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The First Amendment and Limitations upon Parades and Protest Demonstrations

by Jeffrey Eichner

(Part One of a Three-Part Article)

The First Amendment and Traditional Public Fora

The First Amendment provides in pertinent part that: "Congress shall make no law. . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." While the First Amendment addresses only action by Congress, it has been applied to the states and municipalities through the Fourteenth Amendment.[1]

The First Amendment applies not only to speech and the press, but also to other forms of expression. "Entertainment as well as political and ideological speech is protected; motion pictures, programs, broadcasts by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[2] First Amendment protections have been extended to "adult" films,[3] stage productions,[4] musical performances,[5] parades and marches,[6] peaceful marches and sit-ins,[7] and public issue picketing.[8] Of course, just because a type of speech or expression may be protected by the First Amendment, it does not follow that limitations may not be placed upon that speech or expression. "Even protected speech is not equally permissible in all places and at all times."[9]

The United States Supreme Court has recognized the importance of streets as a public forum for First Amendment expression. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[10] This recognition of streets as fora in which First Amendment activities are privileged has led to significant protections being placed upon expressive activities in the streets.

It does not matter that a street or public sidewalk is located in an industrial, commercial or residential area, "all public streets are held in the public trust and are properly considered traditional public fora."[11] "[A] public street does not lose it status as a traditional public forum simply because it runs through a residential neighborhood."[12] In *United States v. Grace*,[13] the Supreme Court invalidated a federal law which prohibited persons from carrying signs, banners or devices on the sidewalks around the Supreme Court, finding those sidewalks, like others, constitute traditional public fora for expressive activities.

State action restricting First Amendment activities in public fora is severely limited. The United State Supreme Court has ruled that in traditional public fora such as streets and parks, the test is as follows:

"In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . .The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[14]

Regulations enacted for the purpose of restraining speech on the basis of content presumptively violate the First Amendment.[15] In *Boos v. Barry*,[16] the Supreme Court invalidated a provision of the District of Columbia Code that prohibited persons from displaying signs within 500 feet of a foreign embassy if the sign tended to bring the foreign government into public odium or disrepute, finding that the code provision was content-based and not narrowly tailored. "Regulations that focus on the direct impact of speech on its audience" and not on its "secondary effects" are content-based.[17]

Content-neutral time, place, and manner regulations face a less-exacting standard which in practice is little different from the standard applied to regulations with only an incidental effect on speech.[18] A seemingly more relaxed time, place, and manner standard was even set forth in *City of Renton v. Playtime Theatres, Inc.*[19] as follows: "'content-neutral' time, place, and manner regulations are acceptable so as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[20] "Content-neutral" speech regulations are those that "are *justified* without reference to the content of the regulated speech."[21]

In determining whether a regulation is content-based or content-neutral, the purpose and spirit of the First Amendment should be kept in mind. "The First Amendment's fundamental purpose, however, is to protect all forms of peaceful expression in all of its myriad manifestations."[22] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[23] "We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'"[24] Any attempt to quiet speech because of its content is unlikely to be upheld:

". . .[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest..."[25]

Prior Restraints

A permit requirement involving First Amendment activities does not enjoy the usual presumption of validity which applies to local regulations.

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Inside...

Quality Communities: New York's Response to Smart Growth

by Patricia E. Salkin

I. Introduction

Smart growth. One can hardly read a newspaper today without mention of urban sprawl, uncoordinated land use policies, and the high costs and unpredictability associated with local land use controls. With his recent Annual Message to the Legislature foreshadowing long awaited action, on January 21, 2000, Governor George Pataki issued Executive Order No.102, "Establishing The Quality Communities Interagency Task Force." New York now joins the ranks of more than half of the states that have or are continuing to tackle the challenge of crafting a formal smart growth agenda.

II. The National Landscape

In 1992, Maryland referred to its reforms as the Economic Growth, Resources Protection and Planning Act, and in 1997, it adopted the Smart Growth Areas Act,[1] beginning the brand name identification for "smart growth." In 1998, Tennessee enacted a major initiative designed to create a comprehensive growth strategy for the State.[2] This past year, Wisconsin laid the ground work for sweeping smart growth reforms in proposals encompassed in the Governor's budget. Over the last few years, a growing number of states have appointed study commissions, including: the Growing Smarter Commission in Arizona; the Commission on Urban Planning, Growth Management of Cities, and Protection of Farmland in Iowa; the Land Use Management and Farmland Preservation Study in New Hampshire; the 21st Century Communities Task Force in North Carolina; the 21st Century Environmental Commission in Pennsylvania; and the Quality Growth Advisory Committee in Utah. Legislative task forces on smart growth have been working in states including: Colorado, Kentucky, New Mexico, and Virginia. Active smart growth proposals have been introduced in Colorado, Illinois, Massachusetts, Michigan, New York, North Carolina, Oklahoma and Pennsylvania.[3]

III. New York State of Mind

With all of the national activity and attention to the multiple and complex issues encompassed by smart growth, pressure was building in New York by various constituencies urging the State Legislature and the Governor to do something to make certain that New York localities could, among other things: stay economically competitive; undertake effective community revitalization efforts; maintain greenspaces where desired, and best implement local smart growth strategies. In his January 5, 2000 State of the State Address, Governor Pataki, addressing the need to revitalize the Main Streets of New York, stated, "With smart investments and targeted economic policies we can recapture the spirit and breathe new life into those Main Streets so they can bustle again with all of the vigor, energy and excitement of their glory days. Some call it smart growth. We call it smart. Period."

A. The Executive Order

Among other things, the Governor stated in his Quality Communities Executive Order that, "New York and its local governments require creative strategies to combine growth and environmental protection in order to enhance economic vitality and quality of life."[4] The Order directs the creation of an interagency task force chaired by the Lt. Governor and consisting of at least, the Commissioners of the Departments of Agriculture and Markets, Economic Development, Environmental Conservation, Health, Transportation, the Office of Parks, Recreation and Historic Preservation, the Division of Housing and Community Renewal, the Secretary of State (who serves as Vice Chair) and the Director of the Budget. The Chair is also directed to appoint an advisory committee to the task force consisting of representatives of local government, environmental, business, agricultural and other related interests.

After conducting an inventory of key federal, state and local programs impacting quality communities, and after collecting public input, the Task Force is directed to report back to the Governor in January 2001 with recommendations designed to: strengthen the capacity of local governments to develop and implement land use planning and community develop strategies; and make needed changes in state regulations and legislation to enhance community choices in land development, preservation and rehabilitation. Among the factors to be considered by the Task Force in arriving at its recommendations is, "...making development decisions predictable, sustainable, fair and cost effective..."

B. Funding is Now Available

At the end of the legislative session in 1998, Senator Mary Lou Rath (R-Erie) and Assemblyman Sam Hoyt (D-Buffalo) introduced the Smart Growth Economic Competitiveness Act. Although the bill did not move through the legislative process, it was reintroduced with significant attention in 1999 following press conferences, public hearings and the creation of an ad-hoc "unofficial" smart growth task force coordinated and staffed by National Audubon of New York and comprised of more than two dozen statewide stakeholder interest groups. Several other smart growth bills were introduced before the end of the 1999 legislative session,[5] resulting in a negotiated compromise for some short-term action with the inclusion of $800,000 in the State budget earmarked for local smart growth programs.[6]

In early February 2000, Task Force Chair Lt. Governor Mary O. Donohue announced that $1.15 million in funding was available to local governments (including school districts) for a quality communities demonstration program. Administered by the Department of State, the "incentive grants" will be awarded through a competitive application process to localities that demonstrate one or more of the following concepts: revitalization of existing communities and promoting liveable neighborhoods; preservation of open space and critical environmental resources; sustainable economic development; development of intergovernmental partnerships, shared services and collaborative projects; and fostering public awareness.[7]

IV. The Challenges of Building Quality Communities One Brick at a Time

Municipal lawyers know all too well that it is no small feat to walk a corporate client through the morass of planning and zoning laws in New York, considering that this State boasts 1,544 cities, towns and villages with zoning authority.[8] According to a 1999 survey conducted by the New York State Legislative Commission on Rural Resources, only 59% of these municipalities have a written comprehensive land use plan, yet 77% have zoning regulations.[9] Seventy percent (70%) of these local governments have subdivision regulations and 64% have site plan review laws. In addition to the state enabling statutes, the process for land use regulation and review can vary considerably from municipality to municipality.

Further, state adopted building codes as well as various federal laws factor into the cost analysis for local redevelopment initiatives. State and federal environmental regulations addressing, among other things, contaminated sites or brownfields may also be at issue. While various state and federal laws and regulations may be obstacles to quality communities at some level, there is a great deal of opportunity for local governments to act now.

Although New York may still have a long way to go, the fact is that major reform efforts have occurred throughout the 1990s. Many have been made and implemented without pomp and circumstance, often escaping wide public notice.

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First Amendment

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The requirement of a permit in order to conduct First Amendment activities creates a prior restraint, as it gives "public officials the power to deny use of a forum in advance of actual expression."[26] "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[27]

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[28] This "heavy presumption" applies to permits involving activities such as parades.[29] However, not all government regulations which affect speech will be reviewed as a prior restraint. In *Ward v. Rock Against Racisim*,[30] sound amplification guidelines were not considered a prior restraint because they did not forbid speech, but merely regulated volume. "The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression."[31]

Permit regulations may not vest government decisionmakers with uncontrolled discretion in deciding whether to issue a particular permit:

"A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view... To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority... The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formulation of an opinion... by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted."[32]

The prior restraint doctrine generally has two components: (1) discretion must be limited, and (2) adequate due process must be provided. Licensing schemes which provide for unbridled discretion in turn create "two major First Amendment risks": "self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action."[33] By placing unbridled discretion in a decisionmaker, "a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of the speech by suppressing disfavored speech or disliked speakers."[34]

In addition to placing limits upon the discretion which may be exercised by a government official, the prior restraint doctrine also requires sufficient due process standards. Three procedural safeguards have been identified by the Supreme Court as necessary when the government attempts to censor materials protected by the First Amendment: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."[35]

"The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."[36] *FW/PBS, Inc. v. Dallas*,[37] dealing with the licensing of an adult business, did not apply the third *Freedman* standard requiring the government to go to court and to bear the burden of proof in order to deny a license, because the direct censorship of materials was not involved.[38]

Licensing schemes have been stricken for failure to provide definite limitations on the time in which the license must be granted or denied,[39] but the Supreme Court has not specifically decided which of the *Freedman* safeguards must be applied in a licensing case involving activities such as a parade. The Second Circuit in *Macdonald v. Safir*[40] recently remanded to the District Court to determine whether the New York City Police Commissioner is required by *Freedman* to seek and bear the burden of judicial review when denying a parade permit, if the Commissioner is found to have discretion to deny a permit on the basis of the content of protected speech. The scope of necessary procedural safeguards has been the frequent topic of lower court decisions, as will be discussed further herein.

Parade permit requirements have been specifically analyzed as prior restraints in *Forsyth County v. Nationalist Movement*[41] and *Shuttlesworth v. Birmingham*.[42] Even though a regulation is found to constitute a prior restraint, it may still be found to be a valid content-neutral, time, place, and manner regulation. "Although there is a heavy presumption against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing use of the public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally."[43]

In *Beal v Stern*,[44] the Second Circuit reviewed a New York City ordinance requiring a permit to conduct assemblies in city parks. The Court determined that the amount of discretion granted to the permitting authority must be reviewed in accordance with the standards set forth in *Forsyth County*, *City of Lakewood v. Plain Dealer Pubishing Co.*[45] and *Shuttlesworth*. Even if there are standards in a licensing regulation, if they are too broad they will not be upheld, because "the very existence of some broadly written laws has the potential to chill

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A. Recodification Effort of the 1990s

In 1990, Senator Charles Cook appointed the Land Use Advisory Committee to the Legislative Commission on Rural Resources, as an advisory body to help craft statutory land use reform initiatives by recodifying the existing laws.[10] From 1991 through 1999, this initiative has resulted in thirty-one statutory changes to the state planning and zoning enabling acts. These changes are significant as many were designed to enable communities to better interact with and to accommodate builders, developers and other applicants. Keeping up to date with almost three dozen reforms in the land use control and permitting process, that can best be described as a "quiet revolution in New York's land use law,"[11] can be challenging even for those whose practice includes a substantial amount of land use law.

Laws enacted in 1993 and 1995 now provide for the first time in New York history, definition, guidance and a statutory procedure for the preparation and adoption of local comprehensive plans.[12] A 1991 law provides specific authority for local governments to enact incentive zoning laws, enabling—for the first time—local governments to offer applicants increased density in exchange for certain community amenities.[13] In an effort to clarify decades of case law, in 1991 the Legislature also enacted a new law containing statutory tests for the granting of area and use variances, matters that had been costly, and, at times, uncertain to litigate.[14] A temporary state coordinating council on geographic information systems (GIS) was authorized in 1994 to begin to examine technical and policy issues related to the use and development of GIS in New York.[15]

Applicants had long expressed concern over the inconsistencies in the level of sophistication of the volunteer members of planning and zoning boards in New York. The Legislature responded by amending the enabling acts to specifically authorize local legislative bodies to require training for members of the planning and zoning boards.[16] Provisions clarifying the subdivision review and approval process as well as improved coordination with SEQRA for these actions were enacted.[17]

Many have been critical with the process of looking at land use decisionmaking on a purely local level, and failing to consider regional needs, issues and opportunities.[18] The Legislature adopted two new laws to provide specific statutory authorization for local governments to now cooperate and coordinate these activities should they deem it beneficial and appropriate.[19] In addition, key provisions addressing county planning boards and regional councils were amended and recodified in 1997.[20]

At its January 2000 meeting, the Land Use Advisory Committee discussed two important legislative initiatives for the current session: 1) a bill designed to provide specific statutory authority and a framework for planned unit developments including residential, business and

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the expressive activity of others not before the court."[46] "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable."[47]

The Second Circuit applied *Beal* in *MacDonald v. Safir* and remanded for a review of the text of the New York City ordinance requiring a permit for a parade, as well as judicial or administrative construction of it and any well-established practice in enforcing the ordinance, in order to determine if too much discretion was granted. It is clear that without a limiting construction or well-established practice, the ordinance will fail, as the Police Commissioner must deny a permit if he believes the parade "will be disorderly in character or tend to disturb the public peace," and can grant a permit for "occasions of extraordinary public interest."[48] The Second Circuit decided these provisions afford the Commissioner the same type of discretion which had been found to violate the First Amendment in cases such as *Lakewood* and *Shuttlesworth*.

Preliminary injunctions granting permits due to the lack of definite standards in New York City licensing provisions have been issued in *Million Youth March, Inc. v. Safir*[49] and *Million Youth March, Inc. v. Safir*,[50]. Finding undue discretion created the possibility of content-based discrimination in granting permits for large favored events, but denying permits for smaller events, the District Court granted preliminary injunctions allowing the events in *Housing Works, Inc. v. Safir*.[51]

Time, Place, and Manner Restrictions

No person is allowed to carry on expressive activities wherever, whenever, and however he pleases. Permit requirements can give notice to the public of a parade, allow for police protection, and minimize inconvenience to the public.[52] "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[53]

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others."[54]

In *Ward v. Rock Against Racism*,[55] the Supreme Court upheld New York City guidelines which required use of city sound equipment and an independent, experienced sound technician for all performances at a certain bandshell, based upon the City's interest in controlling unwelcome noise, preserving the residential character of nearby areas, and insuring the sufficiency of sound amplification at bandshell events. The Court specifically found that "the government may act to protect even such traditional public forums as city streets and parks from excessive noise."[56] It is "highly relevant" to review "[a]dministrative interpretation and implementation of a regulation."[57] The Court also clarified:

"Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the. . .regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. ... To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals... So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[58]

As a result, a "city's reasonable determination" as to the guidelines to be used to meet the significant governmental interests test should be accepted by the courts.[59] "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[60].

Time for Application

Municipalities often attempt to establish a time before an event within which application for a permit must be made. This allows for proper processing of the permit application and planning for the event. However, such regulations may have the effect of prohibiting spontaneous demonstrations which are protected by the First Amendment. They also may be overbroad if they apply even to small groups for which advance planning is not necessary. In addition, it is not uncommon for favored parades and demonstrations, even large ones, to be organized and approved in very short order, thereby resulting in discriminatory application of the rule. In ***Douglas v. Brownell,***[61] the Court struck down a requirement that permit applications be made five days before a proposed parade as not narrowly tailored. A seven day advance notice requirement was struck down in *Grossman v. City of Portland*,[62] and a twenty day requirement was stricken in *NAACP v. City of Richmond*.[63]

Time to Grant or Deny a Permit

In *Beal v. Stern*,[64] the Second Circuit determined that the first two *Freedman* factors must be applied to licensing schemes which are content-neutral, based upon an analysis of the *FW/PBS* case in which six members of the Supreme Court applied the *Freedman* factors to an adult use license.[65] As a result, the licensing authority must determine whether to issue a license within a brief period of time within which the status quo is maintained, and expeditious judicial review of that decision must be available.

In *FW/PBS*, a Dallas licensing ordinance was struck down even though approval of the license by the Chief of Police was required within thirty (30) days after receipt of an application. The Supreme Court found that there was no real time limit for the approval, since the license could not be issued unless inspections had been made by the Health Department, Fire Department and building officials, and there was no time limit placed upon such inspections. Without such limits, there is the risk of the decisionmaker "indefinitely suppressing permissible speech."[66]

In *Beal*, the Second Circuit found that either "failure to specify a time-period in which appeals from permit denials will be resolved or to provide for prompt judicial review thereof. . .would constitute a First Amendment violation.

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commercial uses;[21] and 2) support for a member item to fund a pilot program for mediating local land use disputes (if funded, the pilot will be coordinated through the New York State Dispute Resolution Association with technical assistance from the New York State Office of Court Administration).

B. Build Now New York

Recognizing the business need for site-ready areas to entice manufacturing, warehousing, high tech, and other business to locate in New York, in 1999 the Governor's Office of Regulatory Reform announced the "Build Now New York" program. In essence, the program offers model zoning ordinances for municipalities to use as they tailor their own local laws to allow for the siting of certain businesses.[22] Seven sample ordinances were developed: light industrial district; office park district; manufacturing district; retail commercial district; warehouse/ distribution district; research and development district; and business/commerce park district.[23] This effort is a good first step at providing technical assistance and information for local governments interested in promoting business and economic development at the forefront of the agenda.

C. Building Code Reform

There are many pieces to the smart growth reform puzzle. For example, the New York State Builders Association has long advocated for building code reform in the State.[24] According to the Builders' Association, "a model code would assist the adaptation of building to new uses, would not treat every rehab as if a new building were being constructed, and would facilitate variances and alternative solutions." Furthermore, the Association asserted that a model code would, "encourage the rebuilding of neighborhoods, cities and older suburbs by allowing increased flexibility in the renovation of existing buildings." In July 1999, the Legislature approved $1.4 million to pay for the cost of developing a statewide code,[25] and in November 1999, the New York State Fire Prevention and Building Code Council, operating under the auspices of the Secretary of State, took the first step towards reform by deciding to adopt the International Family of Codes provisions into the New York State Building Code.[26]

V. Conclusion

Senator Mary Lou Rath, chair of the New York State Senate Committee on Local Government, summed up many of the challenges quite well at a May 1999 public hearing in Buffalo: for smart growth to work in New York it must be a bottom-up approach; to work in New York, smart growth cannot mean new bureaucracies, mandates or new layers of government; we need better coordination between state and local governments and between governments and the others who have a stake in economic and community well-being; and it is going to mean something different in New York State than it has meant anywhere else. As we begin to build quality communities in New York, municipal lawyers can now take advantage of a cadre of new tools in the land use and community development toolbox, and we can expect additional reform measures as the work of the task force gets underway.

Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. She has written extensively on the topic of smart growth and land use law reform both in New York and nationally.

1. Denny Johnson, Maryland, in Planning Communities for the 21st Century, American Planning Association (Dec. 1999) at 25.
2. Pub. Chap.1101 (Tenn. 1998); *see also*, Karen Finucan, Tennessee, in Planning Communities for the 21st Century, American Planning Association (Dec. 1999) at 70.
3. *See generally*, Salkin, Reform Proposals by the Thousand in Planning Communities for the 21st Century, American Planning Association (Dec. 1999) at 85 *et. seq.*
4. N.Y. Exec. Order 120 (Jan. 21, 2000).
5. A. 8829 (1999); A. 130 (1999); A. 9080 (1999); A. 8387 (1999); and A. 8386B.
6. $500,000 was set aside in the Aid to Localities section of the budget, and individual allotments of $150,000 to certain counties in the lower Hudson Valley and on Long Island and in western New York.
7. Copies of the RFP can be downloaded from the Department of State website at www.dos.state.ny.us.
8. NYS Legislative Commission on Rural Resources, 1999 Land Use Planning & Regulations in New York State Municipalities: A Survey (Fall 1999) at 5.
9. *Id.* This is somewhat ironic in that state statute specifically provides that zoning shall be in accordance with a comprehensive plan. See, N.Y. Town Law sec. 263; N.Y. Village Law sec. 7-704; and N.Y. Gen. City Law sec. 20 (25), referring to a "well considered plan."
10. Coon, Damsky & Rosen, "The Land Use Recodification Project," 13 Pace L. Rev. 559 (1993).
11. Salkin, "The Politics of Land Use Reform in New York: Challenges and Opportunities, 73 St. John's L. Rev. 101 (forthcoming, 1999).
12. Chap. 209 of the N.Y. Laws of 1993; Chap. 418 of the N.Y. Laws of 1995, both codified at: Town Law §272-a; Village Law §7-722; Gen. City Law §28-a.
13. Chap. 629 of the N.Y. Laws of 1991, codified at Town Law §261-b; Village Law §7-703; Gen. City Law §81-d.
14. Chap. 248 of the N.Y. Laws of 1991, codified at Town Law §267-b; Village Law §7-712-b; Gen City Law §81-b.
15. Chap. 564 of the N.Y. Laws of 1994. This function continues at the New York State Office for Technology.
16. Town Law §267(2), 271(1); Village Law §7-712 (2); 7-718 (1); and Gen. City Law §81(1).
17. Chap. 727 of the N.Y. Laws 1992; Chap. 423 of the N.Y. Laws 1995.
18. *See*, Salkin, Regional Planning in New York: A State Rich in National Models, Yet Weak in Overall Planning Coordination, 13 Pace L. Rev. 505 (1993).
19. Chap. 724 of the N.Y. Laws of 1992 (allowing for intermunicipal cooperation in planning), codified at Town Law §284, Village Law §7-741, and Gen. City Law §20-g; and Chap. 242 of the N.Y. Laws of 1993 (specifically authorizing county participation in intermunicipal land planning agreements), codified at Gen. Mun. Law §119-u.
20. Chap. 451 of the N.Y. Laws of 1997; Chap. 459 of the N.Y. Laws of 1997.
21. S.4328-A/A.5722-A (this bill is currently on the floor in the Senate).
22. New York State Governor's Office of Regulatory Reform, Model Zoning Ordinances for Economic Growth (1999), http:/www.gorr.state.ny.us/ gorr/zoning.html.
23. *Id.* These may all be downloaded from the GORR website.
24. New York State Builders Association, Builders 1999 Blueprint for Smart Growth, The 1999 Legislative and Regulatory Program (1999).
25. The Governor included this in the 1999-2000 Executive Budget Proposal, S.1603/A.3003 (1999).
26. New York State Department of State, Division of Code Enforcement, "Incorporation of the International Codes into the Uniform Fire Prevention and Building Code," (2/15/2000).

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. . ."[67] The Second Circuit, however, remanded in *Beal* for a review of these issues, specifically noting that "if the Parks Department's demonstrated practice in implementing the Rules is to respond promptly to appeals of permit denials, this practice should be taken into account."[68] "[I]t is clear that three-month delays in responding to appeals of permit denials of this sort would violate *Freedman*."[69]

Time limits for administrative review have been a frequent subject of lower court decisions. See, for example, *T. K.'s Video, Inc. v. Denton Co.*,[70] in which a 60 day limit was approved and *11126 Baltimore Blvd., Inc. v. Prince George's Co.*,[71] in which a 150 day limit was found unconstitutional. A recent decision, *4805 Convoy, Inc. v. City of San Diego*,[72] concluded that time limits for administrative review are not necessary if the status quo is maintained throughout the administrative process.

In *MacDonald v. Safir*,[73] the Court granted summary judgment against New York City parade permit requirements because of the lack of a brief and specified time within which the permit was to be granted or denied. Neither this ruling, nor a change in the Police Department's guideline requiring a response within 45 days of a permit request if the permit application was filed more than 90 days prior to an event, was the subject of the recent decision of the Second Circuit in this case.

The Second Circuit had recognized the problem regarding the time for response to a permit request in *Beal* where it remanded for a trial the issue of whether the Parks Department's response to permit requests no later that 30 days prior to the requested date, or as soon as reasonably possible if the application is filed within 60 days of the date requested, met the *Freedman* requirement.[74] The need for flexibility to balance competing requests for permits, especially last-minute requests, was

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the Parks Department's justification for the provision. Although the Court "express[ed] no opinion as to the ultimate merits of the Parks Department's argument, it is not plainly unreasonable." [75] Issues include competing permit requests, as well as "both applicants' and the Parks Department's need for advance notice and flexibility."[76]

Prompt Judicial Review

The second *Freedman* requirement, prompt judicial review, is an issue which has divided the Circuit Courts. This division results in large part from the different opinions in the *FW/PBS* case. Justice O'Connor, in the plurality opinion, indicated "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." [77] Justice Brennan referred to the requirement of "a prompt judicial determination."[78] The issue of whether there needs to be a possibility of prompt judicial review or a specific time frame during which judicial review must be completed is obviously a crucial issue for municipalities, which do not have the ability to control the time frame for judicial decisions.[79]

In *Beal*, the Second Circuit remanded on the issue of prompt judicial review, but noted that "prompt access to judicial review in state courts would satisfy *Freedman*."[80] The issue was again discussed by the Second Circuit in *MacDonald v. Safir*, where the Court remanded for the District Court to review the Article 78 proceeding to see if it met the *Freedman* requirement.

In Part II of this article, the reasons for denial of a permit and limitations that can be placed on a parade or demonstration, as well as the fees that can be charged, will be reviewed. Part III will examine governmental regulation of picketing.

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1. *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).
2. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (citations omitted).
3. *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).
4. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)
5. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
6. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)
7. *Gregory v. Chicago*, 394 U.S. 111 (1969), *Brown v. Louisiana*, 383 U.S. 131 (1966)
8. *Frisby v. Schultz*, 487 U.S. 474 (1988), *Boos v. Barry*, 485 U.S. 312 (1988), *United States v. Grace*, 461 U.S. 171 (1983), *Carey v. Brown*, 447 U.S. 455 (1980).
9. *Cornelius v. NAACP Legal Defense Educational Fund, Inc.*, 473 U.S. 788, 799 (1985).
10. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (Roberts, J.).
11. *Frisby*, 487 U.S. at 481.
12. *Id.* at 480.
13. 461 U.S. 171 (1983).
14. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) (citations omitted), as cited in *Frisby*, 487 U.S. at 481.
15. *Carey*, 447 U.S. at 462-463 and n. 7; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 98-99 (1972); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115 (1991); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
16. 485 U.S. 312.
17. *Boos*, 485 U.S. at 321.
18. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); see *Ward*, 491 U.S. at 797-98; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).
19. 475 U.S. 41 (1986).
20. 475 U.S. at 47, citing *Clark*, 468 U.S. at 293; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 648 (1981).
21. *Renton*, 475 U.S. at 48, citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added). See also *Boos*, 485 U.S. at 320; *Clark*, 468 U.S. at 293; *Heffron*, 452 U.S. at 648; *Ward*, 491 U.S. at 791.
22. *Bery v. City of New York*, 97 F.3d 689, 694 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).
23. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
24. *Boos*, 485 U.S. at 318, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
25. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1181 (8th Cir. 1999), citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).
26. *Southeastern Promotions, Ltd.*, 420 U.S. at 553.
27. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
28. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
29. *Forsyth County*, 505 U. S. at 130.
30. 491 U.S. 781 (1989).
31. *Ward*, 491 U.S. at 795 n.5 (emphasis in original).
32. *Forsyth County*, 505 U.S. at 130-131. (Internal quotations and citations omitted); *see also Freedman v. Maryland*, 380 U.S. 51 (1965).
33. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988).
34. *Ibid.*
35. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990), citing *Freedman*, 380 U.S. at 58-60.
36. *FW/PBS*, 493 U.S. at 228.
37. 493 U.S. 215 (1990).
38. *Id.* at 229-30.
39. *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)
40. Docket No. 99-7010, 3/10/2000
41. 505 U.S. 123 (1997).
42. 394 U.S. 147 (1969).
43. *Forsyth County*, 505 U.S. at 130, as cited in *Beal v. Stern*, 184 F.3d 117, 124 (2nd Cir. 1999).
44. 184 F.3d 117 (2d Cir. 1999).
45. 486 U.S. 750 (1988).
46. *Forsyth County*, 505 U.S. at 129.
47. Id.
48. N.Y.C. Admin. Code, Section 10-110(a)(1) and (4).
49. 63 F. Supp.2d 381, 388-90 (S.D.N.Y. 1999) ("*MYM II*")
50. 18 F. Supp.2d 334, 341-44 (S.D.N.Y. 1998), injunction modified, 155 F.3d 124 (2nd Cir. 1998)("*MYM I*").
51. 1998 WL 409701 (S.D.N.Y. 1998) and 1998 WL 823614 (S.D.N.Y. 1998).
52. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).
53. *Ward*, 491 U.S. at 791, citing *Clark*, 468 U.S. at 293.
54. *Ward, Id.* citations omitted.
55. *Id.*
56. 491 U.S. at 796.
57. *Id.* at 795.
58. *Id.* at 798-800. Quotations, citations and footnotes omitted.
59. *Id.* at 800.
60. *Id.* at 794.
61. 88 F.3d 1511 (8th Cir. 1996).
62. 33 F.3d 1200 (9th Cir. 1994)
63. 743 F.2d 1346 (9th Cir. 1984).
64. 184 F.3d 117 (2d Cir. 1999).
65. 184 F.3d at 128.
66. 493 U.S. at 227.
67. 184 F.3d at 129.
68. *Id.* (footnote omitted), citing *Ward*, 491 U.S. at 795-96.
69. *Id.* at n. 10, citing *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968) in which the Second Circuit noted a 50 to 57 day review period was found to be not "a specified brief period."
70. 24 F.3d 705 (5th Cir. 1994)
71. 58 F.3d 988 (4th Cir. 1995), cert. denied, 516 U.S. 1010 (1995)
72. 183 F.3d 1108, 1114 (9th Cir. 1999)
73. 26 F. Supp.2d 664 (S.D.N.Y. 1998)
74. 184 F.3d at 128-129.
75. *Id.* at 129.
76. *Id.*
77. *FW/PBS*, 493 U.S. at 228.
78. *Id* at 239.
79. For cases holding that when reviewing licensing regulations, access to prompt judicial review is all that is necessary, see *T. K.'s Video, Inc.*, 24 F.3d at 709; *Grand Brittain, Inc. v. City of Amarilo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993), cert. denied, 511 U.S. 1085 (1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1327 (1st Cir. 1993); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255-57 (11th Cir. 1999). For cases requiring a prompt judicial resolution see *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *4805 Convoy, Inc.*, 183 F.3d at 1114-16; *11126 Baltimore Blvd., Inc. v. Prince George's Co.*; *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995), cert. denied, 516 U.S. 909 (1995). The Ninth Circuit in *4805 Convoy, Inc.* found a mandatory stay during judicial proceedings also may satisfy the *Freedman* requirement even if there is not a time limit on the decision itself.
80. 184 F.3d at 129.