator] has no special responsibility, beyond that to the general public, to seek judicial enforcement of that law when she believes it has been violated. 2002 Ops. Atty. Gen. No. 2002-4, at p. 7.

50. 2002 N.Y. Op. Atty's Gen. No. 2002-4 (February 19, 2002) 2002-4.
51. The Appellate Division relied on *Cahn* for the principle that actions for which counsel may be assigned must be within the board's or official's official duties, and held that contesting the dissolution of the planning board is not within the power or duties of former planning board members.
52. Town Law Section 271(2) authorizes the town board to appropriate funds for planning board expenses, and planning boards "shall have the power and authority to employ experts… not exceeding in all the appropriation that may be made therefore by the town board for such planning board." Village Law § 7-718 (2) is identical in that regard to Town Law § 271(2).
53. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13 (N.Y.C.R.R.) Fees and Costs provides that the "lead agency may charge a fee to the applicant in order to recover the actual costs of either preparing or reviewing the draft and/or final EIS."
54. General Counsel of the New York Conference of Mayors recently adopted the view that in some limited circumstances, a village governing board may be entitled to separate counsel for non-litigation duties. *See* Beltramo, *Retaining The Village Attorney: It's Not A Problem Until It Is One*, New York Council of Mayors Bulletin, November–December, 2010, p. 21. Local customs aside, *Cahn* and *Commco* have not been extended to apply outside of active litigation.

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Review of Annual Disclosure Reports

By Julia Davis

Introduction

Annual disclosure by public officials most at risk of a conflict of interest is an essential component of a municipal ethics program. However, disclosure in and of itself does not deter conflicts of interest; review of the information provided is critical for the disclosure to be effective in combating conflicts of interest. This article will discuss the reviews that can and / or should be conducted by the municipal agency administering the disclosure program.

Reviews for Completeness

The first review of an annual disclosure report that the administering entity must do is to ensure that the report submitted is complete and that critical information has not been omitted. The method of filing the report determines how extensive this review must be. If the report filed is a paper report, the filer can easily submit an incomplete report. Since the method of submitting the report—on paper—does not contain an automatic check for completeness, the agency administering the annual disclosure report must manually view each and every report to ensure that the report is complete. Jurisdictions that have filers submit paper reports generally do so because they do not have the resources for an electronic annual disclosure application; these jurisdictions would face similar challenges to obtain the resources to manually check that reports submitted are complete, especially since review of paper reports can be time consuming and onerous.

In contrast, if the annual disclosure report is filed electronically, the electronic filing application can be designed so that an incomplete report cannot be filed. The application can be programmed so that all or critical questions must be answered before the filer can submit a report. There are two advantages to this system: one, as previously stated, the filer cannot submit an incomplete report; and, two, significant staff time and resources are not required to manually check for completeness. However, total completeness may not be achievable and some review may be necessary.[1]

Conflict Reviews

The report itself can and should also be reviewed for any potential conflicts of interest. Any review for potential conflicts, whether on the face of the report or through comparison of the report to other databases or documents, requires the reviewer to be familiar with the jurisdiction's ethics laws, as explained below. Without such knowledge, the reviewer will not know which answers in a report might raise an actual or potential conflict of interest and which ones will not.

When familiarizing oneself with the jurisdiction's ethics code, the reviewer must insure that the annual disclosure is tailored to that code. If the report is tailored to the jurisdiction's ethics laws and requires only information that would reveal an actual or potential violation of the applicable laws, any "yes" answer and substantive response would highlight an actual or potential conflict violation and there would be little to no work required to review a report. However, where the annual disclosure form is not tailored to the jurisdiction's ethics rules—the usual case in NewYork State—the reviewer must first separate out those questions and answers that would not reveal a conflict of interest under the applicable ethics laws, and exclude them when determining whether a potential conflict of interest exists. Where the annual disclosure report is not tailored to the jurisdiction's ethics laws, a "yes" answer and substantive response would not necessarily reveal a conflict of interest under the law, and significant resources, as well as analytical skills, will be required to conduct a substantive review. New York City's annual disclosure report, which is based on state law,[2] requires disclosure of information that would not be a conflict under the City's ethics laws. So, for example, an affirmative response to the question requiring information concerning gifts in the amount of $1,000 or more from a single donor over the course of the reporting year does not reveal a violation of the prohibition against accepting a gift of $50 or more from a single donor who does business with the City.[3]

Once the ethics law against which the report is to be compared is identified and the determination whether the report is tailored to those laws is made, review of the report for actual or potential conflicts can be conducted. In the easiest case, the filer provides information in the body of the report that, in of itself, discloses a potential or actual conflict, and the conflicts review can then be conducted on the face of the report. So, for example, in a jurisdiction where the ownership interest of a spouse or domestic partner is imputed to the filer and the report requires disclosure of the ownership interests of the filer's spouse and whether any such firms do business with the filer's agency, a reviewer will know that a potential conflict of interest exists when the filer discloses that his or her spouse's or domestic partner's company does business with the agency that employs the filer.[4] In this case, the review has identified a potential conflict without reference to any other documents

or databases and the administering agency can insure that the filer is not involved in those business dealings, on behalf of either the municipal agency or the private company, as discussed below.[5]

In addition to reviewing the face of the report to identify actual or potential conflicts of interest, reviews should compare the report with information and databases relevant to that report. For example, if the rules of the municipality require permission for a second job with a company that does business with the municipality, and the entity collecting and reviewing the annual disclosure reports is also responsible for granting that permission, the reviewer should insure that the filer has obtained such permission. This review will likely require a check of the administering entity's database of those employees who have obtained permission for outside employment to determine if the filer obtained such permission, as well as checking the list or database of all vendors to the municipality to determine if the outside employer has business with the municipality.[6] If the filer has not received such permission, the administering entity should inform the filer of the need either to obtain permission for the otherwise prohibited position or to leave the position.

The reverse review should also be undertaken: the names of all employees to whom the ethics board has granted permission to hold an otherwise prohibited second non-municipal position should be compared with the list of filers to determine if they are filers. If any of the employees who have been granted permission for such second positions are filers, their reports should be reviewed to insure that they have disclosed the non-municipal position. If the job was permitted but not reported, the filer should be instructed to amend the report to disclose the job.[7] If the job was reported, even though permission was denied, the matter should be referred to the appropriate unit or entity responsible for enforcement of the conflicts of interest laws.[8]

"Public" Reviews

Annual disclosure programs are required to have avenues for the public, whether members of the press or private citizens, to view and obtain portions of annual disclosure reports.[9] Journalists often review the reports and publish articles discussing their findings. These "reviews" may focus on high level municipal officials generally[10] or on numerous officials filing from a particular agency.[11]

Journalists often view annual disclosure programs as a device to combat corruption, rather than a tool to prevent actual or potential conflicts of interest.[12] Nevertheless, press accounts of public officials, usually those at a high level who receive press attention, often raise potential conflicts of interest or other issues of concern to an ethics body. When a potential conflict is raised by a press report, care must be taken in choosing when and how to communicate that conflict to the public official in question. When communications about potential conflicts are based on information obtained from internal documents and databases, reviewers can generally rely on the accuracy of the underlying facts. When the ethics body determines that it should alert a public official to a potential conflict raised by a newspaper article, the body must be judicious in its account of whether the article actually raises a conflict of interest. For example, the letter to the filer could qualify its assessment of the ethics violation that the article apparently raises with the phrase "if the facts set forth in the article are accurate and complete" rather than affirmatively state that the facts known to the agency present a conflict.

Procedure for Reviews

Reviews will only have impact on the filing population if the filer is notified of the potential or actual conflict of interest and advised as to what he or she must do to cure the violation. Notification should be made in writing, whether by email or mail, and should advise the filer both of the grounds for the agency's conclusion that a potential or actual conflict of interest exists and of the specific steps he or she must take to become compliant with the applicable ethics rules. Such steps might include either obtaining permission for a second position or leaving that position if a filer who has not obtained permission for the position or amending a report to include a position for which permission has been obtained but not reported. Finally, a deadline by which any such action needs to be taken should be imposed.

Reviews should be conducted as often as the reports are filed, e.g., annual reviews for annual disclosure. Ideally, every report submitted should be reviewed, both for completeness and potential conflicts. After notifications to the filer are made, the administering entity should follow up during the year before the next annual disclosure is made to insure that the filer has taken the necessary action(s) requested. For those filers who do not respond to the administering agency's notifications, the reports of the following calendar year should be reviewed to determine whether, for example, the filer continues to report a second job for which he or she has not obtained the requisite permission. If the filer has failed to do so, the administering entity could make one final notification to the filer of the need to address the apparent conflict violation and then, if there is no response, refer the matter for enforcement.

The reviews that can be conducted, whether initially for completeness or potential conflicts of interest or annually thereafter for follow-up reviews, may depend on the personnel available to conduct these reviews. Larger jurisdictions with agencies charged with administering annual disclosure programs will likely be better able to review the reports submitted. However, a

jurisdiction with a large number of filers might find it a challenge to review all submitted reports, especially if such reports are submitted on paper.

Where the entity administering annual disclosure does not have such personnel available to it (e.g., where an ethics board's members are themselves unable to review the reports and the board lacks any staff assigned to it), the task of reviewing reports will prove to be challenging. Use of staff from other agencies or temporary non-municipal personnel could be employed to conduct the reviews, but either of these options may create problems. First, personnel conducting the reviews might require significant training and supervision to become familiar with the underlying conflicts laws and to identify a potential conflict on a report. For example, personnel might need to be trained to access and view reports contained in an electronic filing application. Second, if portions of the report are confidential and may not lawfully be disclosed outside of the entity charged with collecting the reports, only the public portion of the report could be reviewed, or the reviewing personnel must be designated as staff of the administering entity for the purposes of review.[13]

Conclusion

In these days of budget constraints, locating and allocating the appropriate resources for reviews may very well represent a challenge to the entity administering a municipality's annual disclosure program. However, reviews of annual disclosure reports must be conducted for an annual disclosure program to be effective. Any reviews must compare the report against the applicable law, and filers must be advised of any potential or actual conflict that are revealed and the method to cure or prevent it. As annual disclosure is an ethics tool, and not a corruption prevention device, the goal of any review program should be to bring a filer into compliance with the jurisdiction's ethics code.

Endnotes

1. For example, if an electronic application is designed so that a filer must choose within a drop down menu to complete an answer, the filer whose response is not included in that drop down menu cannot submit his or her application. To combat that scenario, applications can be built so that inserting an explanation in a comment field will override the need to choose within the drop down menu. In this case, review to insure completeness of an electronically filed report would still be required but could be limited to those reports for which a comment field has been utilized.
2. General Municipal Law § 811(1)(a-1).
3. *Compare* New York City Administrative Code § 12-110(d)(8)(d) *with* New York City Charter § 2604(b)(5) and 53 RCNY § 1-01(a).
4. *See* NYC Charter §§ 2604(a)(1), 2601(12), 2601(16); NYC Admin. Code § 12-110(d)(11).
5. The majority of reviews aim to cure actual violations of the jurisdiction's ethics rules but may also address and prevent potential violations. For example, if a filer's spouse works at a firm that does business with the filer's agency, the review can ensure that the filer has not been involved with any of the agency's interactions with that firm, and recuses himself or herself from any such interactions in the future.
6. The review should not be limited to the administering entity's internal databases but should include any other available municipal or public databases that might be relevant to a filer's report. In addition to the municipality's database of vendors with which it has contracts or from which it purchases services or supplies, there may be available records concerning land ownership and transfers as well as licenses or permits the municipality has issued.
7. The administering agency may wish to add a statement on the annual disclosure form that reporting information in the annual disclosure report does not constitute disclosure to, or a request for permission from, the ethics board or other body that grants such permission.
8. While this article has discussed reviews for a second job for which there has been a failure either to obtain the requisite permission or for a report that fails to disclosure one for which permission had been obtained, the universe of reviews is not so limited. Reviews could be conducted for disclosure of prohibited political positions, unauthorized reimbursed travel, or any other interest or position which violates the jurisdiction's ethics code.
9. *See* General Municipal Law § 813(18)(a)(1) (requiring that annual disclosure reports filed with the Temporary State Commission on Local Government Ethics be made public); 1987 N.Y. Laws ch. 813, § 26(c) (providing that, upon the expiration of the Commission on December 31, 1992, its powers, duties, and functions devolve upon the municipality's ethics board or, in the absence of a municipal ethics board, upon the municipality's legislative body). *See, e.g.*, NYC Admin. Code § 12-110(e).
10. *See, e.g.*, "Cathie's officially in the Black," New York Daily News, 8/3/11, Page 2.
11. S*ee, e.g.*, "Council's checks & balances," New York Post, 7/20/11, http://www.nypost.com/p/news/local/council_checks_balances_ntiMCugs2Xj7rnTFom7bhP (retrieved 6/12/12).
12. In fact, annual disclosure reports do not usually disclose criminal activity, as bribes or other illegal conduct are rarely reported. Reports are usually employed in criminal prosecutions to support a charge of false filing for failure to disclosure an unlawful gain or illegal activity, such as in the state prosecutions of former New York City Police Commissioner Bernard Kerik for failing to include as a gift the cost of renovations of his Riverdale apartment for which he did not pay contractors in his annual New York City disclosure reports (*see* Bronx County District Attorney Press Release, http://bronxda.nyc.gov/information/2006/case47.htm (retrieved 6/12/12)) or of former New York State Senator Joseph Bruno who allegedly lied on his state financial disclosure report to conceal the true origin of illegal payments (*see, e.g.*, http://abclocal.go.com/wabc/story?section=news/local&id=6621192 (retrieved 6/12/12).
13. If the ethics body has a board, its members could complete this task, but utilizing personnel in what are usually volunteer positions might be an unreasonable drain of those resources.

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The Story of Dharma: The Three-Legged Ethics Dog

By Mark Davies

On June 26, the author served as co-facilitator of a work group on Anti-Corruption Policies, Institutions, and Mechanisms at Different Levels of Government at the United Nations Experts Group Meeting and Capacity-Development Workshop, Preventing Corruption in Public Administration: Citizen Engagement for Improved Transparency and Accountability. His remarks may serve as an introduction to conflicts of interest (ethics) laws for municipalities.[1]

Let me begin with two caveats, as the lawyers call them, two reservations. First, the United States ranks 24th on Transparency International's 2011 Corruption Perceptions Index.[2] Now, when I want answers, I'm not sure I'd ask #24 anything. But that's just as well because, second, I don't know any answers. Yet, after almost 25 years in this conflicts of interest business, I do know, I think, a lot of questions.

So, if I may, let me ask you all four questions:

1. How many of you believe that a majority (over 50%) of your public officials are corrupt? Anybody?
2. How many of you believe that at least 10% of your public officials are corrupt? Anybody?
3. How many of you believe that less than 1% of your public officials are corrupt?

I've asked that last question to representatives from dozens of counties from around the world who have visited our agency (from the poorest countries to the richest, from the least developed to the most developed), and they all answer the same: the vast majority (over 99%) of their public servants are basically honest and want to do the right thing.

So, then, my fourth question is this: What are we—all of us—doing for the 99% of our officials who are honest?

I'm here today to speak for the 99%. For the honest public officials.

I understand how serious corruption is. One visitor to our agency said, "I have a hard time worrying about a government official taking a couple free tickets to a football game when I've got officials stuffing bribe money in their pockets." I get it. But what about the 99%? Who's looking out for them? Who's protecting them? Who's guiding them? Who's keeping them honest? That's what a conflicts of interest compliance system (as distinguished from an anti-corruption system) is all about. And that's what I'd like to talk about.

Unfortunately, most of my talks are really boring, so let me try something different today. Let me tell a story, or maybe it's a parable, about a little three-legged dog named Dharma, which in Sanskrit means teaching or right behavior. Now despite being born with only three legs and being kind of scruffy looking, Dharma can walk fine and even run a little. His breed is an ancient one, which barks loudly and bites hard. But he can play, too. Like many dogs he is loyal and helpful and tries to keep people out of trouble. Of course, he also likes to sniff around a lot. Down the street from Dharma is a factory, which is protected at night by a police dog, who is big and scary and mean and who will sniff out and attack anyone who breaks in.

That police dog is how I think of anti-corruption laws and agencies. Their job is to catch crooked public servants and put them in jail and stop bad officials from doing bad things, including making systemic changes.

But Dharma is different. Dharma is like a conflicts of interest law and agency, whose purpose is to promote both the reality *and perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur. So conflicts of interest laws and agencies focus not on punishment but on prevention, not on catching crooks but on guiding honest public officials and keeping them honest. And by conflict of interest, I mean divided loyalty, that is, a conflict, usually (though not always) a financial conflict between one's private interest and public duties—like an official who has a second job with a company he also deals with in his government job.

Like Dharma's heritage, these laws go back millennia, at least to the Code of Hammurabi, over 3,800 years ago. And like Dharma, these conflicts of interest laws are not just about barking and biting and sniffing and playing. They're also about loyalty and integrity. Conflicts of interest codes are compliance-based. For example, they may say: "Government officials shall not accept a gift from anyone they are dealing with in their government job." But they rest on values, such as: "Government officials shall place the interest of the public before themselves." Just as Dharma's nature and personality (his loyalty and integrity) determine how and when and whom he barks at and bites and sniffs and plays with, so, too, the values of a country or

province or city or village determine what its conflicts of interest code provides.

Like Dharma, these laws rest on three legs. Now if Dharma lost another leg, that would be the end of him. Same thing for a conflicts of interest law. Take away any of its three legs, and it's finished.

The first leg is a simple, clear, and comprehensive conflicts of interest code. It probably addresses such issues as misuse of government office for private gain, misuse of government resources for private purposes, asking for or accepting gifts from anyone doing business with the government, taking tips (gratuities) for doing one's government job, disclosing or using confidential government information, or after leaving government service appearing before one's former government agency or working on a matter one had worked on for the government. I'm not talking about outright corruption here (like bribes and kickbacks and theft), but simple conflicts of interest (like taking those two free football tickets from someone you're dealing with in your government job).

The second leg is disclosure, especially disclosing and recusing (disqualifying) oneself when a conflict of interest arises: "My brother's company is bidding on this government contract, so I recuse myself." And annual disclosure of certain assets and liabilities, the purpose of which, like the purpose of the conflicts of interest law itself, is to prevent violations. So the annual disclosure form has to be tied directly to the conflicts of interest code—that is, the annual disclosure form must ask only questions that may reveal a violation of that code—because the form's purpose is not to catch crooks but to reveal potential conflicts of interest before they occur and thereby help avoid violations.

The third leg is effective administration by a *separate* and *independent* conflicts of interest agency—separate for a lot of reasons and independent because unless it's independent no one will believe it is acting in the interest of the public and not just in the interest of whoever controls it.

Now Dharma, you'll recall, can bark loudly, bite hard, sniff around, and play. Same thing with a conflicts of interest (or ethics) agency, which has those same four main functions:

1. Like Dharma, it barks loudly by giving quick and confidential advice on whether future conduct is legal under the conflicts of interest code.
2. Like Dharma, it sniffs around by making sure people file their disclosure forms and then by reviewing those forms for possible conflicts of interest.
3. Like Dharma, it can also play by providing training in the conflicts of interest law to every public official. After all, officials can't obey a law they don't know about. And the best ethics training *is* fun.
4. But like Dharma, the conflicts of interest agency bites hard when it discovers a violation: by aggressively investigating it, by prosecuting it, and by imposing a fair but significant civil penalty, not merely disciplinary action but civil fines, debarment of vendors, disgorgement of ill-gotten gains, damages, and so forth. If a dog can't bite—if a conflicts of interest agency can't enforce the law—then it might as well have no teeth at all. In fact, you might as well just shoot it and put it out of its misery.

And like Dharma, most conflicts of interest agencies are pretty small and kind of scruffy looking. Few of them are fat. But you can't starve them either, or they can't do their job.

So an effective conflicts of interest law and a separate and independent conflicts of interest agency that rests on these three legs and that exercises these four duties speak to and for the 99% of our public officials who *are* honest. That law and agency promote both the reality and the perception of integrity in government by preventing conflicts of interest violations, by guiding honest public servants, by reassuring citizens, and by reinforcing the core values upon which the government is founded. Even in a government perceived to be a desert of corruption, such a system can provide a small oasis of stability, integrity, efficiency, and hope.

Dharma, the three-legged conflicts of interest dog

Anyway, in the midst of all this anti-corruption, put-the-bad-guy in jail stuff—as important as that is—I hope you'll remember Dharma, the little three-legged conflicts of interest dog.

Endnotes

1. For an extended discussion of the issues raised in these remarks, *see* Mark Davies, A Practical Approach to Establishing and Maintaining A Values-Based Conflicts of Interest Compliance System, available at http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan049601.pdf.
2. *See* http://cpi.transparency.org/cpi2011/results/.

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The Ironic Legislative Response to *Kelo*

By Gregory J. Robson

I. Introduction

The Supreme Court's (hereinafter "Court") 2005 decision in *Kelo v. City of New London* brought eminent domain takings to the fore as a controversial sociolegal issue in 21st century America. Historically, eminent domain has been used to refurbish blighted areas (*Berman v. Parker*),[1] reconfigure skewed housing markets (*Hawaii Housing Authority v. Midkiff*),[2] and revitalize stagnant economies (*Kelo*).[3] In *Kelo*, five justices voted to uphold the 2004 decision of the Connecticut Supreme Court to permit the City of New London (hereinafter "City") to use eminent domain for the purpose of economic development. *Kelo* addresses the "important question of when eminent domain may constitutionally be used to take property for projects that are not publicly owned and operated facilities."[4] At issue is the constitutionality of takings that transfer property between private owners for economic development purposes, and particularly whether City's development plan serves a "public purpose."[5] The majority held that the taking satisfies the Public Use Clause and that the Court should defer to City's determination of the fitness of this plan under the Court's understanding of "public use." The Court also noted that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power," and "[t]his Court's authority…extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth amendment to the Federal Constitution."[6]

Congressional legislation in recent months provides a fitting occasion to examine the net effect of *Kelo* on economic development takings authority.[7] Although the decision itself may have increased such authority, the state and federal policy responses to *Kelo* have been so vigorous and wide-ranging that, taken together, they more than offset any increase in economic development takings authority. *Kelo*, then, has had an ironic impact upon takings authority.

II. The Federal Policy Response

Perhaps most striking about the federal policy response to *Kelo* were the measures to constrain takings authority soon after the decision. Reflecting the highly one-sided public backlash to *Kelo*, the House voted 365 to 33 to adopt House Resolution 340 (2005). H.R. 340 criticized *Kelo* and admonished state and local governments not to "construe *Kelo* as justification to abuse the power of eminent domain."[8] Representative Phil Gingrey (R-GA) sponsored the bill,[9] but bipartisan disapproval of *Kelo* found strong expression when conservative Speaker of the House Tom DeLay (R-TX) teamed up with liberal representative Maxine Waters (D-CA) in support of House Resolution 340.[10] That fourteen bills that aimed to rein in takings authority were introduced in Congress soon after *Kelo* is particularly telling. Despite only one passing in the end, Congress was not running in place legislatively speaking. President Bush signed House Resolution 3058 into law on November 30, 2005, which prohibited expenditures at the federal, state, and local levels on eminent domain projects not for a public use.[11] "Public use," it states, "shall not be construed to include economic development that primarily benefits private parties."[12] H.R. 3058 enabled the House to leverage its power of the purse. For it "approved funding for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and other independent agencies for fiscal year 2006."[13] On the Senate side, neither of the two notable bills—House Resolution 4128 and Senate Bill 1313—made it through the Senate Judiciary Committee,[14] since each was overly broad and may have impeded positive uses of eminent domain authority.[15]

The 110th Congress also proposed two bills a little over one year after *Kelo*. The Private Property Protection Act aimed to prevent federal funding from going to projects enabled by eminent domain that were not for a public purpose or for a public use in the sense enunciated in the bill.[16] Moreover, the 2007 Strengthening the Ownership of Private Property Act was introduced in February 2007. It limited private party takings transfers except in particular cases such as national emergencies and is substantially similar to more recent legislation including the 2012 House bill mentioned above.[17] In proposing fourteen bills within two years of *Kelo*, Congress brought to the fore the strong anti-*Kelo* public opinion that was especially acute during that time.

III. State Responses to *Kelo*

A. Anticipatory State Legislation

By playing a significant role in curbing economic development takings authority post-*Kelo*, state legislation helped engender *Kelo's* ironic impact on takings authority. We turn now to some of the more notable examples of anticipatory and responsive state legislation.

1. *Utah*—Three months before *Kelo*, Utah enacted a redevelopment statute limiting the permissible uses of eminent domain for redevelopment and setting out criteria that any proposed redevelopment must satisfy in order to gain approval from the State Board of Education.[18] The bill proscribed takings save those within a designated "project area."[19] Arising out of stern opposition in the Utah legislature to redevelopment projects like that in *Kelo*, the bill assuaged fears that tax dollars would be spent on redevelopment projects rather than public schools and other such recipient institutions of tax revenue.[20] Utah also required that the relevant legislative body approve the plan (constraining power of its judiciary over takings law); a blight study be conducted; a hearing be held to inform the public about details of the plan; and the redevelopment plan be shown likely to succeed.[21] Utah's strict plan mandates that any "blighted" area must undermine municipal, economic, or public health; safety or welfare; or housing goals or improvements in the project area.[22]

2. *Nevada*—Like Utah's, Nevada's response owed to the perception, as Sheffler-Wood relates, that "the city's action in *Kelo* was a wrongful taking of land from a private party because the city transferred the land to another private party."[23] Sheffler-Wood concisely summarizes Nevada's impetus to limit the ambit of permissible economic development takings. In enacting two pieces of legislation on June 14 and June 17, 2005, shortly before *Kelo* was decided, Nevada sought to "mandate written offers, good faith negotiation, fair appraisals, just compensation, and significant blight in order to take private property."[24] Controversial takings in Washoe County and Las Vegas, moreover, raised awareness in Nevada about the gravity of eminent domain and its potential to harm certain citizens disproportionately while helping others.[25]

3. *Oregon*—In Oregon, Ballot Measure 37 passed, mandating that just compensation be paid if the enforcement of any new or until then unenforced land measure were to reduce the fair market value of a unit of property.[26] Passage of this bill led to a bifurcated public response. Proponents applauded an apparent strengthening of property rights. Opponents voiced several worries: that the bill makes land use planning more difficult; that claimants are exempted from land use regulations while non-claimants are not (potentially contravening the principle of equal protection under law); that administering the bill would be exorbitantly expensive; and that fair market value does not adequately correspond to actual land value and may even lead to profiteering behavior.[27] The Oregon Supreme Court upheld Ballot Measure 37 in February 2006.

B. Responsive State Legislation

If politically quite different states (*e.g.*, conservative Utah, liberal Oregon) sought to preempt possible detrimental effects of *Kelo*, state responses to the Court's decision were even more one-sided. We turn now to several state responses that ironically seem to have reduced takings authority post-*Kelo*.

1. *Texas*—After *Kelo*, Texas Governor Rick Perry requested a legislative session focused on eminent domain.[28] In it the Texas Legislature responded to *Kelo* by passing S.B. 7, a measure that "attempts to restrict the eminent domain powers of the state and public entities" by granting "statutory authority to steer the judiciary away from upholding takings that provide an excessive benefit to private parties."[29] Despite Texas courts' traditionally high level of deference to the legislature in determining what counts as a "public use," S.B. 7 sought specifically to prevent eminent domain from being used in Texas as it had been in *Kelo*, by limiting the authority of governmental and non-governmental entities to undertake such takings.[30] S.B. 7 also established The Interim Committee on the Power of Eminent Domain, which included five state House members and five state Senate members.[31] It was responsible for investigating the use of eminent domain for economic development and the payment of just compensation to those whose property was taken. S. B. 7 amended the Texas Government Code by proscribing government or private entities from taking private property that (1) confers a private benefit on a private party using the property; (2) is taken for "public use" in order to benefit private parties; or (3) whose purpose is economic development.[32]

2. *North Carolina*—Many North Carolinians—like many Texans—expressed dismay at *Kelo*.[33] There was mounting pressure in North Carolina to amend its state constitution, but this state instead took a statutory tack. A House Select Committee on Eminent Domain Powers was formed and made responsible for analyzing *Kelo* with special regard to its possible effect on North Carolina's eminent domain practices. A bill[34] passed that not only proscribed the passage of local acts permitting the use of certain classes of takings especially susceptible to abuse, as listed in Chapter 40A of the North Carolina General Statutes,[35] but also repealed "the authority to use the power of eminent domain in connection with revenue bond projects."[36] The bill also circumscribed the scope of takings authority, leaving it to encompass only takings for the purpose of refurbishing a blighted parcel.[37] In North Carolina, eminent domain can no longer permissibly be used to develop areas that include both blighted and non-blighted properties, rendering this case an interesting instance of a post-*Kelo* legislature countermanding not only the spirit of *Kelo* but that of *Berman* as well.[38]

3. *Idaho*—In responding to *Kelo*, the Idaho legislature passed a bill that, as Watt explains, aims to "provide limitations on eminent domain for private parties, urban renewal or economic development purposes and to provide for review at judicial proceedings involv-

ing the exercise of the power of eminent domain."[39] Barring exceptions for, *inter alia*, the welfare, health, and safety of Idahoans, Idaho Code Section 700-701A expressly proscribes eminent domain takings "for the purpose of promoting or effectuating economic development."[40] It also disallows takings "for any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party."[41] Idaho also added Proposition 2 to its ballot in November 2006; however, having not been passed, it was unable to reshape several key definitions in the state's eminent domain law—*e.g.*, "owner," "public use," and "property"—as planned.

4. *Florida*—Post-*Kelo*, the Florida legislature passed HB 1567, a bill limiting eminent domain use chiefly in two ways.[42] First, writes William Keith, it limits the "use of eminent domain law by restricting some transfers of land to certain persons and private entities."[43] Second, HB 1567 "provides that the elimination of a slum or blighted area does not meet the state constitutional requirement that the taking be for a public purpose."[44] So, Florida's response to *Kelo* was similar to North Carolina's. Each re-shaped takings law as regards blights and espoused a narrower reading of "public use" than the Court adopted in *Kelo*. Interestingly, despite *Kelo's* focus on private-to-private transfers for economic development, the case provided the Florida legislature with the political leverage necessary to enact a broader legislative reform, namely a key qualification to how the judiciary should interpret "public use." As in so many other states, with no *Kelo* there would likely be no such reform in Florida. This is yet another case where takings authority ironically would be even broader were it not for *Kelo*.

5. *Delaware*—A longstanding takings law precedent in Delaware, going back at least to *Randolph v. Wilmington Housing Authority* (1958), did not prevent the state from considering two Senate bills and one House resolution.[45] Senate Bill 217, which the governor signed into law on July 21, 2005 after it passed unanimously in the House and Senate,[46] amended title 29 of the Delaware Code.[47] S. B. 217 awards fees to property owners against whom takings proceedings fail.[48] It also specifies that, to be permissible, eminent domain takings by any agency require notification of the taking at least six months in advance, in the form of a certified planning document, public hearing, or report published by the acquiring agency.[49] There was also S.B. 221, which arose out of similar legislative intent as that behind S.B. 217, but was introduced to apply to the courts (S.B. 217 applied to state agencies).[50] Finally, House Concurrent Resolution 38, which passed unanimously in the House and Senate, characterized *Kelo* as having condoned a "dangerous expansion of eminent domain," and created a task force charged with confining takings to those constituting "bona fide public usage."[51]

C. New York

Whereas the just discussed states responded to *Kelo* by enacting robust legislative measures, New York maintained its pre-*Kelo* standard of heavy judicial deference to a post-*Kelo* legislature that remained ready and willing to use eminent domain.[52] As Franzese asserts, "New York's government-permissive statutory scheme and solicitous judicial response remains [sic] unchanged" post-*Kelo*.[53] New York requires by statute that any agency charged with evaluating the appropriateness of a taking demonstrate (a) that the property in question is blighted or (b) the taking itself be for a "civic purpose."[54] The two key cases in recent years are *Goldstein v. Pataki* (2d Cir. 2008)[55] and *Kaur v. New York State Urban Development Corp.* (2010)[56] in New York's Court of Appeals.[57]

In *Goldstein*, New York's highest court upheld a robust standard of legislative deference. It permitted the building of an NBA arena on property that the legislature designated as blighted, despite the court's acknowledgment that the area is not nearly as blighted as an urban slum area in a previous case that was in "dire circumstances."[58] Moreover, the court evinced its willingness to allow takings so long as they are not based on irrational (or "baseless") premises or corrupt legislative processes.[59] In *Kaur*, the court upheld a standard of "wholesale deference" (in Franzese's apt words) to legislative determination of West Harlem as blighted.[60] This blight determination enabled Columbia University to expand its campus.[61] "*Kaur* makes plain," writes Franzese, "the [great] extent of the New York judiciary's disinclination to enter the fray."[62] A common theme was the use of takings authority for projects that benefit interested parties—Columbia University in *Kaur*, Forest Ratner Companies in *Goldstein*.[63] Regardless of whether New York's takings process is too quick to favor agencies over property owners,[64] New York's response to *Kelo* is notable in that it is a clear outlier in the trend of reactive state legislation post-*Kelo*.[65]

IV. Local Responses to *Kelo*

Post-*Kelo* takings worries have also motivated significant changes in eminent domain law in major cities such as Memphis, San Jose, and Los Angeles.[66] As with state lawmakers, local political leaders "would risk negative publicity and voter unease in resorting to eminent-domain proceedings for economic-development projects."[67] Accordingly, "many local officials have shied away from eminent domain" and some local officials—like Councilwoman Liz Wade of Riviera Beach, California—have "pledged never to use it except as a last resort."[68] Although what constitutes a "last resort" is debatable, local legislatures have clearly been under pressure not to use takings authority as it was used in *Kelo*.

V. Conclusion

It is debatable whether *Kelo* as a legal case actually increased takings authority. Clearly, however, the case has since sparked a robust legislative response at the federal, state, and local levels. So the ironic impact of *Kelo* as a legal decision is that, all things considered, it has quite likely reduced economic development takings authority. The striking, multidimensional legislative response to which *Kelo* has given rise has more than offset any increase in takings authority due to the legal decision itself.

Endnotes

1. *Berman v. Parker*, 348 U.S. 226 (1954).
2. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).
3. *Kelo v. City of New London*, 546 U.S. 469 (2005).
4. *See* D. H. Merriam and M. M. Ross, Eminent Domain Use and Abuse: *Kelo* in Context xvii (2006).
5. *See Kelo supra* note 3, at 480. Herein "economic development purposes" include increasing tax revenues and the employment rate.
6. *See id.* at 489-90.
7. *See* Committee Reports, 112th Congress (2011-2012), House Report 112-401 (2012), *available at* http://thomas.loc.gov/cgi bin/cpquery/R?cp112:FLD010:@1(hr401). *See also, e.g.,* A. Hudson, *Big Private Property Victory: House Bill Would Reverse Kelo Decision*, 68 (8) Human Events 10 (Mar. 5, 2012); C. Stephenson, *House Passes Bill to Reverse "Kelo,"* Lawyers USA (Mar. 7, 2012).
8. *See E. Sperow, The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 McGeorge L. Rev. 415 (2007) (quoting H.R. Res. 340, 109th Cong. (2005)).
9. *See* E. J. Lopez & S. M. Totah, *Kelo and Its Discontents: The Worst (or Best?) Thing to Happen to Property Rights*, XI The Independent R. 405 (2007). Emphasis original.
10. *See* Sperow, *supra* note 8, at 415.
11. *See id.*
12. *See id.* (quoting H.R. 3058 (2005))
13. *See id.*
14. *See id.*
15. *See id.* at 417.
16. *See id.*
17. *See id. See also* Committee Reports, *supra* note 7 (concerning House Report 112-401, on the Private Property Rights Protection Act of 2012).
18. *See* A. C. Sheffler-Wood, *Where Do We Go From Here? States Revise Eminent Domain Legislation in Response to* Kelo, 79 Temple L. Rev. 626 (2006).
19. *See id.* at 625-626. Original quotation: Utah Code Ann. 17C-1-206.
20. *See id.* at 627.
21. *See id.* at 626. Interestingly, Ilya Somin writes:

    > Of the seventeen states (counting Utah) that have recently enacted eminent domain reform laws with real teeth of any kind, six have either abolished blight condemnations or come close to doing so.

    See I. Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 Northwestern University L. Rev. 1935 (2007).
22. *See* Sheffler-Wood, *supra* note 18, at 626.
23. *See id.* at 629.
24. *See id.* at 630.
25. *See id.* at 630.
26. *See* K. M. Watt, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-*Kelo *Northwest*, 43 Idaho L. Rev. 573 (2006-7).
27. *See id.* at 571-574.
28. *See* A. Archer, *Restricting* Kelo*: Will Redefining "Blight" in Senate Bill 7 be the Light at the End of the Tunnel?*, 37 St. Mary's L. J. 828 (2005-6).
29. *See id.* at 842.
30. *See id.* at 821, 828.
31. *See id.* at 829.
32. *See id.* at 830 (citing the Texas Government Code).
33. C. Pearce, *Forcing Urban Redevelopment To Proceed "Building by Building": North Carolina's Flawed Policy Response to Kelo v. City of New London*, 85 N. C. Law Rev. 1785 (2006-7).
34. Specifically, Draft Bill, 2005-Rl-11A[v.3] section 1. *See also* C. Pearce, *Forcing Urban Redevelopment To Proceed "Building by Building": North Carolina's Flawed Policy Response to Kelo v. City of New London*, 85 N. C. Law Rev. 1789 (2006-7).
35. *See id.* at 1789.
36. *See id.*
37. *See id.*
38. As described above, *Berman v. Parker* permitted takings of non-blighted property for blight refurbishment when taken together with other parcels of blighted property.
39. *See* Watt, *supra* note 26, at 577.
40. Idaho Code Ann. Section 7-701A(2) (Supp. 2006)—from *id.* at 578. Such "exceptions," however, would seem not to be takings as they fall within the police power (described above).
41. Idaho Code Ann. Section 7-701A(2) (Supp. 2006)—*see id.*
42. *See* W. P. Keith, *Recent Developments*, 22 J. of Land Use and Env. Law 156 (2006-7).
43. *See id.* at 156.
44. *See id.* at 156.
45. *Randolph v. Wilmington Housing Auth.*, 139 A.2d 476, (Del. 1958).
46. *See* J. U. Galperin, *A Warning to States, Accepting this Invitation May Be Hazardous to Your Health (Safety and Public Welfare): An Analysis of Post-*Kelo *Legislative Activity*, 31 Vermont Law Review 693 (2007).
47. *See id.* at 690.
48. *See id.*, referring to Delaware S.B. 217.
49. *See id.*
50. *See* Galperin, *supra* note 46, at 693.
51. *See id.* at 696, quoting H.R. Con. Res. 38, 143d Gen. Assemb., Spec. Sess. (Del. 2005).
52. P. Franzese, *Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law*, 38 Fordham Urb. Law J. 1093 (2011). Throughout most of this section, I follow Franzese's illuminating analysis. Besides her descriptive analysis of New York's recent eminent domain law, Franzese also offers an interesting normative analysis for (1) the need for a "more meaningful standard of judicial review" (1095) and, more specifically, (2) the claim that "the New York model must be

recast to more effectively balance and vindicate the various equities that pit private property rights against concerns for the greater good" (1093). The risk of "blight designations" being "allowed to stand unchecked" is a betrayal of public trust and shows insufficient respect for property rights (1116).

53. *See id.* at 1091.

54. *See id.* at 1095.

55. *Goldstein v. NYS Urban Development Corp.*, 921 N.E.2d 164 (NY 2009).

56. *Kaur v. NYS Urban Development Corp.*, 933 N.E.2d 721 (NY 2010), *cert. denied*, 131 S. Ct. 822, 823 (2010).

57. *Goldstein* is the "Atlantic Yards" case. For an interesting recent analysis, *see* A. Lavine & N. Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW 287, 340 (2010).

58. *Goldstein*, 921. N.E.2d at 171 (NY 2009). *See* Franzese, *supra* note 52, at 1092-93.

59. *See id.* at 1095.

60. *See id.* at 1092. *See also Kaur*, 933 N.E.2d. (N.Y. 2010).

61. *Kaur v. NYS Urban Development Corp.*, 933 N.E.2d 721, 724 (NY 2010).

62. *See* Franzese, *supra* note 52, at 1093.

63. *See id.* at 1092.

64. *See id.* at 1098. "From affording affected landowners only thirty days to seek judicial review (or lose the right)," writes Franzese, "to limiting judicial review to those objections raised at public hearing, to creating a parade of exemptions regarding agency compliance with the procedural protocol, the procedural regime is less than generous to the targets of agency action" (*See id.* at 1098-99). Moreover, "[t]he record amassed in *Kaur* makes plain that blight findings are susceptible to distortion at the hands of those private interests who have most to gain from the blight designation" (*see id.* at 1116).

65. Connecticut and Oklahoma, too, have either not changed or strengthened the scope of their eminent domain authority post-*Kelo*. *See Marc Mihaly & Turner Smith, Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 721 (2011).

66. *See* Lopez & Totah, *supra* note 9, at 411. Emphasis original.

67. *See id.* at 405.

68. *See id.* Emphasis original.

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Land Use Case Law Update

By Noelle Crisalli Wolfson

This edition of the Case Law Update features cases from the Second and Third Departments. While it is unlikely that any of the recent land use cases will become a best-selling beach read this summer, they are informative on issues such as judicial review of a default denial of an area variance (*Jonas v. Stackler*[1]), generalized community opposition as a basis (or, rather, lack of basis) to deny a land use approval in the face of contrary expert evidence (*Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*[2]), the standing of one municipality to challenge the land use decisions of another (*Village of Pomona v. Town of Ramapo*[3]) and the steps a land use approval challenger must take to ensure that his challenge will not be rendered moot by substantial construction (*Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*[4]).

I. A Court May Affirm a Default Denial of an Area Variance Absent Factual Findings to Support the Denial, Provided Support for the Denial Is in the Administrative Record

In *Jonas v. Stackler,*[5] the Second Department affirmed a default denial of an area variance (a denial based on a failure of a majority of the Board to vote to grant or deny the variance)[6] notwithstanding that such denial was not supported by factual findings.

Therein the petitioner was the owner of a vacant waterfront parcel in the Village of Centre Island and sought to build a residence on the parcel. Among other approvals, variances from the Village's frontage, lot size, building setback and building elevation requirements were necessary to allow petitioner to construct the proposed residence.[7] The Village's Board of Zoning Appeals (BZA) was a five-member board; however, at the time of petitioner's variance application, one seat was vacant and one member recused himself. Accordingly, in order to obtain the variances necessary to construct the proposed residence, the unanimous approval of the BZA members able to vote on the application was required.[8] After several public hearings and the submission of credible evidence both in favor of and in opposition to the requested variances, the board members entitled to vote on the application unanimously agreed to grant the lot area, frontage and setback variances, but could not reach an agreement regarding the elevation variance. Because no unanimous agreement was reached, the elevation variance was denied as a matter of law, with no factual findings provided to support the denial of the variance.[9]

The petitioner commenced an Article 78 proceeding challenging the denial of the elevation variance as arbitrary and capricious, and the lower court, agreeing with petitioner, annulled the BZA's determination and directed that the elevation variance be granted.[10] The BZA members appealed and the Second Department reversed and dismissed the petition on the merits, reasoning that the absence of a formal statement of reasoning in support of the default denial was not necessarily required since a review of the record of the application before the BZA, along with affidavits submitted in the Article 78 proceeding (the precise nature of which were not described), can provide a sufficient basis from which a reviewing court can determine whether the denial was rational.[11] Here, the Court held that the record before the Board did, indeed, support the BZA's denial of the elevation variance.[12]

II. General Community Opposition Is Not Sufficient Basis Upon Which to Deny a Land Use Approval

In *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals,*[13] the Second Department, in reversing the Town of Islip Zoning Board of Appeals' denial of a special exception permit (and the Supreme Court, Suffolk County's affirmance of that denial), reminds the reader of the well-established principle that a determination to deny a land use approval that rests entirely on generalized community opposition and lacks an objective factual basis is irrational.

In *Kabro Associates, LLC,* the petitioner was the owner of a shopping center that was located along Montauk Highway in West Islip. The front portion of petitioner's property (the portion along Montauk Highway) was located in the Town's Business 1 District, and the rear portion of the property was located in the Town's Residence A District. Petitioner applied to the Town's Planning Board for a special permit to establish a restaurant on the property. As a condition of the restaurant special use permit, the Planning Board required petitioner to obtain a special exception permit from the Town's Zoning Board of Appeals (ZBA) to allow extension of off-street parking into the residence district and to increase the size of the building on the property by more than 3,000 square feet. The ZBA held a public hearing on petitioner's application, at which petitioner presented the testimony of a traffic engineer

and real estate appraiser, who respectively testified that the proposal would not exacerbate existing traffic congestion or negatively impact real estate values in the surrounding area. Neighboring property owners also appeared at the public hearing and argued that the petitioner's proposal would negatively impact traffic conditions and decrease property values, but their arguments were not supported by any type of expert or empirical evidence.[14]

Ultimately, the ZBA denied petitioner's application, citing concerns about traffic, impact on property values, and the appropriateness of the proposal for the location as grounds for the denial. Petitioner commenced this Article 78 proceeding challenging the denial. The Supreme Court, Suffolk County, denied the petition and dismissed the proceeding, and the Second Department reversed.[15]

In support of its reversal of the lower court's decision, the Second Department recognized the weighty deference that must be given to a zoning board of appeals' decision, but annulled the ZBA's decision, finding it to be irrational and unsupported by the record. The Court explained that "[a] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis."[16] In light of the expert testimony petitioner presented demonstrating that its proposal would not negatively impact traffic or property values (and the Town's Department of Planning and Development's concurrence with that finding), the Court held that the ZBA was not free to deny the petitioner's application on the grounds that it would negatively impact traffic and real estate values based only on the uncorroborated and unsupported assertions of the opposing neighbors.[17]

The Second Department further annulled the finding that the proposed use was not appropriate for the given location since the petitioner was seeking special exception approval, not a variance. The Court distinguished the special exception application from a variance application, explaining that the petitioner's burden in an application for special exception use approval is lighter than in an application for a variance since the special exception use carries with it a legislative determination that the use is appropriate for the specific location provided that certain legislatively imposed conditions are met. Here, the Court held that the ZBA's finding that such standards were not met (i.e., that the application would have a negative impact on property values and traffic) was arbitrary and capricious, and therefore so was the Board's determination that the proposed use was not an appropriate use in the proposed location.[18]

III. Standing of One Municipality to Challenge the Zoning Enactments of Another

In *Village of Pomona v. Town of Ramapo,*[19] the Second Department further defines and clarifies, again with the help of the Town of Ramapo and one of its neighboring villages,[20] when one municipality may challenge the land use decisions of another.

In *Village of Pomona,* the Village challenged the Town of Ramapo's decision to, among other things, rezone property in the Town adjacent to the Town's Pomona border from R-40 (40,000-square-foot single-family zoning) to MR-8, which permits multi-family housing at a density of eight units per acre, on the grounds that such rezoning was not in accordance with the Town's comprehensive plan (i.e., that it was impermissible spot zoning), that the rezoning was adopted in violation of General Municipal Law §§239-nn and 239-m, and was adopted in contravention of SEQRA.[21] The Town moved to dismiss the proceeding on the grounds that the Village lacked capacity and standing to sue.[22]

The Second Department dismissed the argument that the Village lacked capacity to sue with little discussion, but held that the Village had standing to bring and maintain some, but not all, of its challenges to the rezoning.

The Court first held that the Village did not have standing to challenge the Town's rezoning on the grounds that the rezoning was not in accord with the Town's comprehensive plan, citing (as it does several times in the opinion) *Village of Chestnut Ridge v. Town of Ramapo*[23] for the proposition that "villages 'have no interest in [a] Town Board's compliance with…its comprehensive plan.'"[24]

The Court dismissed the Village's cause of action pursuant to General Municipal Law §239-nn, but denied the Town's motion to dismiss the Village's General Municipal Law §239-m cause of action. General Municipal Law §239-nn *encourages* adjacent municipalities to cooperate in adopting land use development decisions and regulation in a manner that is respectful of the goals of each municipality, but only *requires* the giving of notice of public hearings for certain types of approvals to the neighboring municipality, and that the non-adopting municipality be given a chance to appear and be heard at any public hearing on the proposed application. Since there was no dispute that the Village received the required notice and appeared at the public hearings, the Town was entitled to dismissal of the Village's cause of action pursuant to General Municipal Law §239-nn, notwithstanding the Village's apparent allegations that the Town did not act in the manner encouraged by the statute.[25] However, the Court held that the Village could maintain its cause of action

pursuant to General Municipal Law §239-m since the Village was challenging the adequacy of the Town's compliance with that section's procedural requirements, and, because General Municipal Law §239-m facilitates regional review of land use plans, a neighboring municipality has an interest in making sure that the procedures set forth therein are followed.[26]

With respect to the Village's SEQRA claim, the Court begins its analysis, as courts often do when considering SEQRA challenges, with a recitation of the required showing that must be made to establish standing. Specifically, the decision provides as follows:

> "[T]he right of a municipality to challenge the acts of its neighbors must be determined on the basis of the same rules of standing that apply to litigants generally"…. "To establish standing under SEQRA, the petitioner[ ] must show (1) that [it] will suffer an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by SEQRA"… "[V]illages may have standing to sue in appropriate cases…where they have a demonstrated interest in the potential environmental impacts of the project[.]"…[27]

Here, the Court held that the Village adequately demonstrated its standing under SEQRA based on its allegations that the Town failed to take a hard look at the potentially significant environmental impacts resulting from the rezoning of the subject property, including the impact on community character. Indeed, as was noted by the Rockland County Department of Planning, the proposed rezoning had the potential to essentially quadruple the residential density of the subject property, which did not seem consistent with the relatively low-density zoning in the adjacent portions of the Town and Village.

IV. Challengers to the Grant of Land Use Approvals Must Take Steps to Maintain the Status Quo During the Pendency of the Litigation or Risk Dismissal on the Grounds of Mootness

In *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*,[28] the Third Department affirmed the Supreme Court, Montgomery County, determination that two Article 78 proceedings (one challenging the issuance of a use variance and one challenging the issuance of site plan approval) were moot because the work permitted pursuant to such approvals was essentially completed and the petitioners did not seek to enjoin the work.

In *Kowalczyk*, the petitioners were the owners of property located adjacent to a residentially zoned parcel improved with a pre-existing, nonconforming junkyard. In 2007 the owner of the junkyard property (the Kaczkowskis) applied to the respondent Zoning Board of Appeals (ZBA) for a use variance to construct a garage on their property which would be used to dismantle cars and sell the car parts.[29] In November of 2008 the respondent ZBA granted the use variance and the Kaczkowskis obtained a building permit to construct the garage. Petitioners commenced an Article 78 proceeding challenging the grant of the use variance. For reasons not explained in the decision, the ZBA, at the Kaczkowskis' request, held a rehearing on the use variance application in 2009 and again voted to approve the variance and the issuance of the building permit. Petitioners commenced a second Article 78 proceeding challenging the ZBA's determination (the two proceedings were ultimately consolidated into one proceeding, referred to in the Third Department's opinion as proceeding No. 1).[30]

In the Fall of 2010 the Kaczkowskis obtained site plan approval from the Town's Planning Board and received a certificate of occupancy for the garage. However, between the grant of site plan approval and the issuance of the certificate of occupancy, petitioners commenced another Article 78 proceeding challenging the grant of site plan approval and seeking the removal of the garage from the Property (proceeding No. 2).[31]

The ZBA made a motion, which the Kaczkowskis joined, to dismiss proceedings No. 1 and 2 on the grounds that they were moot at the time of the motion because the construction of the garage was completed and the petitioners never sought to enjoin the construction or otherwise maintain the status quo during the pendency of the proceedings notwithstanding that the such construction was readily visible to petitioners.[32] The lower court granted the motion and the Third Department affirmed, reasoning that:

> "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy"…. Where, as here, the change in circumstances concerns a construction project which is completed, while relief is "theoretically available" in that a structure or project "can be destroyed," courts have considered several factors to be significant…in addition to "how far the work has progressed towards completion"…."Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise

> preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation"….
>
> We agree with Supreme Court's conclusion that petitioners failed to make sufficient efforts to preserve the status quo and safeguard their rights, pending judicial review, by failing to even attempt to obtain an injunction or stay to prevent the commencement of the construction of the garage or the continuation of the open, visible and ongoing construction, although aware of the availability of that relief.[33]

Thus the clear lesson to challengers is that they must take steps to preserve the status quo or halt construction during the pendency of a judicial challenge to land use approvals, or run the risk of their challenge being rejected as moot in the face of advanced construction.

Endnotes

1. *Jonas v. Stackler*, 95 A.D.3d 1325, 2012 WL 1939964 (2d Dep't 2012).
2. *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*, 944 N.Y.S.2d 277 (2d Dep't 2012).
3. *Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103 (2d Dep't 2012).
4. *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*, 95 A.D.3d 1475, 944 N.Y.S.2d 660 (3d Dep't 2012).
5. *Jonas v. Stackler*, 95 A.D.3d 1325, 2012 WL 1939964 (2d Dep't 2012).
6. *See* Village Law §7-712-a [13](b).
7. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *1.
8. *Id.*
9. *Id.*
10. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *2.
11. *Id.*
12. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *3.
13. *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*, 944 N.Y.S.2d 277 (2d Dep't 2012).
14. *Id.* at 279.
15. *Id.*
16. *Id.*
17. *Id.* at 280.
18. *Id.*
19. *Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103 (2d Dep't 2012).
20. *See also Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74 (2d Dep't 2007).
21. State Environmental Quality Review Act (ASEQRA@ collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617).
22. *Village of Pomona*, 94 A.D.3d at 1104.
23. *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74 (2d Dep't 2007).
24. *Village of Pomona*, 94 A.D.3d at 1104.
25. *Id.* at 1105.
26. *Id.* at 1107-1108.
27. *Id.* at 1105 (internal citations omitted).
28. *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*, 95 A.D.3d 1475, 944 N.Y.S.2d 660 (3d Dep't 2012).
29. *Kowalczyk*, 944 N.Y.S.2d at 661.
30. *Kowalczyk*, 944 N.Y.S.2d at 661-662.
31. *Kowalczyk*, 944 N.Y.S.2d at 662.
32. *Id.*
33. *Kowalczyk*, 944 N.Y.S.2d at 662-663.

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Blogging the Law—A Growth Industry

By Harvey Randall

Internet blogs maintained by attorneys, law firms and others in the field are frequently referred to as "Blawgs." How many "Blawg" postings are there currently on the Internet? 25,000? 50,000? 100,000? How about more than 363,000!

A recent Google search for "blawgs" reported that there were some 363,000 such postings on the Internet. A "refined" search of these 363,000 postings for "Blawg New York" reported that there were 7,230 blogs having a "New York" connection.[1]

Postings, with a brief description of their respective contents and other data, by Google[2] included Blawgs listed in Yahoo,[3] "The Blogs of Law"[4] and "Legal Blogs" posted by Duke University School of Law.[5] Google even listed 1040 "Blawg Directories" such as the "Justice Blog," described as "…a Justice directory online [that] provides numerous links to justice, law, lawyer, court, consultant service, legal services, law schools and more."[6]

Among the more manageable directories is one maintained by ***Justia***. At the time of this article was submitted to *Municipal Lawyer*, ***Justia*** listed 6,766 Blawgs in 74 categories[7] in its "Blawg Directory," but this is a moving target.[8] ***Justia*** is continuously adding new Blawgs to its directory.[9]

Other "***Justia*** size" directories of Blawgs include:

ABA Journal Blawg Directory—over a thousand legal blogs categorized by practice, jurisdiction, region and law school maintained by the American Bar Association.[10]

Blawg Review—a weekly review of a blawg of note and blawg news and commentary.[11]

Blawg.com—a directory of blawgs on the Internet maintained by Bill Gratsch.[12]

LexMonitor—blog directory and selected featured posts from LexBlog.[13]

MyHq Blawgs—large list of blawgs and other law-focused materials.[14]

USLaw Blog Directory—a large directory from USLaw.com.[15]

World Directory of Alternative Dispute Resolution Blogs—a directory of alternative dispute resolution covering mediation, arbitration, conflict resolution, negotiation, online dispute resolution and innovations in the practice of law—blogs broken down into sub-areas. Developed by Diane Levin, a mediator, trainer, consultant, and attorney based in the Greater Boston area.[16]

Set out below are a sampling of Blawgs, 99 in all, and their Internet URLs culled from the ***Justia*** and the ***American Bar Association*** Blawg directories that may be of particular interest to readers involved in Government Administration; Civil Rights Law; Education Law; Employment and Labor Relations; and Environmental and Zoning Law.

1. Administrative Law issues. Edited by Edward M. McClure and Professors Kamina Pinder, Lisa Tripp, Kari Mercer Dalton and Malik Edwards. Reports on trends in administrative and related law. http://lawprofessors.typepad.com/adminlaw/
2. Agricultural law blog. Seeks to bring current legal issues of interest to the doorsteps of farmers, ranchers, and agribusinesses. Tackles state and federal environmental issues related to agriculture. By Todd Janzen. http://www.janzenaglaw.com/
3. Albany Law School Blog. Albany Government Law Review runs this legal blog. It is the first student-written and edited law blog in the country to engage in substantive law review-like legal analysis and academic speculation. http://aglr.wordpress.com
4. Aviation and Airport Development Law. Covers aviation law issues, including federal environmental and transportation regulations. By Barbara E. Lichlman of Chevalier, Allen and Lichman, LLP. http://www.aviationairportdevelopmentlaw.com/
5. Civil Liberties Union Blog. Captioned: "Because freedom can't blog itself," addresses civil rights issues. http://www.aclu.org/blog
6. Civil Service Law, with a New York focus. Covers employment and discrimination issues related to New York employees in the Civil Service. Published by the Law Offices of Kevin P. Sheerin. http://civilservice.sheerinlaw.com/
7. Clean Air. Covers clean air laws and policies. By Clean Air Watch. http://blogforcleanair.blogspot.com/

8. Climate Change and Carbon Management. Concerned with carbon capture and sequestration, clean technologies, carbon markets, and renewable energy. By Alston & Bird LLP. http://climate.alston.com/blog.aspx

9. Disability Law blog. Posted by Sheri R. Abrams, The Blawg focuses on Social Security disability law and special needs trusts. http://sheriabrams.com/blog

10. Disability Law. Covers developments in disability law and related fields. http://disabilitylaw.blogspot.com/

11. Disability Law. Keeping the general public informed of changes made by the Social Security Administration. Posts highlight the firm's periodic webcasts. Markhoff & Mittman. http://www.nydisabilityattorneyblog.com/

12. Disability. *DisAbility Rights Galaxy* is a cross disability blog (and networking portal) where disability rights issues including current cases, legal articles, and legislative actions are reported as well as law review articles on disability rights issues and original articles." http://disabilityrightsgalaxy.com/

13. Diversity at Albany Law School. A blawg posted by Albany Law School's Diversity Office to engage all students, faculty and staff to create a community of inclusion and to have an open forum to address issues facing all of us. http://albanylawdiversity.wordpress.com/

14. Education Blog. Addresses issues involving "No Child Left Behind," charter school, religion, school law, special education and more. Posted by the National School Boards Association. http://boardbuzz.nsba.org

15. Education law and civil rights issues considered and commented upon. By R. Tamara de Silva. http://www.timelyobjections.com/

16. Education Law and Student Rights. Covers education law and student rights in public and private school settings, from preschool through college. By Michelle Ball. http://edlaw4students.blogspot.com/

17. Education law, politics, and the judiciary. By Stuart Buck. http://stuartbuck.blogspot.com/

18. Education law. Explores the nexus between public education and laws affecting how schools operate. By Tyler St Cyr. http://www.edlawsoup.com/

19. Educational law. Scholars blogging on recent developments "at the intersection of law and education." http://www.edjurist.com/

20. Eminent Domain Blog. Covers condemnation and real estate law. By David B. Snyder of Fox Rothschild, LLP. http://eminentdomain.foxrothschild.com/

21. Eminent domain, regulatory takings, inverse condemnation, property rights, and land use law. By Robert H. Thomas of Damon Key Leong Kupchak Hastert. http://www.inversecondemnation.com/inversecondemnation/

22. Eminent domain. Blog covers condemnation, property rights issues, and the law and process of eminent domain. By Biersdorf & Associates. http://www.condemnation-law.com/blog

23. Employment Benefits Law. Covers legal developments and trends affecting employee benefits. By Porter Wright Morris & Arthur LLP. http://www.employeebenefitslawreport.com/

24. Employee Benefits Legal Blog. Considers employee benefits related to labor and employment matters. Published by Keith R. McMurdy of Fox Rothschild, LLP. http://employeebenefits.foxrothschild.com/

25. Employer Defense Law Blog. Reviews matters concerning FLSA, disability discrimination, labor relations, and retaliation. By Epstein Becker Green. http://www.employerdefenselaw.com/

26. Employer Law Report. Covers recent legal developments and trends affecting employers. By Porter Wright Morris & Arthur LLP. http://www.employerlawreport.com/

27. Employment & Labor Insider. Discusses timely issues in labor and employment law and human resources from management's perspective, with subjects ranging from discrimination to employee handbooks and religious accommodations. By Constangy, Brooks & Smith, LLP. http://www.employmentandlaborinsider.com/

28. Employment Law 101. Covers employment law trends. By John A. Gallagher. http://employmentlaw101.blogspot.com/

29. Employment Law Alert. Covers employment law topics, including discrimination, employment agreements, family leave, privacy and restrictive covenants. By the Gibbons Law Firm. http://www.employmentlawalert.com

30. Employment Law with a New York focus. Covers employment discrimination, severance, wage violations, sexual harassment and civil rights. By The Harman Firm, P.C. http://www.newyorkemploymentattorneysblog.com/

31. Employment Law with a New York focus. Discusses age, employment, racial, and sexual discrimination. By the Ottinger Firm. http://www.newyorkemploymentlawyerblog.com/

32. Endangered Species and Wetlands. Covers the Endangered Species Act, wetlands and takings law. By Steve Davies. http://www.eswr.com/

33. Endangered Species Law & Policy. Covers listing decisions, critical habitats and endangered species litigation. By Nossaman LLP. http://www.endangeredspecieslawandpolicy.com/

34. Energy and Natural Resources. Covers renewable energy, environmental regulation and the Clean Water Act. By Gordon Thomas Honeywell. http://www.energynaturalresourceslaw.com/

35. Environmental—Appeals Court decisions. Summarizes environmental decisions of the U.S. Courts of Appeals. By Waste Information & Management Services, Inc. (WIMS). http://environmentalappealscourt.blogspot.com/

36. Environmental Crimes Blog. Covers environmental crimes and enforcement, from pre-trial to trial strategy. By Walter D. James III. http://environmentalblog.typepad.com/environmental_crimes_blog/

37. Environmental Law & Climate. Considers recent happenings in the world of environmental and climate change law. By Steven M. Taber. http://taberlaw.wordpress.com

38. Environmental law issues, including CERCLA, climate change, permitting, and renewable energy. By Foley Hoag LLP. http://www.lawandenvironment.com/

39. Environmental Law Resource. Reviews environmental law issues, rulings and developments. By Reed Smith. http://www.environmentallawresource.com

40. Environmental law updates on climate change, compliance, and pesticides. By Dianne Saxe. http://envirolaw.com

41. Environmental law. News and updates. By Sive, Paget & Riesel. http://blog.sprlaw.com

42. Environmental Legal Blogs. Covers asbestos, biomonitoring, CERCLA, endangered species, EPA, ethanol, global warming, and toxic torts. By Stephen Holzer. *Last* http://environmentallegal.blogs.com/sholzer/

43. Environmental Notes—electronic edition. Highlights new documents and events in the areas of Environmental Law, Energy Law, and Land Use Law. Maintained by Pace Law School. http://paceenvironmentalnotes.blogspot.com/

44. ERISA and Disability Benefits Law. Covers ERISA and Disability benefits litigation. Published by the Wood Law Firm. http://www.erisaontheweb.com/

45. Fracking Insider. Covers federal policy and regulatory developments related to hydraulic fracturing. By Kelley Drye & Warren LLP. http://www.frackinginsider.com

46. Freedom of Information. Government disclosure law, such as the Freedom of Information Act, Privacy Act, and other federal and state laws that deal with disclosure." http://thefoiablog.typepad.com/

47. Government documents. From all levels of government, from local to international. Blawger and law librarian Kevin McClure hopes the blawg will provide useful research and information. Mr. McClure also aims to raise the profile of some valuable sources of government information. http://library.kentlaw.iit.edu/blogs/govdocs/

48. Green Building Law. Covers legal issues related to green building and sustainable development. By Shari Shapiro. http://www.greenbuildinglawblog.com/

49. GreenLaw. Provides information, context, and commentary on current events and developments in the field of environmental law. By Pace University School of Law's environmental law program. http://greenlaw.blogs.law.pace.edu/

50. Health Plan Law. Discusses employee benefit issues for group health plans. Covers ERISA, third party administrators, insurance brokers and agent, legal planning and risk management. By Roy F. Harmon III. http://www.healthplanlaw.com

51. Hearings and appeals. Examines the Medicare administrative appeals process and covers issues related to the appeal of ZPIC, PSC and RAC audits of Medical claims. By Lilies Parker. http://www.aljappeal.com/

52. HR & Benefits Update. Covers human resources and other workforce management, compensation and employee benefits laws, policies and practices. By Solutions Law Press. http://slphrbenefitsupdate.wordpress.com

53. Human rights—abuses involving children. Cardozo Law Student Chapter. Blog is

dedicated to raising awareness about human rights abuses involving children. http://www.childrensrightsinstitute.org/blog/

54. Labor & Employment Law Perspectives. Written for an audience of consisting essentially of employers, this blog discusses topics such as the ADA, discrimination, terminations and wage and hour law. Foley & Lardner LLP, http://www.laboremploymentperspectives.com/

55. Labor Relations Today. Provides analysis, resources and commentary on developments in traditional labor law. By McKenna Long & Aldridge. http://www.laborrelationstoday.com/

56. Land use and environmental law. http://herrickzone.com/

57. Land Use. By Professors Will Cook, Chad D. Emerson, Matthew J. Festa, Ngai Pindell and Jamie Baker Roskie. http://lawprofessors.typepad.com/land_use/

58. Law of the Land. A blog focusing on land use law and zoning. By Patricia Salkin. http://lawoftheland.wordpress.com/

59. Law of the Lands—Farm, Energy and Environmental Law. Provides legal information of interest to landowners in the areas of agriculture law, energy law and environmental law. By John Goudy. http://landownerlaw.blogspot.com/

60. Legal Planet. Covers environmental law and policy. By Berkeley Law and UCLA Law. http://legalplanet.wordpress.com/

61. Municipal and Planning Law. Covers current issues and updates on law, legislation and policy. By Davis & Company. http://www.davis.ca/en/blog/Municipal-and-Planning-Law

62. Municipalities and other political subdivisions. Issues of importance to local governments with a focus on New York. Posted by Harris Beach PLLC as a public service. Various contributors. http://nymuniblog.com/?author=1

63. National and international environmental law news. By Waste Information & Management Services, Inc. (WIMS). http://enewsusa.blogspot.com/

64. New York Civil Service Attorney Law Covers employment and discrimination issues related to civil service. Published by the Law Offices of Kevin P. Sheerin. http://civilservice.sheerinlaw.com/

65. Open Government. Covers legal issues on open government laws in Washington State and the rest of the nation. By Foster Pepper. http://www.localopengovernment.com/

66. Pay to Play Law Blog Covers pay-to-play legislative developments. By McKenna Long & Aldridge LLP. http://www.paytoplaylawblog.com/

67. Pensions & Benefits Weblog. Covers accounting, cash balance plans, IRS 409A, PPA and more. http://fuguerre.wordpress.com

68. Privacy. Covers wiretaps, privacy, copyright, and free speech. By Jennifer Granick. http://www.granick.com/blog

69. Property Law in all its aspects. By Professors D. Benjamin Barros and Alfred L. Brophy. http://lawprofessors.typepad.com/property/

70. Public Law. This blawg covers court decisions and other news relevant to the practice of public law. It also provides information about law conferences and links to recently issued government documents. http://www.publiclawnews.com/blogs/public-blawg

71. Real Estate Law Blog. Includes news, cases and commentary on real estate and property law in New York and nationwide. From Finkelstein Newman LLP. http://www.nyrealestatelawblog.com/

72. Real Estate. Focus: Settlement Procedures Act (RESPA). By Sterbcow Law Group LLC. http://www.respalawyer.com/

73. Renewable Energy Law Blog. Covers legal issues surrounding renewable energy projects. By Luke Hagedorn. http://therenewableenergylawblog.com/

74. School Law. This blawg covers news, court decisions and analysis relating to K-12 education. Aimed at education lawyers, teachers, school administrators and parents. http://blogs.edweek.org/edweek/school_law/

75. Social Security Disability Blog. Covers the Social Security disability process and strategies for winning cases. By Jonathan Ginsberg. http://www.ssdanswers.com

76. Social Security disability law. Focus on social security disability and long-term disability law. By Insler & Hermann, LLP. http://www.newyorksocialsecuritydisabilitylawyerblog.com/

77. Spatial Law. Covers legal issues associated with geospatial data and technology. Published by

Kevin Pomfret. http://spatiallaw.blogspot.com/

78. Special Education Law Blog. Discusses special education law topics. By Jim Gerl. http://specialeducationlawblog.blogspot.com/
79. Special Education Law. Covers case law, news, practical advocacy advice, and developments in state and federal statutes and regulations regarding special education law. By Charles Fox. http://specialedlaw.blogs.com/home/
80. Special Education. Covers special education, service animals, disability accommodations, assistive technologies, disability rights issues, and civil rights issues." http://stoloff-law.com/blog/
81. Special Education. Current developments in federal and New York State special education law. By H. Jeffrey Marcus. http://blog.jeffmarcuslaw.com/
82. Sustainable Development. Covers green building and sustainable development news and resources. By Goodwin Proctor LLP. http://www.goodwinsustainabledevelopment.com/
83. Tax Assessment & Condemnation. Covers tax assessments, eminent domain, school districts and valuation. By Bond, Schoeneck & King, PLLC. http://www.taxassessmentcondemnation.com/
84. Toxic Tort Litigation Blog. Covers toxic tort litigation topics, including product liability, environmental litigation, contamination, pollution, toxicity, toxicology, diminution of property value, Value Assurance Plans, and medical monitoring. By Epstein Becker Green. http://www.toxictortlitigationblog.com/
85. Transparency, accountability and integrity in government. From Judicial Watch. Covers campaigns and elections, education, energy and environment, faith and family, foreign affairs, immigration and more. By Chapman University law professor Hugh Hewitt. http://hughhewitt.townhall.com/
86. Water. Covers legal issues impacting water rights and the water industry. By Alex Basilevsky. http://thewaterlaw.blogspot.com/
87. Whistleblower Protection Blog. Covers legal issues related to corporate malfeasance and protection of whistleblowers. Posted by the National Whistleblower Legal Defense and Education Fund. http://www.whistleblowersblog.org/
88. Whistleblowing & Compliance Law. Covers compliance counseling and whistleblowing defense claims. By Epstein Becker Green. http://www.whistleblowingcompliancelaw.com/
89. Wind Power Law. Focuses on wind energy legal developments, including land use, zoning, and environmental concerns. By Cooper Erving & Savage LLP. http://windpowerlaw.info
90. Women's Rights Employment Law Blog. Addresses women's and transgender rights, with links to news items and posts of reader comments. http://womensrightsny.com/blog/
91. Workers' Compensation Roundup. Covers workers' compensation cost containment techniques and strategies. http://blog.reduceyourworkerscomp.com
92. Workers' Compensation Insider. Covers workers' compensation, risk management, business insurance, workplace health and safety, occupational medicine, injured workers, insurance webtools and technology. By Lynch Ryan. http://www.workerscompinsider.com/
93. Workers' compensation and personal injury law with a New York focus. By Paul Giannetti. http://www.albanyaccidentinjurylaw.com/
94. Workplace abuse and bullying. Offers legal resources for victims of workplace bullying, mobbing and workplace abuse and for employers who are interested in having a workplace where all employees are treated with dignity and respect. http://pgbarnes.wordpress.com/
95. Workplace Discrimination Law. Covers workplace discrimination claims. http://www.workplacediscriminationlaw.com/
96. Workplace Privacy. Covers employment-related privacy issues. Published by Philip Gordon of Littler Medelson's Privacy and Data Protection Practice Group. http://privacyblog.littler.com/
97. Workplace Privacy, Data Management. Covers data security, HIPAA, identity theft and workplace privacy. By Jackson Lewis. http://www.workplaceprivacyreport.com
98. Workplace Prof Blog. Covers arbitration, disability, employment discrimination, labor law, public employment law and workplace safety. By Professors Richard Bales, Jeffrey M. Hirsch and Marcia L. McCormick. http://lawprofessors.typepad.com/laborprof_blog/
99. Zoning and Municipal Law. Covers adverse possession, environmental law, municipal law,

zoning and land use with a New York focus. Published by Silverberg Zalantis. http://blog.szlawfirm.net/

Other areas of interest include:

Ask the Judge: Posts are addressed to teens and cover how the law may affect them, such as First Amendment issues in schools, cyber-bullying and litigation brought by teens against other teens, charges relating to parenting decisions. http://www.askthejudge.info/category/uncategorized/

Still other blogs address:

Legislation and Lobbying[17]

Qui Tam[18]

Constitutional Law[19]

Endnotes

1. A Google search using the term "law blogs" resulted in an overwhelming 1,710,000 blogs being so identified.
2. Google's Blawg listing is posted on the Internet at: http://www.google.com/search?tbm=blg&hl=en&source=hp&biw=1024&bih=568&q=law+blog+directory&gbv=2&oq=law+blog&gs_l=blog-hp.1.2.0l10.4659.13904.0.16337.8.8.0.0.0.0.76.585.8.8.0...0.0...1ac.sbVAZXezSIc#q=law+blog+directory&hl=en&gbv=2&tbm=blg&source=univ&tbs=blgt:b&tbo=u&sa=X&ei=GWYhULK8NumB7AGmxIGAAQ&ved=0CDUQ-Ag&bav=on.2,or.r_gc.r_pw.r_qf.&fp=fd6c06992f8070d8&biw=1024&bih=568.
3. dir.yahoo.com/Government/Law/News_and_Media/Blogs/.
4. www.theblogsoflaw.com/.
5. http://law.duke.edu/lib/blogs.
6. www.searchjustice.com/blog/.
7. http://blawgsearch.justia.com/blogs.
8. Justia invites its users to submit suggested additions to its directory and has an Internet site for this purpose at http://blawgsearch.justia.com/suggestblawg.
9. There are numerous blogs in languages other than English such as JuraBlogs—directory of German legal blogs at http://www.jurablogs.com/.
10. http://www.abajournal.com/blawgs/by_topic/.
11. http://blawgreview.blogspot.com/.
12. http://www.blawg.com/.
13. http://www.lexmonitor.com/blogs/by_alpha/a.
14. http://www.myhq.com/public/b/l/blawgs/.
15. http://www.uslaw.com/law_blogs.
16. http://adrblogs.com/listing-by-category/.
17. http://www.abajournal.com/blawgs/topic/legislation+lobbying/.
18. http://blawgsearch.justia.com/blogs/categories/qui-tam.
19. http://blawgsearch.justia.com/blogs/categories/constitutional-law.

Harvey Randall served as Principal Attorney, New York State Department of Civil Service. He also served as Director of Personnel for the State University System, as Director of Research, Governor's Office of Employee Relations, and Staff Judge Advocate General, New York Guard. He is a co-author of a number of electronic manuals [e-books] focusing on New York State public personnel law including *The Discipline Book; Layoff, Preferred Lists and Reinstatement in the Public Service;* and *The General Municipal Law §207-a /§207-c Manual*. Randall also maintains a law blog, *New York Public Personnel Law*, at http://publicpersonnellaw.blogspot.com.

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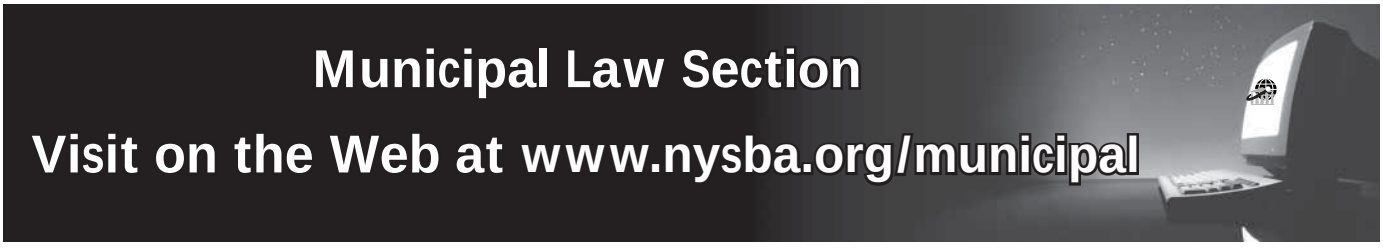

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