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Municipal Lawyer

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A Message from the Chair

More Questions Than Answers

A newly minted rabbi once asked his mentor, "How do you decide what to preach on each week?" The elder rabbi replied, "Always try to scratch where the congregation itches."

So there you have my first questions to you: where do you, as Section members, itch? And what can the Section do to scratch?

Assuming the Chair of the Municipal Law Section of the New York State Bar Association has already proven to be a humbling experience, particularly because I must fill the large shoes of our outgoing Chair, Howard Protter, whose sure and steady hand has calmly guided the Section over these past two years. He and his co-officers have positioned the Section well to adapt and move forward. So, my first concern lies in not dropping the baton that Howard has passed to me. Luckily, I am joined by a talented and dedicated group of Executive Committee members and officers, including First Vice-Chair Carol Van Scoyoc, White Plains Corporation Counsel; Second Vice-Chair E. Thomas Jones, who serves as Town Attorney of the Town of Amherst; Secretary Richard K. Zuckerman, of Lamb & Barnosky, LLP; and Howard Protter, of Jacobowitz and Gubits, LLP, our delegate to the House of Delegates.

But the real work of the Section has always been done by the Section's committees. The Section is right now in the midst of revising its committee structure, revamping existing committees and forming new ones:

Inside

- By-laws
- Employment Relations
- Ethics and Professionalism
- Finance
- Land Use and Environmental
- Liability and Insurance
- Membership and Diversity
- Municipal Counsel
- Programming
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- State and Federal Constitutional Law

Each committee will be responsible for a number of activities requiring the active involvement of its members, including articles for the *Municipal Lawyer*; blog entries; case law digests; legislative digests; proposed legislation; technology; outreach to other Sections, local and specialized bar associations, and law schools and law students; and CLE courses for upcoming Section meetings.

If you have not already become active in a Section committee, please consider doing so. Just email our Section liaison Beth Gould at bgould@nysba.org and / or me at davies@coib.nyc.gov, and we will put you in touch with the appropriate Committee chair.

If you have suggestions for other or additional committees or Section activities or programs, please contact us as well.

For the past couple decades I have served as an adjunct professor at Fordham Law School, teaching New York Practice. I end every exam with the same words: "Do Good, and Have Fun." For as I tell my students each semester during my Dutch Uncle's Speech in the first class, if you're not having fun and helping others, what's the point of even being a lawyer? So, I really hope you will take seriously my invitation to join a committee and become active in the Section.

Which brings me back to my original questions: Where do you, as a member of the Section, itch, and what can the Section do to scratch that itch? Let us know.

Hope to hear from you soon.

And remember to save the date for our fall meeting: October 25-27 at Jiminy Peak in the Berkshires. This is a family-friendly resort at a reasonable price.

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When Does a Plaintiff's Conduct Relieve a Municipality From Liability for Injuries Occurring at Municipally Owned or Operated Water Sites?

By Karen M. Richards

Introduction

New York is blessed with an abundance of beautiful water sites and the summertime beckons both swimmers and non-swimmers to them. Although most leave the water sites unscathed, for an unfortunate few the water can be a mechanism for serious injury or even death. Many of these water sites are municipally owned and operated, and when an injury or death occurs, a claim of negligence is often brought against the municipality.

As a landowner, a municipality "is subject to the same rules of liability as a private citizen and must act reasonably in view of all the circumstances" and "has a duty to take reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property."[1] However, this duty "does not extend to open and obvious conditions that are natural geographic phenomena which 'can readily be observed by those employing the reasonable use of their senses.'"[2] This article focuses on cases where a plaintiff's conduct may relieve a municipality from liability for accidents occurring at various types of municipally owned water sites.[3]

Naturally Occurring Turbulent Body of Water Not a Designated Swimming Area

In analyzing a municipality's liability, courts have found that if the body of water was an open and obvious naturally occurring hazard, a swimmer's decision to swim in the water constituted unforeseeable or reckless conduct which interrupted any causal connection between the municipality's alleged liability and the swimmer's injuries. For example, in *Cohen v. State*, the body of water was a naturally occurring whirlpool located downstream from a main swimming hole.[4] Four young men drowned in the whirlpool. The whirlpool area was described variously as "a cavern-like area creating a hydraulic, that was formed by water coming over a rock and then taking a hard right-hand turn and then going downstream," as "a box in which a large volume of water…was coming down rapidly by the falls, resulting in a great deal of aeration, white foamy water" and "water spinning in a circle pretty fast."[5] The danger presented by the whirlpool was so obvious that witnesses recognized it would be futile to jump in the water to try to save the boys. Even rescue divers found it too dangerous to enter the raging water.

> The observations of the counselors and rescue personnel, as well as the compelling photographic evidence in the record, establish that the whirlpool area was an open and obvious hazard that comprised a part of the natural environment of the Boquet River, the danger of which was readily apparent to a person reasonably using his or her senses. This, combined with the fact that the area was not easily accessible from the more commonly used main swimming hole, leads us to conclude that defendant did not owe a duty to neutralize the danger presented thereby.[6]

The court thus rejected the claimants' contention that the whirlpool's tendency to pull swimmers underwater was not apparent from viewing the surface or readily known by individuals not experienced with white water. Even accepting the claimants' evidence as true, the court found that "the unknown mechanics of the whirlpool [did] not transform it into a latent danger imposing a heightened duty on defendant," and the fact that another drowning had previously occurred in the same vicinity also did not impose such a duty.[7] Accordingly, the court found that the defendant's motion for summary judgment must be granted and the claims against it dismissed.

The visibility and nature of the water in question was also relevant in *Salas v. Town of Lake Luzerne*.[8] In *Salas*, the decedent and friends walked down a path, went through a hole in the fence, and proceeded to the river where many people were swimming, diving, and jumping off a bridge. The decedent's friends bodysurfed on rapids generated by a waterfall. Bodysurfing entailed going under rapids into a natural, unknown phenomena containing unseen rock formations and other natural hazards. After spending a few hours observing his friends bodysurfing, the decedent, an inexperienced swimmer, decided to bodysurf fully clothed. Tragically, he drowned on his first attempt at bodysurfing.

The Third Department assessed whether the decedent's conduct constituted unforeseeable or reckless conduct. It found that it did because:

> the hazardous water conditions of this naturally occurring phenomena were readily observable and that decedent's decision to engage in this activity, when wholly unfamiliar with its characteristics, exemplifies a disregard of his own common sense concerning his safety at the time of the accident. Therefore, decedent's actions must be considered the only cause, or a legally superseding cause, of his injuries.[9]

It thus reversed the judgment and order of the Supreme Court denying the Town's motion to set aside the jury verdict and dismissed the complaint.

Naturally Occurring Shallow Body of Water Not A Designated Swimming Area

Often the body of water where a swimming accident has occurred is not as dangerously turbulent as the whirlpool in *Cohen* or the rapids in *Salas*. However, if the injured swimmer was aware that the depth of the water was shallow and nevertheless dove into the water, his reckless conduct could constitute a superseding act absolving the municipal defendants from liability.[10]

For example, in *Olsen v. Town of Richfield*, the body of water was a shallow creek not designated as a swimming area.[11] Olsen was injured after he dove into the creek from a bridge owned by the County of Otsego. He admitted that he was familiar with the area, having jumped off the bridge "more than hundreds of times" in the five or six years prior to the accident, and that he was aware that the water level in the creek fluctuated.[12] Olsen also knew the location of the deepest water since he "roamed every…square inch of [the creek] to determine where the deepest water was" and that he had to precisely execute a shallow dive into a very narrow target of deep water.[13] Accordingly, the court found that the sole legal cause of the plaintiff's injuries was his own reckless conduct in attempting the dive. Since this was entirely dispositive of the case, the court did not address whether triable issues existed concerning the County's breach of duty relating to maintenance of the bridge or posting of warnings at the site.[14]

Similarly, in *Culkin v. Parks and Recreation Department of the City of Syracuse*, the plaintiff was aware of the shallow depth of the brook.[15] He had been swimming in the brook, which was not maintained as a swimming area, on many prior occasions and knew that the water was not over his head except in a deep hole located somewhere near the middle of the creek. He also was aware that a dive from the bridge was dangerous because he asked a friend who dove before him whether he had "hit bottom."[16] Despite this knowledge, he dove head first off a trash barrel turned upside down and placed upon a wooden footbridge that crossed over the brook. He was rendered paralyzed from the neck down after diving.

As the Fourth Department noted:

> By virtue of his awareness of the conditions of the brook, as well as his own common sense, plaintiff must have known that diving into the brook from the top of an overturned trash can balanced upon a footbridge posed a danger of injury…Additionally, even if it is assumed that defendants' conduct was a causative factor in bringing about plaintiff's injuries, we determine that plaintiff's reckless conduct in using an overturned trash barrel as a diving board to dive into what plaintiff knew was relatively shallow water was an unforeseeable, superseding event sufficient to absolve defendants of liability.[17]

The court therefore rejected the plaintiff's claims of alleged negligent maintenance, negligent supervision, and failure to warn and granted the municipal defendants' motion for summary judgment.

Designated Swimming Areas Open to the Public

In *Cohen*, *Salas*, *Olsen*, and *Culkin*, the water was not designated for swimming. However, even in cases where there was a designated swimming area and/or lifeguards, courts have dismissed claims against the municipal defendants.

For example, in *Heard v. City of New York*, the plaintiff had interacted with a lifeguard at the beach just moments before he dove off a jetty into water that he knew was shallow.[18] The lifeguard had ordered Heard and his friends to get off the jetty, but Heard repeatedly refused the order to leave, stating that he wanted to make one more dive. Finally, the lifeguard acquiesced. Heard dove off the jetty and sustained paralyzing injuries.

On appeal, the Court of Appeals focused on the consequences attached to the lifeguard's acquiescence in allowing Heard to dive because the "core theory of plaintiffs' case [was] that the lifeguard's assent breached a duty of care owed to Heard and was a proximate cause of his injuries."[19] The City argued that Heard had assumed the risk inherent in diving.

The Court of Appeals first addressed whether the City had breached a duty of general supervision. The court found that it did not, recognizing that "[e]ven when an agent of the municipality expressly authorizes swimming in a location where the municipality has banned it, a swimmer continues to assume the obvious and necessary risks unless a presentation as to safety has been given."[20] The lifeguard told Heard to stop diving and was not required to do more.[21] The city's "duty to provide adequate general supervision did not extend to providing 'strict or immediate supervision' to protect users of the beach from obvious risks."[22]

The court next addressed whether, beyond the general duty of supervision, a duty arose from negligent words or acts that induced reliance.[23] Two theories of reliance were available to the plaintiffs.[24] The first theory, an "assumed duty" or "duty to go forward," arises once a person undertakes a certain course of conduct upon which another relies.[25] In other words, did the lifeguard's conduct place Heard in a more vulnerable position than he would have been in had the lifeguard done nothing? The court determined that:

> the mere fact that the lifeguard undertook to remove the boys from the jetty neither enhanced the risk Heard faced, created a new risk nor induced him to forgo some opportunity to avoid risk. Simply stated, the lifeguard's actions created no justifiable reliance. Heard was in no worse position once the lifeguard acquiesced in his dive than if the lifeguard had stood by and done nothing.[26]

Therefore, the court concluded as a matter of law that the lifeguard's failure to insist that Heard leave the jetty was not a breach of duty proximately causing Heard's injuries.[27]

The second theory of reliance was that the lifeguard's acquiescence to the dive was a negligent misrepresentation as to the safety of the dive that Heard detrimentally relied upon.[28] Heard had some familiarity with the area, and in requesting one last dive,

> he was not a person wholly without knowledge seeking assurances from one with exclusive knowledge. Nothing about the exchange suggested that the lifeguard was imparting exclusive information about safety upon which Heard should rely. To the contrary, he clearly communicated to the boys that they were to leave the jetty. While his decision to permit Heard one last dive was inconsistent with that message, such inconsistency did not revoke the prior admonition or, according to the testimony, even create an ambiguity in the minds of the divers as to whether they were to leave the jetty.[29]

At most, "the lifeguard's statement was a reluctant assent that may have implicitly minimized the risk" but "no reasonable person in Heard's position would have relied on such a statement in deciding to dive."[30]

> In the context of his [the lifeguard's] continuing order that the jetty be cleared and his obvious reluctance to accede to Heard's wishes, the lifeguard was as much warning of danger as vouching for safety. In the face of such ambiguity, a reasonable person would not have relied upon the lifeguard's reluctant assent to decide to undertake an obvious hazard. That being so, as a matter of law, the lifeguard's statement was not a breach of duty that proximately caused Heard's injuries.[31]

The Court of Appeals thus found there was insufficient evidence to establish the necessary reliance needed to sustain a cause of action under the theory of negligent misrepresentation.

In *Mosher v. State*, there was a sign in the park prohibiting running on the beach and racing, splashing, or jousting in the water, and lifeguards routinely reprimanded swimmers who disobeyed the rules.[32] Despite all these prohibitions and his failure to obey the rules, the claimant sued the State for injuries he sustained when he ran down the beach into a gradually downward-sloping sand bottom and dove into 18-24 inches of water. The claimant alleged that the State breached its duty to maintain the swimming area in a safe condition by failing to post a sign prohibiting shallow water dives. He also alleged that the State neglected to train its lifeguards to prevent such dives despite having notice that shallow dives are more dangerous than the general public realizes. Because the claimant knew about the signs prohibiting running and failed to comply, the court found it "doubtful that additional signs or more uniform reaction by the lifeguards" in curtailing such behavior would have prevented the claimant's conduct.[33] It was the "claimant's failure to obey existing rules and his disregard of his own common sense with respect to the water depth when he dove [that were] the proximate cause of his tragic misfortune."[34]

Designated Swimming Areas Closed to the Public

In some cases, although the body of water in question was closed to the public at the time of the accident,

plaintiffs have nonetheless still claimed that the municipal defendants had a duty to warn.[35] This was the case in *Rowell v. Town of Hempstead*, where the plaintiff was rendered a quadriplegic as a result of injuries he sustained when he dove into shallow water from a piling that anchored a swim platform.[36] At the time of the accident, although the beach was closed to the public and there were signs posted warning that the beach was closed, the plaintiff argued that there were questions of fact as to whether the defendant had effectively warned against the danger of diving off the pilings and whether that danger was known or obvious to the plaintiff.

The plaintiff, who was an experienced swimmer, admitted that he had dived "thousands of times," had swum in the area on many occasions, was familiar with the changing levels of the tides in the area, and knew from experience how to tell by the location of the platform on the pilings whether the tide was high or low. He also had been swimming and diving in the water for fifteen minutes prior to the accident.

The court found that the plaintiff's reckless conduct was an intervening, superseding event that absolved the municipal defendant of liability even if the warning was insufficient. It stated that "[t]he extreme risk inherent in diving into water, which, by the plaintiff's admission, was 'murky and unclear,' from the top of a piling that was three-and-one-half feet higher than the swim platform, at 9:00 P.M., at a closed beach with no lifeguard on duty, is self-evident," and "[t]he depth of the water was readily observable to, and 'physically experienced' by the plaintiff, who had been swimming and diving in the water for 15 minutes prior to the accident."[37] Accordingly, the court found that the municipal defendant was entitled to summary judgment dismissing the complaint.

Natural, Transitory Conditions

In instances where the threats to swimmers arose from the existence of natural, transitory conditions, courts have found that imposing a duty to warn would be impractical and of little value in preventing injury.[38] For example, in *Dewick v. Village of Penn Yan*, the accident occurred on a hot day, four days before the beach officially opened for the season. The beach was closed and "no swimming" signs were posted. Despite the beach being closed and signs prohibiting swimming, one of the decedents waded into the lake, stepped from a sandbar where the lake bottom drops off, and became caught in an undertow or current.[39] The other decedent drowned trying to save her. Neither person could swim. It was alleged that the Village failed to specifically warn about the dangerous condition caused by the drop off and current.

The Fourth Department found that the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint because no evidence was presented that additional signs were necessary or would have made a difference, and the risk of a drop-off was a reasonably foreseeable risk inherent in wading into a lake. In addition, the current resulted from a sandbar, and there was no duty to warn of the presence of a natural transitory condition such as a sandbar.

Similarly, in *Graham v. County of Suffolk*, the County was not liable for a drowning that occurred due to a dangerous rip current, a naturally occurring phenomenon.[40] The County established that it was not under a duty to warn swimmers that a dangerous rip current had developed that afternoon and that the swimmer's death, which occurred after 5:30 p.m., was not proximately caused by any alleged negligence on its part. Notably, the lifeguards had explained to the decedent that swimming was prohibited after 5:30 p.m., that they were going off duty, and that the water would accordingly be unprotected.

Man-Made Hazards

In considering claims of failure to warn of a dangerous condition, New York courts often have made a distinction between naturally occurring hazards and man-made hazards. The potential liability associated with a man-made hazard results because "liability for failure to warn the public of a dangerous condition is reasonably imposed upon a governmental body when it creates or contributes substantially to the creation of that condition."[41] However, in swimming and diving accidents, even where the water was man-made, municipal liability often hinges on whether the depth of the water was known to the plaintiff.

In *Ziecker v. Town of Orchard Park*, the plaintiff was injured when he dove into a man-made lake. He asserted that the Town was negligent in failing to warn against diving into the lake because the water was too shallow, in failing to maintain the bottom of the man-made lake in manner which preserved what appeared to be its natural slope, and in failing to keep the bottom free of debris including silt, rocks, and tree limbs. Following a jury trial in which the plaintiff was found to be 70% liable for his injuries, the Appellate Division reversed and dismissed the complaint, holding that the plaintiff's action in diving into the water was an unforeseeable superseding cause barring defendant's liability. The Court of Appeals overturned the Appellate Division's reversal, finding there was:

> sufficient evidence in the record from which the jury could have rationally concluded that plaintiff was not aware of the depth of the water at the point

> he would reach on his dive, and accordingly, that plaintiff's conduct was not reckless. For this same reason it cannot be said that plaintiff's conduct was a superseding act absolving defendant from liability.

If a municipality alters naturally existing conditions in such a manner as to affirmatively create a danger, it may be liable. For example, in *O'Keeffee v. State*, while walking on a boardwalk above the wall of a marina in a state park, a young boy fell into the water.[42] His father and younger brother jumped in to rescue him. All three drowned. Various flushing inlets had been constructed in the marina walls so water from the river could be flushed through the marina area to prevent stagnation of the water. No signs were posted to warn marina users of the strong swift currents in the area of the flushing inlets, even though the State was aware of the strong currents. The swift nature of the currents could not be seen by people on the boardwalk above the inlet area, and the State's failure to post any warning constituted a failure to exercise reasonable care to prevent foreseeable injury. Thus, since the decedents could not have been aware of the swift nature of the current, they did not assume the risk of drowning.

In *Ziecker* and *O'Keeffee*, the municipal defendants were not absolved from liability because the plaintiff and the decedents were not aware of the depth of the water. Where the plaintiff is aware of the water's depth in a man-made lake, however, his decision to swim or dive may constitute, as a matter of law, an intervening act so extraordinary or far removed from the municipality's conduct as to be unforeseeable. This was the situation in *Tkeshelashvili v. State*, where Colgate Lake had been formed following construction of a dam in 1887.[43] Citizens had complained about the dam leaking because lower water levels made the lake less desirable for recreation and less aesthetically appealing; the lower levels had caused the water to take on a brownish tinge.

The claimants' theory of the State's liability was that the State:

> was "negligent as a matter of law for failing to warn of a known danger and in failing to take any steps to warn of the hazards posed by this danger." The "known danger" identified by claimants was that the lake's water near the dam was too shallow for diving because the dam leaked. Claimant contends that he did not possess the requisite "specific and actual awareness of shallow water" necessary to warrant dismissal because he had previously dived into the lake from the spillway without incident and had "no knowledge that the water level [had] been altered."[44]

The claimants attempted to distinguish their case from previous cases, such as *Olsen* and *Culkin*, arguing that Mr. Tkeshelashvili had only imputed knowledge, whereas the injured swimmers in other cases had actual knowledge of the depth of the water into which they dove and proceeded despite the evident risk. The court rejected this argument, finding it "difficult to grasp any meaningful difference" between what the injured swimmers in previous cases actually knew about the depth of the water into which they dove and Mr. Tkeshelashvili's knowledge about the conditions at Colgate Lake."[45] He was familiar with the area and knew the level of the lake fluctuated. Further, on the day of the accident, Mr. Tkeshelashvili made no attempt to ascertain the depth of the water.[46] In fact, he "didn't hesitate" before diving headfirst into the water and dove into the lake "in the same manner as in his many past visits."[47]

Thus, "based upon [claimant's] substantial prior experience, [he] knew or should have known both that Colgate Lake was shallow and that the actual depth of the lake fluctuated."[48] His dive "constitute[d], as a matter of law, an intervening act which was so extraordinary or far removed from the [State's] conduct as to be unforeseeable."[49]

Conclusion

A municipal defendant may be relieved of any duty it might have owed a plaintiff, who knew or should have known the shallow depth or the dangerous turbulence of the water, and despite that knowledge, dove into or swam in the water. However, if a plaintiff did not have knowledge of the dangerous condition and the condition was not open and obvious, his conduct may not constitute, as a matter of law, an unforeseeable, superseding event sufficient to absolve a municipal defendant of liability.

Endnotes

1. *Cohen v. State*, 50 A.D.3d 1234, 1235 (3d Dep't 2008), *leave to appeal denied*, 10 N.Y.3d 713 (2008) (citations omitted).
2. *Id.* (citations omitted).
3. This article discusses natural or man-made bodies of water, not municipally owned swimming pools.
4. *Id.*
5. *Id.* at 1236.
6. *Id.*
7. *Id.* at 1237. The fact that another drowning had previously occurred in the same vicinity also did not impose such a duty.
8. *Salas v. Town of Lake Luzerne*, 296 A.D.2d 643 (3d Dep't 2002), *leave to appeal denied*, 99 N.Y.2d 502 (2002).

9. *Id.* at 646. The water was so turbulent that the rescue squad and scuba unit refused to attempt an underwater rescue.
10. *Ziecker v. Town of Orchard Park*, 75 N.Y.2d 761 (1989).
11. *Olsen v. Town of Richfield*, 81 N.Y.2d 1024 (1993); *see also Donohoe v. Town of Babylon*, 246 A.D.2d 576 (2d Dep't 1998) (finding the plaintiff's act of diving headfirst into water which he knew to be shallow was an unforeseeable superseding event absolving the defendants of any liability); *Adornato v. Town of Smithtown*, 212 A.D.2d 561 (2d Dep't 1995) (dismissing the complaint where the plaintiff was familiar with the depth of the water by being in it prior to the accident and by observing other swimmers).
12. *Olsen*, 81 N.Y.2d at 1024.
13. *Id.* at 1026.
14. *Id.*
15. *Culkin v. Parks & Recreation Dep't of the City of Syracuse*, 168 A.D.2d 912 (4th Dep't 1990), *appeal denied*, 77 N.Y.2d 806 (1991).
16. *Id.* at 914.
17. *Id.*
18. *Heard v. City of New York*, 82 N.Y.2d 66 (1993), *reargument denied*, 82 N.Y.2d 889 (1993).
19. *Id.* at 70.
20. *Id.* at 71.
21. *Id.*
22. *Id.* The claimants failed to demonstrate that the risk encountered from diving from the jetty was unusual to ocean diving or not obvious.
23. *Id.* at 72.
24. *Id.*
25. *Id.*
26. *Id.*at 73.
27. *Id.*
28. *Id.*
29. *Id.* at 75.
30. *Id.*
31. *Id.* at 76.
32. *Mosher v. State*, 145 A.D.2d 682 (3d Dep't 1988), *appeal denied*, 73 N.Y.2d 708 (1989).
33. *Id.* at 683.
34. *Id.*
35. *Dewick v. Village of Penn Yan*, 275 A.D.2d 1011 (4th Dep't 2000), *leave to appeal denied*, 724 N.Y.S.2d 143 (4th Dep't 2000) (finding no duty to warn of the presence of a dangerous condition caused by the lake bottom drop-off and current where the beach was closed and "no swimming" signs were posted).
36. *Rowell v. Town of Hempstead*, 186 A.D.2d 553 (2d Dep't 1992), *leave to appeal denied*, 81 N.Y.2d 703 (1993), *reargument dismissed*, 81 N.Y.2d 936 (1993).
37. *Id.* at 553.
38. *Perez v. Town of E. Hampton*, 166 A.D.2d 640 (2d Dep't 1990) (finding the imposition of a duty to warn of sandbars would be impractical owing to their transitory nature); *Sartoris v. State*, 133 A.D.2d 619 (2d Dep't 1987) (dismissing the claim after a nonjury trial where the claimant contended that the defendant breached a duty to warn potential bathers of a dangerous lateral "sweep" condition along the shoreline because there was no evidence such warnings would have prevented the drowning or altered the behavior of the decedent, who was an experienced ocean swimmer).
39. *Dewick*, 275 A.D.2d 1011.
40. *Graham v. Cnty. of Suffolk*, 34 A.D.3d 527 (2d Dep't 2006).
41. *Herman v. State*, 94 A.D.2d 161, 162 (2d Dep't 1983), *appeal dismissed*, 62 N.Y.2d 617 (1984), *order aff'd*, 63 N.Y.2d 822 (1984), *reargument denied*, 64 N.Y.2d 755 (1984).
42. *O'Keeffe v. State*, 140 A.D.2d 998 (4th Dep't 1988), *appeal dismissed*, 73 N.Y.2d 756 (1988).
43. *Tkeshelashvili v. State*, 18 N.Y.3d 199 (2010).
44. *Id.* at 205 (alteration in original).
45. *Id.* at 207.
46. *Id.* at 202.
47. *Id.*
48. *Id.* at 204.
49. *Id.*

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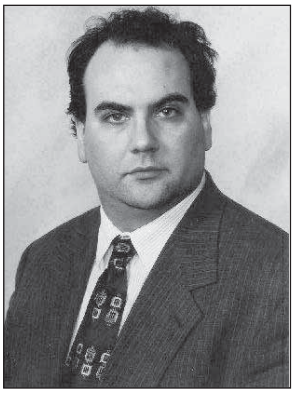
Can Methods Used to Uncover No Fault Fraud Save Medicaid?

By Daniel McLane



The news is replete with discussions of fraud in public and social insurance programs. In recent years, organized crime has infiltrated the motor vehicle No Fault insurance medical claims area through complex arrangements where motor vehicle accidents are staged and then false medical claims are submitted to insurance companies for reimbursement. Similarly, false Medicaid claims are submitted in a variety of imaginative ways, including as health care provider fraud and false representations by individual claimants. No Fault claims fraud has resulted in millions of dollars of loss for the insurance industry. Medicaid, a public benefit paid for by a combination of federal and state moneys, sees millions of dollars wasted in what are estimated to be fraudulent practices.

No Fault insurers and authorities charged with policing the Medicaid system have differing methods for ensuring the integrity of their respective systems. No Fault insurers have developed a variety of weapons in their arsenal against fraud, ranging from aggressive utilization of claims verification tools, independent medical examinations and peer reviews, special investigation unit inquiries, examinations under oath, civil racketeering law suits, and cooperation with prosecutorial agencies. Medicaid has utilized in house investigatory front-end detection, referral to prosecutorial agencies, and audit tools. Medicaid anti-fraud efforts are the product of cooperation between multiple levels of government and prosecutorial agencies, including those on the federal, state, and county levels.

This article compares and contrasts the two insurance programs and proposes that some of the investigatory tools utilized by the private insurance industry to police No Fault providers and claimants be adapted to the Medicaid system. The enormity of policing Medicaid suggests that the aggressive tools utilized in the private insurance area could be beneficial to governmental authorities, but may require enabling legislation or regulation.

No Fault Insurance Fraud: "The Fraud Factory" and the Corporate Practice of Medicine

In New York, No Fault insurance is a benefit provided under motor vehicle insurance policies for first party loss without consideration of the parties' comparative fault or negligence. While No Fault provides payment for medical expenses and wage replacement benefits, the most important concern from a fraud perspective is the medical expense payments. This is especially true because the most infamous form of No Fault fraud involves the creation of entirely fraudulent medical practices.

A notorious example of No Fault fraud was demonstrated through what the Queens County District Attorney referred to as "Operation Fraud Factory." In this matter, the District Attorney charged forty three defendants, including a reputed Bonanno crime family associate, five lawyers, three medical doctors, a dentist, a physical therapist, a chiropractor, an acupuncturist, an insurance claims manager, and others, including "fake patients," with Enterprise Corruption, a Class B Felony under New York Law. The center of this so-called fraud factory was a Medical Arts Center located in Richmond Hill, Queens.[1] Convictions for the Crime of Enterprise Corruption were secured against the principals involved in this crime.

In the "Fraud Factory Scam," a physician named Dr. Roger Brick was the nominal owner of a number of medical practices that purportedly treated motor vehicle accident victims and sought reimbursement through No Fault insurance benefits.[2] Nevertheless, Dr. Brick "knowingly permitted and allowed the ceding of the operation, management, control and / or (de facto) ownership authority" over his corporations to a lay person. Dr. Brick agreed to an arrangement where he received a percentage of the collections received from a management company, which in actuality had complete profit and loss responsibility and made all decisions regarding financial operations, and hiring, firing, and supervision of office staff and even medical professionals (other than consulting Dr. Brick regarding physical therapist competency).[3] These lay people in turn operated a scheme in which they processed fraudulent benefit claims through staged accidents. The scheme would eventually expand to the corruption of a number of other professionals, the generation of false liability claims for third party benefits, and the alleged corruption of an official from an insurance company.

The "Fraud Factory" was not an isolated incident, as there were criminal convictions secured for other entities that engaged in these practices.[4] Understandably, many instances where an insurance company alleges No Fault fraud are not prosecuted as criminal offenses, but are litigated as civil matters, and thus, in a variety of forums. Insurance companies have been creative with respect to the remedies they utilize to combat No Fault fraud. These include investigations of a medical practice's corporate structure, civil lawsuits under the Racketeering Influenced Corrupt Organizations Act ("RICO"), examinations under oath ("EUO") based upon verifying that treatments were actually rendered, and the ordinary course of verifying medical necessity for continued treatment through Independent Medical Examinations (IMEs) and paper peer review evaluations.

In New York, the "*Mallela*" cases are the leading line of cases with respect to the corporate practice of medicine. In *State Farm Mutual Automobile Insurance Co. v. Mallela*, the State Farm Insurance Company rejected a provider's No Fault insurance claim based upon an allegation that the defendant fraudulently incorporated a professional corporation.[5] The true owner of the corporation was a management company, rather than a licensed doctor. State Farm alleged that the unlicensed defendants paid physicians to act as the nominal owners of medical practices while the non-physicians, or unlicensed defendants, fraudulently and inappropriately retained the actual profits.[6]

The Court of Appeals held that insurance carriers had the ability to refuse to reimburse medical corporations that were fraudulently licensed under the law. In addition, insurance carriers "may look beyond the face of licensing documents to identify willful and material failure to abide by state and local law." Under the N.Y. Insurance Law § 5102, No Fault carriers must reimburse patients for "basic economic loss."[7] However, a provider of health care service is ineligible for reimbursement if they fail to meet the licensing requirements of New York State or any local licensing requirements.[8]

Under 11 N.Y.C.R.R. § 65-3.16(a)(12), before the insurance carrier reimburses a corporation, the insurance carrier may perform an investigation into whether the corporation was fraudulently incorporated.[9] The *Mallela* Court held that insurance carriers' investigations had to be premised upon an element of good cause.[10] Consequently, insurance carriers would not have the ability to abuse the truth seeking opportunity permissible under the New York State insurance regulations.[11] Technical violations, such as failure to hold meetings or pay certain fees, are insufficient to qualify as good cause. An insurance carrier's investigation must be based on its ability to reveal a corporation's fraudulent behavior.[12]

In the *Mallela* line of cases, both the New York State Court of Appeals and the Second Circuit interpreted New York State law and regulations with respect to No Fault claims practice and the "corporate practice of medicine."[13] It has been an established practice among health care providers to delegate certain "business functions" of the medical practice to management companies.[14] Barring fraud, such an arrangement would permit a physician to concentrate her efforts on patient care while a professional management team would handle the medical billing and regulatory compliance aspect of the practice. Such a management structure may be understandable in an environment where providers are concerned about proper billing procedures and pursuit of medical reimbursements. However, the "corporate practice of medicine," presents opportunities for fraud and abuse where physicians tend to sign over profit and loss responsibility to management companies, and as a result become captives of the management companies.

No Fault insurance laws and regulations permit insurance companies to utilize Examinations Under Oath (EUOs) as investigatory tools to verify claims. The New York State regulations permit insurers to demand EUOs of both the insured and the insured's "assignee," or treating provider.[15] Cooperation with an insurance company, such as appearing at an EUO, is a condition precedent to receiving payment for medical bills under the No Fault policy.

An EUO is conducted to confirm that the services billed to an insurance company were actually rendered. During an EUO, "the policyholder is required to appear and give sworn testimony on the demand of the insurer."[16] If the insured does not cooperate, his or her claim can be denied. The line of questioning used during an EUO is very similar to an oral deposition. However, an EUO is not considered a deposition, and the attorney representing the insured does not have the right to cross-examine during the process.[17]

Similarly to an oral deposition, a court reporter is present to give the oath to the parties prior to questioning.[18] An insured would then be asked questions about the accident in question. However, the examiner's emphasis will be on claims verification, as opposed to focusing on liability.[19] At the end of an EUO, the court reporter will prepare a transcript of the proceeding, which is then supplied to the claimant to review, offer testimonial corrections, and have notarized, much like a deposition in civil litigation.

The questions that the examiner will raise seek to explore the possibilities of fraud. Insurers tend to believe that fraudulent practices, particularly staged accidents, follow certain patterns of behavior. Four specific scams that exist are: the Swoop and Squat, the Drive Down, the Sideswipe, and Shady Helpers.[20] The

Swoop and Squat accident occurs when a vehicle (the "suspect car") "swoops" in front of another vehicle and abruptly stops causing a rear-end collision. After the accident, passengers from the suspect car often exit the vehicle complaining of neck and back injuries, which are often fabricated.[21] The Drive Down accident occurs when a vehicle merges into traffic or when a vehicle is backing out of a parking spot. Often the suspect car will "wave" another vehicle to either merge or back out of a parking spot, then proceed to hit the other vehicle, and subsequently deny that they "waved" the vehicle into traffic.[22] The Sideswipe occurs when the suspect car causes an accident by "sideswiping" another vehicle when both vehicles are turning in a dual left-turn lane. Shady Helpers (also known as "runners") are those individuals who contact accident victims either at the site of the accident or later by telephone. They attempt to persuade individuals to receive medical treatment at a specific clinic, see a certain lawyer, or have automobile repairs done at a certain shop.[23]

An insurance company may seek an EUO from any individuals who were in the automobile accident, such as the driver or all passengers involved. In investigating fraudulent claims, an insurance company should look for certain red flags. Insurance companies should look for inconsistent statements from the insured regarding facts of the loss and his whereabouts, and vague and general representations concerning other matters. In addition, they should compare those statements to the statements made by police officers or the fire department regarding the incident. An insurer may be suspicious of a fraudulent claim when a driver and passenger have wildly divergent accounts of the events leading up to the accident, or different accounts of the accident itself.

Unlike liability depositions in personal injury cases, EUOs focus very specifically upon how an individual may have been referred to a particular provider group. The examiner will ask the insured about discussions that occurred at the accident scene, including whether the insured can produce the name and description of a "runner" that may have been present at the accident scene.[24] In general, "[a] runner is a middleman who is paid thousands of dollars per head to bring patients to no-fault clinics."[25] There are two types of patients referred to clinics by "runners." Those include individuals who sustained injuries or fabricated injuries from staged accidents, and individuals who were in legitimate accidents, but did not sustain actual injuries.[26] Identifying the referral source to a particular medical group is considered important to claims examiners.

EUO examiners ask very detailed and sophisticated questions in verifying the treatment received by the insured individual. A thorough examiner would have read through the patient's billing history and would ask specific questions about which modalities of care were provided, how much time was spent with the patient, and how the care was administered. The questions would be framed in the context of verifying if the services billed conformed to the No Fault / Worker's Compensation Fee Schedule.[27] An examiner will ask the insured questions regarding his or her background, and family, educational, and employment histories. An examiner may ask questions regarding the insurance policy, the purchase of specific property, or the events surrounding the "no-fault" incident.

EUOs have a mixed track record with respect to their overall usefulness in claims denials. No Fault billing practices follow a rigid schedule for claims processing. An insurer must pay or issue a denial of claim within thirty calendar days of its receipt, and must offer proof of service of a timely denial of claim.[28] The exception to this rule occurs when either a) there was no insurable accident, as with a staged accident claim, or b) when the carrier can prove that the provider operated through an illegal corporate structure, as in the *Mallela* line of cases. Additionally, instead of paying or denying the claim, an insurer may choose to request additional verification of the claim. An EUO may be used as a tool to verify a claim. However, an insured may refuse to comply with the EUO request if there is a defective notice of intent to examine, objection to unreasonable time and place, or denial of the insured's right to have an attorney present.

In *Fair Price Medical Supply Corp. v. Traveler's Indemnity Co.*, a divided New York State Court of Appeals held that the failure of Traveler's to issue a denial of claim in a timely manner precluded a defense based upon a statement from the insured that he had not received items of durable medical equipment billed.[29] In *Fair Price*, a durable medical equipment provider billed Traveler's for several items allegedly supplied to a patient and a Traveler's insured. The Traveler's insured responded to a lengthy questionnaire submitted to the Travelers in which he claimed that he did not receive any items of DME. The Court determined that the No Fault regulatory scheme mandated prompt payment and that this concern needed to be addressed within the framework of a timely denial. In short, the insurer was obligated to deny the claim within thirty days of receipt, notwithstanding the possibility that the claim was wholly false and rendered for arguably fictitious services.

A fraud investigation may involve the taking of numerous patient EUOs, which, in turn, may establish certain billing patterns, even if the billing itself is subject to some form of "*Fair Price*" style defense. Examinations may reveal that the physician did not himself

conduct patient examinations he billed for, or did not spend a sufficient amount of time with the patient. The testimonies could also reveal the identities of staff who in actuality are the true "owners" of a medical practice as described by the patients themselves, or can reveal other billing discrepancies. Carriers are accordingly permitted to depose physicians through the EUO process to verify their billing practices and to explore the possibility that they may be engaged in the unlawful corporate practice of medicine.

Carriers, however, are not without a remedy if they can demonstrate that the claimant did not receive the treatment or equipment prescribed. Recent case law suggests that, while the insurer is obligated to pay for services not denied within the time frame allotted through the regulations, the insurer can sue the provider for "unjust enrichment" if indeed the insurer timely pays the claim within the thirty day claim period and then can prove the services were not provided.[30]

Carriers are also permitted to ensure the medical necessity of treatment through requesting either a) independent medical examinations, or b) paper peer reviews by consulting physicians. The Independent Medical Examination (IME) is a tool used in both No Fault and third party liability practice. In No Fault, the IME physician examines the patient from the perspective of his discipline to ascertain if the patient requires further medical treatment or if she has reached "maximum medical improvement." The consulting IME physician will also determine if the claimant is able to return to work, as No Fault also pays indemnification or wage replacement benefits, as well as underwrites medical expense up to the Personal Injury Coverage policy limits.

Insured's are obligated to attend IMEs and to cooperate with the examiner as a condition precedent to coverage. A claim can be denied for failure of a claimant to appear for an IME. Similarly, a consulting physician could determine that the claimant reached maximum medical improvement and can be discharged from treatment, but the insurer must do so within the time limitations presented through the regulations for timely denial and requests for verification.

An insurance company can seek a delay in the time to pay by requesting verification of the claim by the provider. An insurer has fifteen business days with which to request "additional verification of the claim." A request for verification serves to toll the thirty day window for claims denial until the relevant information requested is received.[31] The request for verification could therefore enlarge the time in which a carrier may assess the medical necessity of certain testing and diagnostic procedures. A means to accomplish this without examining the patient would be to have a consulting physician consult on the "medical necessity" for certain treatments through a "peer review." A peer review is a review of the patient chart and medical reports to determine if the issues presented "on paper" warrant the diagnostic procedures recommended, such as MRIs, neurological testing, and the like.

Rendering medically necessary treatment is an important concern for claims practice. While the gamesmanship that occurs in this area may be considered by some on both sides of the aisle, the provider and the insurance industry, to be "fraudulent," whether through complaints about "not so independent insurance examinations" by providers and their patients or allegations of "fraud" by the insurance industry, it is an everyday aspect of providing No Fault oriented patient care. Medical necessity disputes involving IMEs and peer reviews are almost always exclusively resolved through the civil litigation or the arbitration process in an amicable matter.

Approaches to Combating Medicaid Fraud

Medicaid is a social insurance benefit first enacted in law by Congress in 1965 and adopted by the State of New York in 1966. Medicaid is a means-tested program that provides health insurance benefits to eligible individuals. For single individuals over the age sixty five, the maximum eligible income is $9,500 per year and the limit for "resources" is $14,750. "One third of all children receive care through Medicaid, as do low income pregnant women, disabled or blind people and nursing home patients."[32] New York's Medicaid program, jointly financed by federal, state and local taxpayers, is the nation's largest, at $53 billion.[33]

In New York, the federal government is responsible for fifty percent of the Medicaid costs, and the remainder of responsibility is divided evenly between New York State and the counties.[34] New York State through the Department of Health and the Office of the Medicaid Inspector General (OMIG) supervises the Medicaid program while county-level local social service districts are responsible for the administration of the program. The five counties that comprise the City of New York are administered by a single local social service department, which is known as the Human Resources Administration (HRA).

Medicaid planning is a sophisticated industry that utilizes complex trust instruments, such as supplemental needs trusts, pooled trusts, and irrevocable trusts, to shelter both assets (referred to in Medicaid Planning as "resources") and income to create eligibility for those whose income and resources would otherwise render them ineligible for benefits. Trust instruments create eligibility and protect assets of all sizes, from those of individuals with sizeable portfolios to those of individuals who receive Social Security Disability Benefits

(SSD), which sometimes exceed the minimum income guidelines. As a government entitlement program, Medicaid applicants/recipients are entitled to due-process-protection fair hearings if they disagree with the determination of a local social service department.

Medicaid fraud can be committed by providers or patients, known in Medicaid as applicant/recipients ("A/R"). Much like in No Fault schemes, providers have been accused of processing false or unnecessary claims by signing up patients through offers of cash, groceries, and food stamps.[35] Fraud can also be committed by individuals who make false statements on Medicaid applications by making false representations about either their income or their resources.

There appears to be a universal consensus with respect to the need to address the potential for fraud and abuse in the Medicaid system. The N.Y.S. Office of the Medicaid Inspector General outlined in its State Fiscal Year 2012-2013 Work Plan ("OMIG 2012-2013 Work Plan" or "the Work Plan") a model for compliance based upon "a cooperative" approach.[36] This focus emphasizes a migration within the Medicaid program from fee for service programs to managed care.

The Work Plan emphasizes third party utilization review to ensure that other programs, such as private insurers, are billed for services before Medicaid is, ensuring that Medicaid is truly payor of last resort, as required by law. The OMIG will continue to review fee for service billing to address duplicative billing by providers.[37] The OMIG will also "review" Managed Care Organizations' (MCOs) management practices to ensure their efficiency.[38] The OMIG will also audit school districts and county preschool providers to ensure that services are provided in accordance with the child's individualized educational program.[39]

With respect to prescriptions and durable medical equipment, the OMIG will identify prescription and DME utilization patterns that are inconsistent with medical necessity. The OMIG proposes that it will "help" MCOs to "self identify" enrollees who abuse prescriptions. The OMIG "will restrict in cases where fee for service payments are involved and work cooperatively to assist MCOs in placing managed care enrollees who abuse prescription and/or DME into the MCO restrictive recipient programs."[40] As demonstrated in the No Fault field, however, DME abuse tends to be provider driven—and not patient driven. It is therefore unclear how a "cooperative" approach would result in curtailing DME abuse.

The OMIG Fiscal Work Plane emphasizes the requirement of the federal Affordable Care Act, which mandates that providers "promptly self-identify, self disclose, explain, and repay overpayments within sixty calendar days of the identification of the overpayment regardless of the financial threshold of participation in the Medicaid program."[41]

Notwithstanding this emphasis upon self reporting, the OMIG will continue to investigate allegations related to recipient eligibility issues, misuse of benefit cards, and cases where enrollees lend or rent their benefit cards to others to obtain medical benefits for which they are not entitled. Also, the OMIG will coordinate with local state and federal law enforcement to investigate recipients defrauding Medicaid and refer those recipients for prosecution.[42]

The OMIG 2012-2013 Work Plan is viewed by some as a departure from a model adopted when the Office of Medicaid Inspector General was created during the Pataki Administration to curb billions of dollars in fraud misspending by health care providers.[43] The current Inspector General served as a regional inspector general in the Midwest. He coordinated national and regional audits for Medicare and Medicaid and helped create a joint Department of Justice and Health and Human Services task force to combat fraud, waste, and abuse in government programs.[44]

There is some concern that the appointment of a new OMIG Inspector General represents a departure from a hard-nosed approach to compliance which emphasized thorough anti-fraud efforts through law enforcement and litigation recovery-based approaches favored by the previous Inspector General, who currently serves as the chief integrity officer and executive deputy commissioner for New York City Human Resource Administration, where his work in Medicaid continues on a local level.[45]

The OMIG 2012 Report does not discuss the utilization of one of the potentially strongest tools in the anti-fraud arsenal, the Qui Tam Act. Qui Tam is a federal anti-fraud statute enacted during the Civil War, which is used to seek reimbursement for misuse of federal money. Since Medicaid is in part federal money, it would be appropriate to utilize Qui Tam to seek reimbursement for Medicaid fraud. The utilization of Qui Tam by Medicaid districts would be analogous to the use of Civil RICO statutes by No Fault insurance companies against the most severe violators.

New York does have a "New York False Claims Act," which is modeled after the Qui Tam, much like the New York Enterprise Corruption Statute is modeled after the federal Racketeer Influenced Corrupt Organization Act. In the fall of 2012, the New York State Bar Association held a Continuing Legal Education Class entitled "Litigating New York State False Claims Act Cases." The seminar included presenters from the New York State Attorney General's Office as well as the private plaintiff and defense bar. It is anticipated that New York will develop a strong public

and private False Claims Act bar to vigorously combat fraud against New York State agencies, including the Medicaid program.[46]

Under the federal Qui Tam statute, a whistleblower, known as a "relator," makes a complaint to the U.S. Attorney regarding a question of fraud. The U.S. Attorney reviews the complaint and brings a civil suit under the Qui Tam Act. The U.S. Attorney can either pursue the suit and share the award with the relator, or can decline to bring the law suit, allowing the relator to hire a private lawyer, and perhaps earn a greater share of any settlement or award. Aggressive civil lawsuits in this area would preserve due process by subjecting providers to depositions where they would be represented by counsel.

Recently, AmMed Direct LLC agreed to pay the United States and the state of Tennessee $18 million plus interest to settle allegations that it submitted false claims to Medicare and Tennessee Medicaid. As per the agreement, AmMed will pay $17,560,997 to the United States and $439,003 to Tennessee. The United States and Tennessee alleged that, from September 2008 through January 2010, the Antioch, Tennessee-based company submitted false claims to Medicare and TennCare for diabetes testing supplies, vacuum erection devices, and heating pads. The Qui Tam action was filed in 2009 in federal district court in Nashville, Tennessee, by former AmMed Direct employee Bryan McNeese. The relator will receive approximately $2.88 million as his share of the settlement proceeds.[47]

Judging from the experience of the No Fault system, self-identification without verification may prove to be a hollow pursuit. Section 144 of the Social Service Law permits local social service districts to conduct Examinations under Oath. However, there is no enabling regulation with respect to the use of EUOs within Title 18 of the New York Compilation of Codes, Rules, and Regulations. In order for EUOs to be utilized with any consistency and effectiveness, it is necessary for the Department of Health to promulgate regulatory guidelines as to their use. The Department of Health and the OMIG could consult with the Financial Services Department regarding the use of EUOs in private insurance programs.

In No Fault practice, cooperation with the insurance company is a condition precedent to coverage. The effective use of EUOs would have to be intermeshed with the considerable due process mechanisms afforded to Medicaid consumers, and this would require some form of regulatory framework.

As a public entitlement, Medicaid benefits are considered a "property right" of the applicant/recipient, consistent with the U.S. Supreme Court's holding in *Goldberg v. Kelly*, in which the Court held that an individual who is denied benefits or loses benefits previously granted is entitled to an oral hearing before an impartial decision-maker, the right to confront and cross-examine witnesses, and the right to a written opinion setting out the evidence relied upon and the legal basis for the decision.[48]

In *Goldberg*, the U.S. Supreme Court held that welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. According to the Court, the interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. The *Goldberg* majority considered welfare benefits (including medical benefits) a form of "new property," which, once granted, cannot be taken away without due process. Accordingly, the *Goldberg* decision created substantive due process rights in the entitlement state as well as a vindication of procedural due process rights.

In conformity to and in the spirit of *Goldberg*, Medicaid applicants and recipients are entitled to due process proceedings, called fair hearings, to dispute any denial of entitlement or changes. Also, since the Medicaid system serves the needs of many with impaired or diminished cognitive capacities, including those who suffer from dementia, the EUO cannot be utilized as an effective investigatory tool to police against provider abuse in those cases. Medicaid recipients are entitled to a pre hearing conference with officials[49] as well as due-process fair hearings.[50]

Regulations would have to be promulgated to address due process concerns and to prevent abuse of the EUO process by overzealous officials. Nevertheless, obtaining sworn testimony from individuals who are competent to testify would be an important investigatory tool with respect to verifying claims and policing against fraud.

Conclusion

With the passage and the U.S. Supreme Court's upholding of the Affordable Care Act of 2010, the problem of Medicaid Provider Fraud, at both the provider and patient level, now has even greater significance. Medicaid is an essential program which provides significant funds for patients who require money that far too often only a form of social insurance can provide, such as nursing home care. The potential migration of a large portion of our health care market to govern-

ment programs increases the need for proper management of these programs.

The extent that the OMIG borrows techniques from the private insurance industry to police its own providers and patients is laudable, but needs to be expanded. Government-based systems have a tendency to emphasize due process style mechanisms and presumptions that favor payment. Recipients are afforded a right to a fair hearing whenever an aspect of their benefit is challenged. The fair hearing process would have to be adopted to handle claimant-level disputes involving medical necessity, and social service departments would have to become more sophisticated with respect to utilizing examinations under oath, peer review, and patient examinations before underwriting more costly payments. It is optimistic to believe that MCOs will cooperate to the level demanded by the Affordable Care Act and it is naïve to believe that organizations such as providers and even MCOs could not be corrupted, as some have been in the No Fault arena.

Indeed, it is even probable that with the aggressive nature of anti-No Fault fraud efforts organized crime will migrate to some form of Medicaid benefit fraud, as the resources of both the managed care and law enforcement approaches will be challenged by the sheer volume of cases generated when new governmental insureds enter the system. It is conceivable that a criminal enterprise would be more than willing to underwrite the risks of operating in a volume-based environment that is administered by a bureaucratic mechanism, one with considerable due process controls for patient services.

On the other hand, a greater marshaling of tools utilized by private insurers, such as examinations under oath, peer reviews, and deposition practice related to Qui Tam actions, could offer the government a more flexible means to police against fraud, and relieve what may be overburdened local departments of social service and law enforcement agencies, particularly since insurance fraud tends to be a non-violent crime and scarce police and prosecutorial resources are needed to deal with those more immediate threats to public safety.

Endnotes

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49. 18 N.Y.C.R.R. § 360-2.8.

50. 18 N.Y.C.R.R. §§ 360-2.9, 360-10.8, 511.2, 511.7, 511.9.

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Tupper v. City of Syracuse and New York's Zoning Uniformity Requirement

By Adam L. Wekstein and Noelle C. Wolfson*

A "uniformity" requirement is virtually universal in zoning enabling legislation and is intended to "assure property holders that all owners in the same district will be treated alike and that there will be no improper discrimination[,]" thus reducing the likelihood of overreaching by approval authorities because "the legislative body pre-approves the uses permitted in a district without reference to particular owners."[1] The requirement is considered fundamental to "Euclidian" zoning by which a community is divided into basic use categories such as residential, commercial and industrial.[2] Yet, although the requirement dates to the early days of zoning and is included in New York's zoning enabling legislation in Town Law §262, Village Law §7-702 and General City Law §20(24), relatively little case law delineates its contours.[3] None of the cases discussed its application to a regulatory distinction between owner-occupied and non-owner-occupied (rental) housing until 2012 when the Appellate Division, Fourth Department, handed down a decision in *Tupper v. City of Syracuse*.[4] *Tupper* addresses precisely this question and discusses the applicability and requirements of General City Law §20(24). This article provides an overview of the uniformity provisions of New York's zoning enabling legislation, describes the uniformity holding in *Tupper* and the case law which preceded it, and concludes with a brief discussion of open issues regarding uniformity.

The Uniformity Requirement

Although the zoning enabling provisions of the Town, Village and General City Laws all incorporate a uniformity requirement, ironically, such provisions are not themselves uniform among the three species of municipality in New York State. The uniformity provision of the Town Law provides as follows:

> For any or all of said purposes the town board may divide that part of the town which is outside the limits of any incorporated village or city into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings, throughout such district but the regulations in one district may differ from those in other districts.[5]

The Village Law's uniformity statute is substantially similar.[6]

However, the General City Law deviates to a limited extent from the parallel provisions of the Town and Village Laws. It provides that every city in the State is empowered:

> *To regulate and limit the height, bulk and location of buildings hereafter erected, to regulate and determine the area of yards, courts and other open spaces, and to regulate the density of population in any given area, and for said purposes to divide the city into districts.* Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire, flood and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air, convenience of access, and the accommodation of solar energy systems and equipment and access to sunlight necessary therefor, and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.[7]

The differences among these statutes have never been the subject of a judicial opinion (indeed, in *Augenblick v. Town of Cortlandt*, Justice Lazer merely calls these provisions "similar"[8]). For the purposes of this article the authors assume that each provision would be interpreted the same way so that cases applying, for example, the uniformity provision of the Town Law would be applicable to both the Village and General City Laws.[9]

The pre-*Tupper* case law provided practitioners with some guidance about the applicability of the uniformity requirement, often in the form of cases demonstrating the types of ordinances that violate the mandate. For example, courts have held that the following types of zoning regulations run afoul of the uniformity requirement: (1) a regulation which allowed asphalt manufacturing as a permitted use on a single property in a Town;[10] (2) a provision prohibiting the sale of food and beverages within a one-thousand-foot perimeter surrounding an existing industrial park;[11] (3) regulations which permitted two-family homes in one portion of a residential zoning district but not others;[12] (4) a provision that proscribed quarrying in certain portions of a town's business and industrial zone, but not others;[13] and (5) regulations that made existing trailer parks a permitted use (not a nonconforming one), but prohibited new trailer parks from being established in the same district.[14]

*Tupper v. City of Syr*acuse

In *Tupper*, the Fourth Department reversed a decision of the Supreme Court, Onondaga County, which upheld the City of Syracuse's adoption General Ordinances 20 and 21 of 2010. General Ordinance 20, among other things, added a definition of "workable parking space" to the City's Zoning Ordinance and limited the maximum area of a parcel that could be devoted to workable parking spaces on properties improved with one- and two-family residences throughout the City. General Ordinance 21, among other things, required that the owners of non-owner-occupied one- and two-family homes in the City's University Special Neighborhood District (the "SND") provide one workable parking space per "potential bedroom" in such homes.[15] In contrast, owners of owner-occupied one- and two-family homes in the SND were only required to provide one workable parking space per dwelling unit. In combination, the General Ordinances could have effectively foreclosed many properties in the SND from being rented to non-owner occupants because the required number of parking spaces could not be provided within the available area.[16] Plaintiffs who were, among others, owners of non-owner-occupied one- and two-family homes in the City and the SND, and an association of such owners commenced an action to invalidate the General Ordinances.

Although Plaintiffs sought to annul and declare invalid the General Ordinances on several grounds, perhaps the most notable was the claim that General Ordinance 21 violated the uniformity requirement of General City Law §20(24).[17] The specific questions for the Court were: (1) is an off-street parking requirement included in a zoning ordinance one that must be uniform for each class of building within a district even though off-street parking is not a specifically-enumerated parameter in General City Law §20(24);[18] and, if so, (2) does General Ordinance 21 violate the uniformity requirement of General City Law §20(24) by requiring one "workable parking space" per "potential bedroom" for non-owner-occupied one- and two-family homes in the SND, where the City's Zoning Ordinance only requires owners of owner-occupied one- and two-family homes in that district to provide one "workable parking space" per dwelling unit, regardless of the number of "potential bedrooms" in such homes?[19]

Answering the first question in the affirmative, the *Tupper* Court held that:

> Contrary to defendants' contention, the statute and charter section apply to General Ordinance 21 inasmuch as that ordinance regulates open spaces. The creation of off-street parking regulations is included in the authority to regulate the use of land and open spaces (citation omitted).[20]

With respect to the second question, the City argued that one-and two-family homes become different classes of buildings depending upon whether they are owner-occupied or non-owner-occupied.[21] Rejecting this argument, the Fourth Department held that:

> "[t]he uniformity requirement is intended to assure property holders that all *owners* in the same district will be treated alike and that there will be no improper discrimination" [citation omitted]. Uniformity provisions protect against legislative overreaching by requiring regulations to be passed without reference to the particular owners (*see id.*). General Ordinance 21 treats buildings within the same class differently based solely on the status of the property owner, i.e., absentee property owners as opposed to owners who occupy the property. Even though such a distinction may be constitutionally valid, it is invalid under the uniformity requirements of the General City Law and the City of Syracuse Charter.[22]

Tupper is significant because it confirms what the authors believe to be a previously implicit principle that

off-street parking regulations must be uniform within a district. More importantly, it expressly recognizes that the limitation on a municipality's zoning authority imposed by the statutory uniformity requirement goes beyond that effected by the constitution and, conversely, that landowners are provided with an extra degree of protection by the requirement for uniform zoning regulations. Notably, case law predating *Tupper* has held that regulations distinguishing between owner-occupied and non-owner-occupied housing can withstand constitutional (equal protection or due process) scrutiny.[23]

Issues Remaining After *Tupper*

Although *Tupper* is a valuable addition to the body of uniformity case law in New York, it certainly does not answer all of the open questions with respect thereto. Several issues involving the construction and operation of the uniformity requirement remain.

For example, *Tupper* does not explain the meaning of the term "class of building" or "kind of building" for which zoning regulations must be uniform; nor does the State enabling legislation or other case law. Under the legislation challenged in *Tupper*, the identical building being occupied by the identical family in the same location would face different regulations based on whether the family residing therein owned or rented it. It would be hard to argue that such a home would constitute a different "class" or "kind" of building under such circumstances and, in fact, the *Tupper* court gave short shrift to the contention that owner-occupied and non-owner occupied were two different classes of building.[24] Whether the meaning of the term will be defined or become significant in future litigation remains to be seen.

A highly significant open question is whether municipalities can dispense with the uniformity requirement altogether by adopting local legislation pursuant to Municipal Home Rule Law §10 to supersede the applicable state statue. The first court to address the question—the Supreme Court, Rockland County—held that the zoning enabling legislation in the Town Law, particularly Town Law §262, may not be superseded pursuant to the Municipal Home Rule Law.[25] Subsequent cases from the Appellate Division and the Court of Appeals make it clear that the zoning enabling legislation in the Town, Village and General City Laws are not entirely immune to supersession.[26] However, "a [municipal government] cannot supersede a state law where a local law is otherwise preempted by State law[.]"[27] In turn, where by its nature a legislative scheme indicates that there is a need for statewide uniformity on a particular topic, it may preempt the entire field and prevent any attempt under the Municipal Home Rule Law to override the state provision.[28] It is at least arguable that representing, as it does, a fundamental aspect of the entire zoning scheme, the uniformity requirement is just the type of state statutory provision that cannot be superseded. Ultimate resolution of the question of whether the requirement for zoning uniformity in the Town, Village and General City Law can be superseded will need to await another day.[29]

Additionally, to the extent that New York's zoning enabling legislation fails to contain uniform uniformity requirements—it differs among Cities, Towns and Villages—it will be interesting to see if or when a court is called upon to interpret the distinctions in the text of such statutes. The applicability of the uniformity requirement pertaining to use regulations in Cities will be of particular note because the Town and Village Laws expressly provide that use regulations must be uniform, but the General City Law does not contain the same language. It is hard to believe that this distinction could have been meant to create a functional difference.

Finally, as noted above, although courts have recognized that the uniformity requirement has its genesis in constitutional law,[30] the *Tupper* Court holds that constitutional and uniformity scrutiny of a law may not result in the same outcome, with uniformity, at times, presenting a more significant hurdle to zoning regulation. Thus, future courts will be left to explore and decide the exact parameters of the interplay between constitutional requirements (particularly due process and equal protection) and statutory mandates for uniformity.

Conclusion

Tupper is a good reminder of the important limitation on the municipal zoning power embodied in the uniformity requirement. Although this requirement is seldom the basis for a challenge to zoning legislation, it is still alive and well and practitioners, particularly those representing municipal governments, should keep its implications in mind when reviewing zoning legislation and advising their clients about the limitations applicable to such laws.

Endnotes

1. *Augenblick v. Town of Cortlandt*, 104 A.D.2d 806, 814, 480 N.Y.S.2d 232, 239 (2d Dep't 1984) (Lazer, J., dissenting), *rev'd on dissenting opinion of Lazer, J.*, 66 N.Y.2d 775, 497 N.Y.S.2d 363 (1985).
2. *Id.* at 813 (Lazer, J., dissenting) (referring to *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the United States Supreme Court case which upheld the constitutionality of modern zoning regulations).
3. *See* P. Salkin, *New York Zoning Law and Practice*, §4:19, p. 4-36 (4th ed. 2012).
4. *Tupper v. City of Syracuse*, 93 A.D.3d 1277, 941 N.Y.S.2d 383 (4th Dep't 2012), *lv. denied*, 96 A.D.3d 1514, 945 N.Y.S.2d 587 (2012).
5. Town Law §262.
6. Section 7-702 of the Village Law reads as follows:

   > For any or all of said purposes the board of trustees may divide the village into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for

each class or kind of buildings throughout each district but the regulations in one district may differ from those in other districts.

7. General City Law §20(24) (emphasis added).
8. *Augenblick*, 104 A.D.2d at 813, 480 N.Y.S.2d at 238-39 (Lazer, J., dissenting).
9. The practitioner may or may not want to make the same assumption and should review the distinctions in the language in the context of the facts of his or her case and the position being advanced.
10. *Augenblick*, 104 A.D.2d 806.
11. *Carleton Tennis Assocs., Inc. v. Town of Clay*, 131 Misc. 2d 522, 500 N.Y.S.2d 908 (Sup. Ct. Onondaga Co. 1985). The Court rejected the Town's argument that the 1,000 foot strip surrounding the existing industrial park was its own zoning district since, among other things, it was not listed in the zoning districts section of the Town's Code or shown on the Town's zoning map.
12. *Klebetz v. Town of Ramapo*, 109 Misc. 2d 952, 441 N.Y.S.2d 216 (Sup. Ct. Rockland Co. 1981).
13. *Callanan Road Imp. Co. v. Town of Newburgh*, 6 Misc. 2d 1071, 167 N.Y.S.2d 780 (Sup. Ct. Ulster Co 1957), *aff'd*, 5 A.D.2d 1003, 173 N.Y.S.2d 780 (2d Dep't 1958).
14. *Jackson & Perkins Co. v. Martin*, 12 N.Y.2d 1082, 240 N.Y.S.2d 29 (1963), *adopting the dissenting opinion below*, 16 A.D.2d 1, 225 N.Y.S.2d 112 (4th Dep't 1962).
15. *Tupper*, 93 A.D.3d at 1277-1278, 941 N.Y.S.2d at 385.
16. Although existing non-owner-occupied dwellings were exempt from these new parking requirements, the owners of those properties were required to bring them into compliance with the new parking requirements if they made any "material change" to such properties. *Tupper*, 93 A.D.3d at 1277-1278, 941 N.Y.S.2d at 385.
17. General Ordinances 20 and 21 were also challenged on the grounds that they were adopted in violation of the New York State Environmental Quality Review Act ("SEQRA"; collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617), violated Plaintiffs' due process rights under the State and Federal Constitutions, and were unlawfully adopted on the night that they were introduced to the City's Common Council without the unanimous consent of the councilors in contravention of Second Class Cities Law §35 and a corresponding provision of the Syracuse Charter. Although Plaintiffs' SEQRA and due process claims were dismissed, the Fourth Department annulled both General Ordinances, holding that they were improperly adopted without unanimous consent on the night they were introduced. As discussed more fully in the body of this article, General Ordinance 21 was also invalidated as being in violation of the uniformity provision of General City Law §20(24) and a corresponding provision of the Syracuse Charter. *Tupper*, 93 A.D.3d at 1277-1281, 941 N.Y.S.2d at 388.
18. General Ordinance 21 was also challenged under a provision of the Syracuse Charter, which paralleled the operative language of General City Law §20(24). Because the Syracuse Charter provision has no applicablity beyond the City's geographical limits, this article focuses on General City Law §20(24).
19. *Tupper*, 93 A.D.3d at 1280-1281, 941 N.Y.S.2d at 385.
20. *Id.*, 941 N.Y.S.2d at 387-88.
21. *Id.* at 1287, 941 N.Y.S.2d at 381.
22. *Id.* at 1280-1281, 941 N.Y.S.2d at 387-88 (emphasis in original).
23. *See, e.g., Kasper v. Town of Brookhaven*, 142 A.D.2d 213, 535 N.Y.S.2d 621 (2d Dep't 1988) (holding that a town may constitutionally enact a local law which permits owners of owner-occupied single-family residences to establish accessory apartments in their residences, but does not extend a similar benefit to owners of non-owner-occupied dwellings).
24. *Tupper*, 93 A.D.2d at 1281, 941 N.Y.S.2d at 387.
25. *Klebetz*, 109 Misc. 2d at 955-958, 441 N.Y.S.2d at 218-20.
26. *Sherman v. Frazier*, 84 A.D.2d 401, 408, 446 N.Y.S.2d 372 (2d Dep't 1982)("we have no doubt that the supersession power includes the power to amend or supersede the zoning provisions of the Town Law"); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144 (1989) (holding that a Town could supersede Town Law §274-a provided that it follows the requisite statutory procedure); *c.f. Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 399, 764 N.Y.S.2d 64, 67 (2003).
27. *Cohen*, 100 N.Y.2d at 400, 764 N.Y.S.2d at 67 (quoting *Kamhi*, 74 N.Y.2d 423).
28. *Id.*, 764 N.Y.S.2d at 67.
29. Although an extensive discussion of the preemption doctrine is beyond the scope of this article, the interested reader may wish to consult *Cohen, supra*, and the relatively recent Second Department case, *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126, 933 N.Y.S.2d 388 (2d Dep't 2011), for their analysis of the topic.
30. *See, e.g., Augenblick*, 104 A.D.2d at 814, 480 N.Y.S.2d at 239.

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New Police Disciplinary Procedures for Cities, Towns and Villages?

By Harvey Randall

To paraphrase Sir Walter Scott, Oh, what tangled webs confront we lawyers.[1]

For more than a decade collective bargaining agreements (CBA) between the Town of Wallkill (the Town) and the Town of Wallkill Police Officers' Benevolent Association, Inc. (PBA), contained "contract disciplinary procedures" negotiated pursuant to the Taylor Law [Civil Service Law Article 14] under color of §76(4) of the Civil Service Law in place. The CBA procedures provided that police officers subjected to disciplinary action by the Town had the right to a hearing before a neutral arbitrator. In 2007 the Town adopted Local Law No. 2, which Law set out a disciplinary procedure for police officers that substantially differed from that set out in the CBA.

Essentially the new disciplinary procedure did not provide for the submission of the matter for adjudication to an arbitrator but, instead, provided that a disciplinary hearing would be conducted by "a Town Board member or a designee of the Town Board." The Board member or the designee was to issue a decision "with recommended findings of fact and a suggested disciplinary penalty." The Town Board would then review the hearing officer's findings and recommendation and render a final determination regarding the allegations set out in the charges and specifications served on the individual. In the event the police officer was found guilty of one or more of the disciplinary charges and specifications filed against him or her, the Town Board was to impose a penalty "consistent with the provisions of the New York State Town Law."[2] Any appeal from such a determination was subject to review pursuant to a CPLR Article 78[3] proceeding in Supreme Court.

Following its adoption of Local Law No. 2 the Town initiated disciplinary action against two police officers. The PBA, on behalf of the police officers, demanded that the disciplinary actions be submitted to arbitration as provided by the CBA whereupon the Town filed an Article 75 application seeking a permanent stay of arbitration. The Town's petition was denied by the Supreme Court, which granted the PBA's cross-petition to compel arbitration. The Town appealed.

The Appellate Division subsequently vacated the Supreme Court's ruling and ultimately the Court of Appeals considered the matter.[4]

Significantly, in *Wallkill* the Court of Appeals held that a demand to negotiate disciplinary procedures applicable to police officers employed by the Town constitutes a **prohibited** subject of collective bargaining[5] for the purposes of the Taylor Law.

As the Court stated in *Lynbrook v. PERB*, a **prohibited** demand is one dealing with a subject or subjects declared by statute, or as a matter of "public policy," as barred from being incorporated in a collective bargaining agreement.[6]

In *Wallkill*, the Court of Appeals, citing *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd.*, then explained that its ruling in "…*Matter of Patrolmen's Benevolent Assn.* is dispositive" in this regard. In *Patrolmen's*, said the Court, it confronted the "'tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law' and 'the policy favoring strong disciplinary authority for those in charge of police forces.'"[7]

In the words of the Court, "…police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials."[8]

The basis for the court's so ruling: Civil Service Law §§ 75 and 76 generally govern the procedures for disciplining public employees in the Classified Service.[9] Civil Service Law Section 76(4), in pertinent part, provides "Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter." Section 76(4) has been relied upon in negotiating alternatives to the disciplinary procedures set out in §75 by political subdivisions of the State and unions representing employees in collective bargaining units employed by the jurisdiction. Section 76(4), however, further provides that "[n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local preexisting laws."[10]

In this instance the Court of Appeals concluded that "the Town properly exercised its authority to adopt Local Law No. 2 pursuant to Town Law §155."[11] Accordingly, the Court held that "police discipline re-

sides with the Town Board and is a prohibited subject of collective bargaining between the Town and the Wallkill PBA."[12]

There are other State statutes vesting in public employers powers similar to those set out in §155 of the Town Law. For example, §137 of the Second Class Cities Law sets out procedures for taking disciplinary action against a police officer or firefighter employed by the jurisdiction while §8-804 of the Village Law addresses initiating disciplinary actions against members of a village police force.[13]

Does *Wallkill* require new police disciplinary procedures to be created by those cities, towns and villages that currently have a disciplinary procedure negotiated pursuant to the Taylor Law applicable to its law enforcement personnel in place?

Presumably procedures established by a CBA are a nullity insofar as initiating any new disciplinary action against a police officer is concerned as the courts would be expected to hold that the Court of Appeal's rationale in the *Wallkill* decision obtains in jurisdictions subject to the Second Class Cities Law and the Village Law insofar as Taylor Law negotiated disciplinary procedures involving police officers are at issue.

Accordingly, *Wallkill* may result in some political subdivisions of the State dusting-off "pre-Taylor Law" disciplinary procedure applicable to sworn officers. Others may consider recasting some provisions set out in an existing "contract disciplinary article" and adopting a "new disciplinary procedure for police officers." Indeed, some may elect to follow the disciplinary procedures set out in "Civil Service Law §§75 and 76 generally."

In any event, this may result in additional litigation. For example, the City of Schenectady, relying on *Wallkill*, announced that final disciplinary hearing determinations involving members of the City's police force would be made by its Public Safety Commissioner rather than being submitted to arbitration as otherwise provided by the relevant CBA negotiated pursuant to the Taylor Law.

A Schenectady *Gazette* news item published Saturday, November 3, 2012 reported that a union representing City of Schenectady's police officers is expected to challenge the City's decision and ask the Public Employment Relations Board (PERB) to determine which controls with respect to disciplinary actions involving Schenectady police officers: the *Wallkill* decision or the CBA.

The union, relying on certain provisions in a plan adopted by the City pursuant to the Optional City Government Law,[14] enacted by Chapter 444 of the Laws of 1914, contends that this plan, reported to have been adopted by Schenectady as an "optional city plan" on November 6, 1934,[15] controls.

The Attorney General has observed that, although the Optional City Government Law was repealed by Chapter 765 of the Laws of 1939, "any plan adopted by a city under the Optional City Government Law remains in effect until it is repealed or succeeded by local law."[16]

Assuming, but not conceding, that PERB has jurisdiction to consider the merits of the Union's complaint, this action by the Schenectady police officer's union would open a number of issues.

First, PERB typically applies its "deferral policy" in cases alleging "improper practices" where an agreed-upon binding arbitration procedure set out in a CBA between the parties to resolve a "claimed improper practice" exists before it considers the allegation.

PERB's deferral policy was recently challenged by Westchester County.[17] The County contended that PERB's "deferral policy" constituted "an abandonment of the exclusive, nondelegable jurisdiction over improper practice charges granted to PERB by Civil Service Law §205(5)(d)."

The union had filed an improper practice charge with PERB alleging that the County had refused to negotiate an issue concerning the "maintenance of standards" clause in the relevant CBA in violation of Civil Service Law §209-a(1)(d).

When PERB applied its deferral policy and conditionally dismissed the charge pending the outcome of binding arbitration conducted pursuant to the negotiated contract grievance procedure set out in the CBA over Westchester's objections, Westchester filed a petition in Supreme Court appealing its decision.

Supreme Court dismissed the County's petition, agreeing with PERB that the charge raised an issue covered by the CBA and thus provided a reasonable basis for PERB to apply its policy of deferring the matter to binding arbitration. The Appellate Division agreed,[18] noting that PERB had earlier ruled on this issue, which decision was affirmed in *Matter of Westchester County Police Officer's Benevolent Assn. v. Public Empl. Relations Bd.* This, said the Appellate Division, gave the union "a reasonably arguable right to submit the conduct alleged in the improper practice charge to binding arbitration."[19]

The Appellate Division, in sustaining the lower court's ruling and dismissing the County's appeal, explained:

1. The application of the policy resulted in a conditional dismissal, meaning that the improper practice charge remains subject to being re-

opened before PERB after the conclusion of the arbitration process; and

2. The courts have generally deferred to PERB's interpretation of its jurisdiction under Civil Service Law §205(5)(d), citing *Matter of Roma v. Ruffo*, 92 N.Y.2d 489 (1998).

However, in the City of Schenectady's situation PERB's application of its "deferral policy" would, in effect, require an arbitrator to rule on "a matter of law"—an area typically reserved to the courts—rather than merely interpret a provision set out in a CBA.

On the other hand, should PERB assume primary jurisdiction, it would, in effect, be required to interpret statutes in making its determination, again an area typically reserved to the courts.

Another issue that may result in litigation: what is the status of any pending disciplinary action taken pursuant to a Taylor Law agreement in light of the Court of Appeals' ruling in *Wallkill*?[20]

The next several months, or perhaps years, is certain to see some interesting permutations and combinations of these issues being considered by the courts.

Endnotes

1. *Marmion***,** Canto VI. Stanza 17.
2. Town Law §155 provides that:

> With respect to the penalties authorized to be imposed, it, in pertinent part, provides as follows: Any member of such department found guilty upon charges…may be punished…by reprimand, by forfeiture and withholding of salary or compensation for a specified time not exceeding twenty days, by extra tours or hours of duty during a specified period not exceeding twenty days, by suspension from duty for a specified time not exceeding twenty days and the withholding of salary or compensation during such suspension, or by dismissal from the department. Such board shall have the power to suspend, without pay, pending the trial of charges, any member of such police department. If any member of such police department so suspended shall not be convicted of the charges so preferred, he [or she] shall be entitled to full pay from the date of suspension.

3. Town Law §155 sets out a 30-day statute of limitations for filing such a petition.
4. *Town of Wallkill v. Civil Serv. Empls. Assn.*, 19 N.Y.3d 1066, 955 N.Y.S.2d 821 (2012), *aff'g* 84 A.D.3d 968 (2d Dep't 2011).
5. For the purposes of collective bargaining under the Taylor Law, contract demands may be classified into one of three types: mandatory, permissive or prohibited. A mandatory subject of collective bargaining concerns a matter that employers and employee organizations have an obligation to negotiate in good faith. A permissive subject of collective bargaining under the Taylor Law consists of a demand which both party may agree or elect to negotiate but which otherwise is neither a prohibited nor a mandatory subject of collective bargaining.
6. 48 N.Y.2d 398, 423 N.Y.S.2d 466 (1979).
7. 19 N.Y.3d 1069, 955 N.Y.S.2d at 822 (quoting 6 N.Y.3d 563, 571, 815 N.Y.S.2d 1, 3 (2006)) (citation omitted).
8. *Id.* at 1069 (quoting 6 N.Y.3d at 570) (citation omitted).
9. A statutory disciplinary procedure applicable to educators and administrators in the Unclassified Service is set out in Education Law §3020-a, which provides for arbitration as a matter of law.
10. Civil Service Law §76(4) continues the provision set out in §22.3 of the Civil Service Law of 1909, as amended, to this end.
11. *Wallkill*, 19 N.Y.3d at 1069. In the words of the Court of Appeals, Town Law §155 is "a general law enacted prior to Civil Service Law §§75 and 76, commits to the Town the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department." *Id.* (internal quotation marks omitted).
12. *Id.* Significantly, the Court ruled that negotiating such disciplinary procedures is a "prohibited subject of collective bargaining" with respect to a town and an employee organization representing the police officers of the town, rather than holding that such negotiation is a "non-mandatory" subject of collective bargaining within the meaning of the Taylor Law [Civil Service Law Article 14].
13. *See also* McKinney's Unconsolidated Law §1041 which addressed the removal of police officers in the competitive class and Chapter 360 of the laws of 1911 addressing certain terms and conditions of employment affecting police officers.
14. Section 1.4 of "Handbook for City Officials," published by the New York Conference of Mayors and Municipal Officials (Revised 2011), provides some background to the Law while various provisions of the Optional City Government Law are discussed by the court in *Cleveland v. City of Watertown*, 99 Misc. 66, *aff'd*, 179 A.D. 954, *rev'd*, 222 N.Y. 159 (1917) (holding statute constitutional).
15. In *Johnson v. Etkin*, 279 N.Y. 1, the Court of Appeals ruled that the Optional City Government Law was a special rather than a general law for home rule purposes. Accordingly, it applies only to those cities electing to come under it.
16. Informal Opinions of the Attorney General 98-5.
17. *Westchester County Dep't of Pub. Safety Police Benevolent Assn., Inc. v. New York State Pub. Empl. Relations Bd.*, 99 A.D.3d 1155, 953 N.Y.S.2d 709 (2012).
18. *Id.*
19. 301 A.D.2d 850, 753 N.Y.S.2d 395 (Mem.) (2003).
20. Presumably any pre-*Wallkill* disciplinary determinations would stand.

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To Mitigate or Not to Mitigate: The New York Residential Landlord's Dilemma

By Allen Shayanfekr

Introduction

To be or not to be, that is the question; history has proven that sometimes the simplest dilemmas are the most controversial. To mitigate or not to mitigate; who should the law side with? Is a residential landlord, whether municipal or private, under an obligation to mitigate damages when faced with a breaching tenant who has abandoned the premises earlier than the end of the prescribed lease term? The question is rooted in the values of modern public policy and our characterization of the lease as a contract or property interest.[1] Typically, a landlord has three options when confronted with tenant abandonment: First, the landlord may terminate the lease and release the tenant from further liability by reentering and reletting the premises for the landlord's account; second, the landlord may keep the tenant liable for deficiencies in rent by giving notice to the tenant that the landlord will reenter and relet the property for the tenant's account; or third, the landlord may choose to do nothing except sue the tenant for individual rent payments as they become due or when the whole rent under the lease comes due.[2]

While the landlord has quite a few options regarding how to proceed post abandonment (especially when we take into account sufficiency of efforts and avenues of recourse), the amount of recovery will largely depend on which option the landlord chooses and whether the relevant courts recognize a duty to mitigate damages. Furthermore, if the courts recognize a duty to mitigate, the landlord must then be concerned with the sufficiency and reasonableness of his efforts.[3] The landlord's first option does not usually pose a problem for the courts because it is undisputed that the tenant was released from liability. However, the second and third approaches raise a question.[4] Should a non-breaching party, specifically the landlord, be regulated by the contract principle of "avoidable consequences?" This doctrine imposes a duty to mitigate that is contrary to the common law and effectively transforms the landlord-tenant relationship into one based on contract rather than property interest.[5]

The once widely accepted common law approach imposed no duty of mitigation on the landlord, but modern trends have led courts in various jurisdictions to question the rationale behind this approach and in many cases those courts have adopted a reasonable duty to mitigate.[6] In fact, only five states currently impose a no-mitigation rule.[7] Whether this modern trend is the more sensible path is debatable.

While the common law may now be the minority view, a number of prominent jurisdictions still follow it and some jurisdictions have yet to formally accept either approach.[8] For example, New York arguably distinguishes between imposing a duty to mitigate on commercial and residential leases.[9] In *Holy Properties, Ltd v. Kenneth Cole Productions, Inc.*, the New York Court of Appeals held that there was no duty to mitigate in the commercial setting, but it was silent on residential leases.[10] Then in 2008, the Appellate Division Second Department decided *Rios v. Carrillo* which held that residential landlords have no duty to mitigate either.[11] Although that decision is now precedent for the Second Department, the First, Third, and Fourth Departments have yet to decide this issue and thus may choose to follow the modern trend.

Proponents of the residential duty to mitigate attempt to debunk the rationale of the common law rule,[12] but many of their arguments are similarly applicable to the modern rule which they advocate. This article discusses each approach, their underlying arguments, and the sufficiency of landlord efforts in attempting to mitigate damages either voluntarily or pursuant to law in order to emphasize why the no mitigation rule is more appropriate and therefore should be applied across all of New York. Section I discusses the common law approach; section II discusses the modern approach and the mechanics of mitigation; section III explores the arguments favoring and disfavoring each approach; section IV analyzes New York statistical data and case law; and section V concludes.

I. Common Law Approach Generally and Exceptions

Following a tenant's abandonment, the common law prescribes a blanket rule which imposes no obligation on a landlord to relet the premises.[13] Instead, the landlord can leave the premises vacant for the duration of the lease term and only take action once the rent under the lease accrues.[14] In effect, this allows the landlord to recover the rent due by enforcing the original agreement between the parties. In theory, a tenant's monetary obligation to pay rent is fixed according to the terms of the lease and a landlord is under no obligation to attempt to minimize damages when no such accountability was set forth in the terms.[15] In other

words, there is no obligation to relet the premises for the benefit of a tenant who has by his own wrongdoing violated the lease and abandoned the property. The premise of tenants relieving themselves of obligations by their own wrongdoing is an undesirable incentive,[16] thus the common law allows the lessees' obligations to continue without abatement.

While the duty to mitigate damages arising from the breach of another party is integral to contract law, some courts reason that this notion should be rejected in the lease setting because leaseholds should be governed by principles of real property law.[17] These courts contend that by conveying a leasehold estate, the landlord has fully performed and thus a lease is a pro tempore transfer of an interest in real property.[18] Furthermore, the tenant is the effective owner of the leased premises for the duration of the lease term and the right to possess the land leads to an absolute liability for the rent.[19] Therefore, upon tenant abandonment of the premises prior to lease-term expiration, "a landlord is within its rights 'to do nothing and collect the full rent due under the lease.'"[20] Moreover, the Restatement (Second) of Property takes the position that there is no duty to mitigate.[21]

However, this right to do nothing and collect the rent due is dependent on the action the landlord chooses to take upon abandonment. If the landlord stood idly by, then he could collect under the common law approach; but the alternate options mentioned earlier raise difficulties in interpreting the intent of the landlord.[22] Upon reentry, the landlord may be attempting to relet the premises for the benefit of the tenant in which case the collected rent would first be used to pay the landlord's costs associated with reletting the premises and second to pay the tenant's obligation.[23] On the other hand, reentry may also be indicative of the landlord's intent to assume full possession of the property. This action by the landlord may be deemed an acceptance of the tenant's surrender and thereby terminate any further obligations of the tenant to pay rent.[24]

Jurisdictions that follow the common law recognize that a landlord may effectively volunteer to mitigate damages either by including a duty to mitigate in the terms of the lease or by providing notice to the tenant.[25] In these instances where the duty is assumed voluntarily, a landlord is still under an obligation to act reasonably in performing as he would have been in a mitigation jurisdiction.[26] The landlord may then collect the difference between rents in the original lease and second lease provided reasonable efforts were made.[27]

II. Modern Damage Mitigation View and Mechanics

A. Modern View

Since the 1960s, a growing number of courts outside of New York opted to reject the longstanding no mitigation rule.[28] Moreover, some states have enacted statutory regulations which require a landlord to mitigate damages upon a tenant's premature abandonment.[29] This modern view initially gained recognition in the residential lease context and support has mounted exponentially. While Alabama, Georgia, Minnesota and Mississippi recognize the common law approach in the residential context,[30] the New York Court of Appeals has yet to rule on this issue.

In other states such as Vermont, the courts have "discarded the 'antiquated concepts' that defined the landlord-tenant relationship solely in terms of property law" in recognition of the fact that a lease is essentially a contract.[31] The Vermont Supreme Court reasoned that the landlord should be deterred from "passively suffering preventable economic loss" and that the landlord should make productive use of the property.[32] However, the issue is multi-faceted because once a court recognizes a duty to mitigate, the sufficiency of landlord efforts comes into question.

B. Mechanics of the Duty to Mitigate

Once a duty to mitigate damages arises, the landlord must take precautionary steps to avoid losing a claim for damages.[33] Courts employ a reasonable efforts test as the standard of mitigation.[34] This approach is an objective standard which asks what a reasonable person would have done under the circumstances.[35] Therefore, it is not sufficient for a landlord to prove his efforts by solely demonstrating "passive reception to opportunities."[36] Instead, the landlord must take affirmative steps "reasonably calculated" to relet the property.[37] This standard of mitigation applies to states which have adopted a mitigation rule and those individual landlords who have voluntarily adopted a duty to mitigate in non-mitigation states.[38]

Unfortunately, there is no direct formula governing what steps need to be taken in order to protect a landlord's claim. The court's determination of sufficiency will depend on a multitude of factors such as: the use of a real estate agent; the diligence with which the landlord acted; advertising the premises; the landlord's failure to accept a potential replacement whether acquired through his own means or brought by the tenant; reletting to a new tenant at a higher or lower rent; and the maintenance of the premises post abandonment.[39] The reasonable efforts analysis is a very fact-sensitive approach which depends on the circumstances of any given case.[40] For example, courts have been faced with questions of whether hiring a real estate agent is necessary or whether a landlord could attempt to relet the premises at a higher monthly rent.[41]

Ultimately, the reasonable efforts determination is left to the trier of fact and if the court finds that the landlord failed to use reasonable efforts, then the tenant may be relieved of any further obligation to make rental payments from the date of the landlord's knowledge of abandonment.[42] While no specific combination of actions can guarantee the landlord's success, a court will probably be hesitant to rule in favor of a landlord who has explored only a single avenue.[43] For instance, simply placing a "For Rent" sign in the window will be inadequate to find that the landlord used reasonable methods.[44] That is not to say that the use of a sign has no effect, but the landlord will have to employ a more resourceful course of action in attempting to minimize damages.[45]

Hiring a real estate agent to assist in the process of re-renting a property is not required but many jurisdictions suggest that it is an effective option because the agent can bring forward tenants that would have otherwise remained unknown.[46] Next, advertising in publications such as newspapers is a relatively simple and inexpensive manner in which to attempt mitigation.[47] Failure to advertise the premises does not amount to unreasonable behavior,[48] but advertising is an easy additional safeguard for the landlord to fall back on.

Next, seeking to relet premises at higher rent is not dispositive of the reasonableness of mitigation efforts, but it may raise questions of good faith.[49] Moreover, "such factors as the amount of increase, market rents of similarly situated properties, and the reasons given by the landlord for seeking increased rents must also be evaluated."[50] Likewise, a refusal to relet the premises at a lower rate is not determinative of reasonableness either because a landlord is not obligated to accept an offer that is lower than the market value of the property or substantially change the obligations that existed in the original lease.[51]

Although case law from various states suggests that advertising higher rent is not dispositive, the safest approach is for a landlord to be flexible and avoid advertising substantially increased rates.[52] If a landlord wishes to obtain a higher rental rate than what was previously received, then he should take additional measures by employing a multitude of efforts such as: advertising in local newspapers, hiring an agent, repairing and maintaining the premises, possibly obtaining short-term rentals, and being prepared to prove that market rates have increased.[53]

Irrespective of the methods employed, a landlord should never ignore possible renters.[54] In Nebraska, a court held that a landlord's inaction in responding to the inquiries of a potential tenant constituted unreasonable efforts.[55] Even if a landlord later secures a tenant at a higher rental rate, a court will probably hold that the landlord's actions in discouraging an earlier prospect will amount to unreasonable efforts.[56] Ultimately, if a landlord chooses to wait before acting on a prospective tenant, the likely result would be an unenforceable claim by the landlord for costs associated with the interim.[57]

Lastly, some courts agree that a landlord is within his rights to rent other vacant spaces prior to the abandoned space.[58] Although not all jurisdictions rule this way,[59] courts in Florida, Maine and Wisconsin specifically provide that a landlord was not per se unreasonable simply because he chose to rent a similar vacant space before reletting the abandoned one.[60] The reasoning rests on the fact that a landlord cannot reasonably be expected to relet a property that does not meet the necessities of a prospective tenant.[61]

III. Arguments for and Against the Duty to Mitigate in New York

New York historically took a case-sensitive approach to residential landlord-tenant abandonment and the duty to mitigate.[62] Prior to *Rios v. Carrillo*, the blanket no-mitigation rule was reserved solely for commercial properties,[63] but the *Rios* case extended that rule to residential leases in the Second Department in 2008 in an attempt to bring consistency to the field.[64] Before 2008, the decision to enforce a duty to mitigate depended on various factors such as: whether the apartment was moderately priced or luxurious; whether the property was in an urban or non-urban setting; whether the property was rent stabilized; whether either of the parties faced economic hardships; whether the parties acted in good faith; and even the relative sophistication of the parties.[65]

For instance, there was no expectation of landlord mitigation in cases involving "a high-rise apartment in the affluent Turtle Bay section of Manhattan's East Side,[66] an over-$9,000-per-month rental home in the waterfront community of Kings Point in Nassau County,[67] or a weekly rental of a vacation cottage in the Finger Lakes."[68] Conversely, a duty to mitigate was seen in an inexpensive Queens[69] apartment and rent-stabilized property in Brooklyn.[70] The multitude of factors that courts considered in deciding whether to impose a duty to mitigate left landlord at a loss because of the uncertainty surrounding this issue. Therefore, departure from this case-sensitive approach by the Second Department was probably an intelligent resolution. However, many are left wondering whether the First, Third, and Fourth Departments will follow suit.

First, some courts argue that the common law rule is outdated and perhaps reflects property policies that are no longer applicable or legitimate.[71] These proponents attack the traditional approach because they believe that the modern lease is more contractual in nature and therefore the antiquated policies of common law should not be applicable.[72] One scholar stated, "the modern lease is more like a continuing contractual obligation rather than the purchase of an estate, and

thus, contract remedies should apply."[73] Moreover, these proponents argue that a no-mitigation rule is inconsistent with other fields of law which prevent parties from recovering damages which were reasonably avoidable.[74]

However, an imposition of contract policies effectively treats the lease as a contract, thus ignoring the reality that a leasehold agreement is a pro tempore transfer of an interest in real property.[75] Moreover, if we accept the notion that a leasehold should be based in contract law, then the precedent set forth in *Holy Properties* is completely inconsistent with this premise.[76] These same proponents of the duty to mitigate argue that commercial leases are more like contracts than their residential counterparts because of the ongoing nature of the agreement.[77] For instance, the agreement establishes who is responsible for air, heat, electricity, taxes, and utilities while also providing the remedies available in event of a breach.[78] Therefore, these proponents argue that because the ongoing nature of the lease lends itself to a contractual exchange of promises, the breach should be governed by contract law.[79]

However, this argument contradicts the reasoning set forth in *Holy Properties* in which the Court of Appeals ruled in favor of a no mitigation rule in the commercial setting.[80] The above logic would require New York to impose a no mitigation rule on residential leases as well because to do otherwise would be inconsistent. If New York imposes no duty in commercial leases which are arguably more contractual in nature, then New York should also govern residential leases (the less contractual counterpart) with the same policy.

Next, advocates of a mitigation rule argue that the rule will discourage landlords from taking advantage of or exacerbating their avoidable injury.[81] In other words, these proponents argue that not imposing such a rule would provide incentives for the landlord to act egregiously. Arguably, given a no mitigation policy a landlord may be inclined to refuse reletting of the premises. However, the same perverse incentive argument applies to a tenant residing in jurisdictions with a mitigation rule.[82] These jurisdictions provide tenants with a potential "get out of jail free" card by absolving the wrongdoer of his liabilities.[83]

Alternatively, if we are trying discourage bad-faith a prohibition can be enacted which prevents the landlord from acting unreasonably rather than requiring a landlord to act affirmatively. If a prospective tenant becomes available at the same rental value and substantially the same parameters as the abandoning tenant, then the landlord should be precluded from refusing to rent the premises. In this scenario, we have not placed any additional burdens on the landlord which were not originally contracted for and we simultaneously discourage unreasonable behavior.

Advocates defend the duty by claiming that courts misinterpreted the mitigation rule to place an affirmative duty on the landlord,[84] but this claim is a fallacy because the rule does in fact place an affirmative duty on the landlord. These proponents state that under the mitigation theory, the tenant is still in breach of the agreement even if the landlord does not take action.[85] Furthermore, they claim that the only effect of the rule would be to reduce the landlord's recovery against the tenant.[86] However, in effect the rule poses an ultimatum for the landlord. Either attempt to reasonably mitigate, or lose your claim for damages. The reasonableness or sufficiency of landlord efforts is largely subjective and left to the whims of a particular court.[87] Therefore, while a duty to mitigate may not facially impose a requirement on a landlord to alter his obligation, it does so in practice.

Next, the Restatement (Second) of Property states, "Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting a duty of mitigation of damages on the landlord."[88] A rule in contravention of the Restatement would incentivize tenant abandonment and potentially lead to vandalism.[89] On the other hand, proponents argue that requiring mitigation aids in preventing economic and physical waste, but curtailing the tenant's liability may effectively increase economic and physical waste by incentivizing the abandonment of property every time a better deal presents itself to the tenant (strategic behavior).[90]

Next, advocates claim that the imposition of a duty to mitigate places the landlord in "as good a position" as he would have been given the performance of the contract.[91] This is arguable because the costs of obtaining a new tenant would be accounted for in the recovery of the landlord. However, this argument neglects to address the problem of a landlord who has additional vacant spaces for rent. Given the abandonment of a property and the presence of other similar vacant spaces, the landlord may be obligated under a mitigation rule to advertise the abandoned premises along with his other spaces.[92] Jurisdictions vary in how they approach this issue, but this could potentially lead to the abandoned property being leased first which would leave the landlord at a loss. In other words, yes the landlord will be in "as good as a position" as he was prior to the breach, but he is now at a loss for his other properties for which the abandoning tenant has absolutely no liability. Some jurisdictions outside of New York address this issue by allowing a landlord to rent his other properties first,[93] but how would this function in a heavily populated metropolitan area like New York City where the landlord often has other properties to rent?

Furthermore, applying a mitigation rule to residential leases would require the landlord to "alter or increase his obligation under the original leasehold agreement."[94] For instance, in a volatile market where market values are subject to fluctuations, the reasonableness approach may force a landlord to accept a tenant under fair market values which are lower than the rates offered at the time of the original lease. This is especially problematic when the decrease in rent is not large enough to warrant a claim for damages. The landlord may be at a loss for a few hundred dollars, but the time, money and effort required to recover those damages would outweigh the costs.

Another justification for a no duty mitigation rule posits that the covenants in a lease are independent of each other and the tenant therefore has an obligation to make payments regardless of the landlord's action or inaction upon breach.[95] This may seem inconsistent with the implied warranty of habitability but in this instance we are not referring to a wrongdoing by the landlord. Rather, the impetus for the breach is willful abandonment by the tenant. Abandonment or withholding rent by reason of the warranty of habitability is a separate issue.

Next, a tenant can negotiate with a landlord to include applicable provisions in the lease agreement for reasonable efforts to mitigate damages.[96] Supporters of the mitigation rule claim that this argument ignores the disparity between tenant and landlord bargaining power.[97] While this may be true in some jurisdictions, New York offers a diverse palette of rental properties which provide the residential tenant with ample opportunity to explore various options.[98] Furthermore, the array of suitable properties gives the tenant an increase in bargaining power because tenants can simply look elsewhere. This is not to say that relative bargaining power is equal among all landlords and tenants because negotiations rely in part on the sophistication of the parties,[99] but the alienability of a landlord's property should not be subject to an imposition that was not previously agreed to.

Another argument in favor of the no mitigation rule lies in stare decisis and the judicial economy of our system.[100] The Court in *Holy Properties* stated, "this is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside."[101] Moreover, the mitigation rule poses a problem because it invites increased litigation and uncertainty regarding the reasonableness of landlord efforts, which is exactly what stare decisis is meant to prevent.[102] As discussed above, this would require the court to delve into the practices of a landlord attempting to mitigate damages. Advocates of the mitigation rule argue that the application of the non-mitigation rule is similarly complex because it invites litigation concerning the acceptance of tenant surrender.[103] However, this complication can be easily resolved by including a relevant provision in the agreement requiring written acceptance from the landlord in the case of tenant abandonment. The reasonableness of mitigation efforts cannot be so easily remedied.

Lastly, the personal relationship between landlord and tenant and the possibility that abandonment of premises coupled with a duty to mitigate could compel the landlord to accept a tenant that would have otherwise been unsatisfactory leads to a big concern.[104] Advocates of the mitigation approach attempt to poke holes in this argument by citing to *Reid v. Mutual of Omaha Ins. Co.* which posits that, although this argument presents a valid concern, the argument is outweighed by policy considerations that favor mitigation (Example: Vandalism).[105] Moreover, they contend that a fair result can be reached for both parties by "careful application of a rule requiring reasonable mitigation efforts only."[106] However, the policy considerations (as described above) that apparently "outweigh" the landlord-tenant relationship are equally faulted. Therefore a bright-line rule imposing no affirmative duty to mitigate would be the optimal approach because it would maintain the status quo, provide consistency and predictability, and serve justice to those who willfully abandon their agreements.

IV. New York Rental Property Statistics and Case Discussion

New York boasts an array of rental properties that are suitable for tenants of all classes.[107] In 2011, the New York Housing and Vacancy Survey stated that there were a total of 2,104,816 renter occupied units.[108] Included in those units are rental agreements ranging from $100.00 to $2000.00 or more per month.[109] However, only 12.18% of those rentals are $2000.00 or more.[110] The vast majority of rental properties are far cheaper.[111] In fact, 38.4% of the properties are less than $999.00 per month.[112] These figures include all property types such as rent controlled, stabilized, public housing, and all unregulated housing.[113] A complete list of data can be seen in table 1 on the next page.

Scholars and analysts believe the primary reason for tenant abandonment is the inability to pay rent.[114] The troubling notion is that an array of suitable rates is available, yet tenants irresponsibly choose rentals which may not be entirely appropriate given the circumstances. Therefore, who should the law side with? New York case law suggests that the law sides with the landlord.[115] Arguably, some scholars and courts believe the common law is outdated and should be replaced with a duty to mitigate.[116] However, the case law in New York supporting this view is based on flawed reasoning and misstatements of law.

The initial discussion in many of these cases begins with *Holy Properties LLP v. Kenneth Cole Productions, Inc.* That Court held there was no duty to mitigate.[117] The Court reasoned that, unlike breaches of contract,

2011 NEW YORK CITY HOUSING AND VACANCY SURVEY
RENTER OCCUPIED HOUSING UNITS BY RENT REGULATION STATUS
TABLE 1

MONTHLY CONTRACT RENT

	TOTAL RENTER OCCUPIED	CONTROLLED	TOTAL STABILIZED	STABILIZIED BUILT PRE-1947	STABILIZED BUILT 1947 OR LATER	MITCHELL LAMA	PUBLIC HOUSING	ALL OTHER GOVERNMNT ASSISTED/ REGULATED*	ALL UNREGULATED RENTER HOUSING
TOTAL	2,104,816	38,374	960,870	724,649	236,221	47,295	184,946	61,207	812,124
LESS THAN $100	4,499	352	402	402	0	0	1,916	1,523	306
$100 TO $199	25,309	2,112	2,358	1,496	863	0	11,537	7,903	1,400
$200 TO $299	52,725	2,311	6,187	4,166	2,021	404	38,028	2,948	2,847
$300 TO $399	43,485	2,064	6,766	6,246	519	1,417	27,420	1,986	3,832
$400 TO $499	44,975	1,932	11,879	9,920	1,959	532	22,654	2,134	5,844
$500 TO $599	66,327	3,396	23,937	19,662	4,274	1,089	22,123	3,759	12,024
$600 TO $699	95,811	3,441	42,934	35,962	6,972	3,609	21,287	2,185	22,354
$700 TO $799	123,813	2,768	72,226	58,197	14,029	4,044	11,589	4,390	28,795
$800 TO $899	169,491	3,792	101,486	78,139	23,347	5,560	9,036	2,789	46,829
$900 TO $999	181,284	2,674	122,179	94,173	28,006	5,531	5,313	3,291	42,297
$1,000 TO $1,249	454,724	4,248	263,560	198,749	64,812	9,541	10,363	9,645	157,367
$1,250 TO $1,499..	256,296	2,856	133,306	98,768	34,538	6,232	2,200	6,064	105,638
$1,500 TO $1,749	196,909	2,260	89,454	65,089	24,365	3,080	771	3,283	98,061
$1,750 TO $1,999	86,569	1,106	41,781	33,937	7,843	1,924	135	2,736	38,887
$2,000 OR MORE	256,411	2,371	28,345	9,799	18,546	3,773	217	5,933	215,772
NO CASH RENT	46,188	693	14,069	9,943	4,126	560	358	638	29,870
MEDIAN	1,100	800	1,050	1,030	1,100	1,000	450	910	1,369
MEAN	1,280	960	1,137	1,097	1,260	1,162	506	1,011	1,679

*Includes HUD-regulated, In Rem, Article 4, Loft Board, and Municipal Loan

Source: U.S. Census Bureau, 2011 New York City Housing and Vacancy Survey

"leases have been historically recognized as a present transfer of an estate in real property."[118] Moreover, the Court stated, "Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages."[119]

Some courts believe that *Holy Properties* should be distinguished from cases involving residential leases.[120] They argue that *Holy Properties* was in a commercial lease setting and should be limited to those facts.[121] Moreover, they argue that "because the court did not expressly reject the recent body of case law imposing a mitigation rule in residential leases" that the Court did not intend for its decision to affect residential leases.[122]

However, the advocates' reasoning that the "court did not expressly reject" the duty to mitigate is unpersuasive. The Court of Appeals made no distinction between residential and commercial leases when it held no duty exists.[123] Furthermore, the Court's reasoning in the commercial setting largely stemmed from *Becar v. Flues*,[124] which was a case involving the duty to mitigate in the residential setting, and one legal reporter states that distinguishing between these two types of leases would lead to irrational consequences.[125]

Next, the Appellate Term, First Department also sided with the Court of Appeals.[126] In *Whitehouse Estates, Inc. v. Post*, the court held that there was no duty to mitigate.[127] That court reasoned, "in rejecting the opportunity to adopt the contract rationale of mitigation of damages, the Court pointed to the overriding benefit of applying 'established precedents' in the field of real property law."[128] Moreover, that court stated the reasoning and language used in *Holy Properties* did not indicate an intent to abrogate the no-mitigation rule in the residential context nor did the Appellate Division adopt a duty in residential cases.[129]

Some advocates of the duty rely on *29 Holding Corp. v Diaz* which declined to follow *Whitehouse Estates.*[130] That court, in holding there is a duty to mitigate, relied on two flawed arguments. First, that court reasoned that the Supreme Court was not bound by Appellate Term precedent.[131] However, in *Mountain View Coach Lines Inc. v. Storms*, the Appellate Division, Second Department stated that lower courts are bound by the decisions of higher courts.[132] Moreover, the Court stated, "the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule."[133] The court goes on to say, "this is a general principle of appellate procedure necessary to maintain uniformity and consistency and, consequently, any cases holding to the contrary are disapproved."[134] The court in *Diaz* not only declined to follow the precedent in *Whitehouse Estates*, but also the precedent in *Mountain View*. The court's holding was an anomaly to say the least.

Second, the Court in *Diaz* relied on a series of cases (prior to *Rios*) from courts in the Second Department which advocated the duty.[135] The court stated,

> Despite these seemingly clear pronouncements and the absence of any case decided by the Appellate Division adopting a duty to mitigate in residential cases, other courts (especially the lower courts in the Second Department) appear to adhere to the distinction in treatment between residential and commercial cases.[136]

Moreover, the court relied on the Appellate Term, Second Department's recognition of the duty in *Paragon Industries, Inc. v. Williams*.[137]

However, the court's reliance on these cases from the Second Department is ultimately unpersuasive because in 2008 the Appellate Division, Second Department decided *Rios v. Carrillo*.[138] The *Rios* court held there was no duty to mitigate in the residential setting and effectively put an end to the imposition of the duty by the lower courts.[139] The court stated,

> Although *Holy Props.* involved a commercial lease, the broad language employed and the reliance on real property principles negate the possibility that the Court of Appeals was confining its determination only to commercial leases. There is simply no basis for limiting the broad language of *Holy Props*.[140]

Moreover, the court supported the view in *Holy Properties* that if a lease provides for tenant liability post eviction, the provision is enforceable.[141] The decision in *Rios* was again affirmed by the Second Department in *Gordon v. Eshaghoff*.[142]

Lastly, several courts, including the Appellate Division and Court of Appeals, agree that "parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents."[143] These courts believe the certainty of settled rules is perhaps more important in real property than any other area of law.[144] In fact, the Court of Appeals stated in *Heyert v. Orange & Rockland Utilities* that "Uniformity and certainty in rules of property are often more important and desirable than technical correctness."[145]

V. Conclusion

Support for the no-mitigation approach is consistently mounting in New York. To date, the Appellate Division, Second Department and the Appellate Term, First Department have held there is no duty of mitigation in residential leases.[146] Those courts interpreted

the Court of Appeals decision in *Holy Properties* to support the no-duty rule, but the Third and Fourth Departments have yet to address the issue. Moreover, the Appellate Division, First Department has not reached this issue either. For the reasons and policy considerations above and in order to maintain consistency, the Appellate Division, First, Third and Fourth Departments should follow suit. Arguably, the decisions of Court of Appeals, the Appellate Division and the Appellate Term impose a statewide no mitigation policy.[147] However, it remains to be seen whether the other Departments will endorse this view.

The need for consistency, the characterization of a leasehold as a property interest by the Court of Appeals, deterring abandonment and vandalism, and protecting a landlord from altering his obligations under a lease are only a few reasons why the remaining Departments should follow. The Court in *Holy Properties* stated, "in business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the 'correct' rule."[148]

Both approaches have their merits and drawbacks, but the safer approach in the New York context would be to adopt a blanket no-mitigation rule. This would still permit a landlord to voluntarily assume the duty or for a tenant to negotiate the duty into a lease while simultaneously protecting the innocent landlord from the whimsical acts of a tenant. Therefore, the remaining Departments should adopt the residential no mitigation rule.

Endnotes

1. Stephanie G. Flynn, *Duty to Mitigate Damages Upon A Tenant's Abandonment*, 34 Real Prop. Prob. & Tr. J. 721, 722 (2000).
2. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 133-34, 661 N.E.2d 694, 696 (1995).
3. Flynn, *supra* note 1, at 722.
4. 72 Am. Jur. Proof of Facts 3d §1 (2003).
5. *Holy Props.*, 87 N.Y.2d at 133.
6. Jeremy N. Sheff, *A Tale of Two Cities: The Residential Landlord's Duty to Mitigate in New York*, 25 J. Civ. Rts. & Econ. Dev 673, 674 (2011).
7. *Id.* at 674.
8. Joshua R. Cohn, *Effecting a "Petrifying Rigidity": Why New York, Under Certain Circumstances, Needs to Impose a Duty to Mitigate on Residential Landlords in the Event of Tenant Abandonment*, 24-25 (2010) (unpublished scholarly note) (on file with author).
9. *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808, 813, 775 N.Y.S.2d 807 (Sup. Ct. Bronx Co. 2004).
10. *Holy Props.*, 87 N.Y.2d 130; *see infra* notes 23-25.
11. *Rios v. Carrillo*, 53 A.D.3d 111, 112, 861 N.Y.S.2d 129 (2d Dep't 2008); *see infra* notes 138-41.
12. Flynn, *supra* note 1, at 722.
13. 72 Am. Jur. Proof of Facts 3d §1 (2003).
14. *Id.*
15. *Holy Props.*, 87 N.Y.2d at 133.
16. Sheff, *supra* note 6, at 675.
17. *Holy Props.*, 87 N.Y.2d at 133.
18. 72 Am. Jur. Proof of Facts 3d §3 (2003).
19. *Id.*
20. *Holy Props.*, 87 N.Y.2d at 133.
21. *See infra* note 88.
22. 72 Am. Jur. Proof of Facts 3d §1 (2003).
23. *Holy Props.*, 87 N.Y.2d at 134.
24. *Id.*
25. The Court in *Holy Properties* noted that the provisions in a lease are controlling. In that case, the landlord included a provision in the lease holding the tenant liable for rent after eviction. It follows then that a landlord can volunteer to mitigate by placing such a provision in the lease. *Id.*
26. 72 Am. Jur. Proof of Facts 3d §4 (2003).
27. *Id.*
28. Cohn, *supra* note 8, at 24-25.
29. Sheff, *supra* note 6, at 674.
30. 72 Am. Jur. Proof of Facts 3d §3 (2003).
31. *Id.* at §5.
32. *Id.*
33. Flynn, *supra* note 1, at 722.
34. *Id.* at 755.
35. *Tomaino v. Concord Oil, Inc.*, 709 A.2d 1016 (R.I. Sup. Ct. 1998).
36. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah Sup. Ct. 1989).
37. *Id.*
38. FLA. STAT. ANN. §83.592(2) (West. Supp. 1999).
39. Flynn, *supra* note 1, at 758-59; *see infra*, at 26.
40. Flynn, *supra* note 1, at 758.
41. *Id.* at 759.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 759-60.
47. *Id.* at 759.
48. *Id.*
49. *Id.* at 760-761.
50. *Id.*
51. *Id.*
52. *Ruud v. Larson*, 392 N.W.2d 62 (N.D. Sup. Ct. 1986).
53. *Jefferson Dev. Co. v. Heritage Cleaners*, 311 N.W.2d 426 (Mich. Ct. App. 1981).
54. *S.N. Mart, Ltd. v. Maurices Inc.*, 451 N.W.2d 259 (Neb. Sup. Ct. 1990).
55. *Id.*
56. *Id.*
57. *Id.*
58. Flynn, *supra* note 1, at 758-59; *see infra*, at 26.
59. *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977).
60. FLA. STAT. ANN §830595(2) (West Supp. 1997).
61. *Brywood Ltd. Partners, L.P. v. H.T.G., Inc.*, 866 S.W.2d 903 (Mo. Ct. App. 1993).
62. Sheff, *supra* note 6, at 674.
63. *Id.*
64. *Rios v. Carrillo*, 53 A.D.3d 111, 112, 861 N.Y.S.2d 129 (2d Dep't 2008).

65. Sheff, *supra* note 6, at 678.
66. *Whitehouse Estates, Inc. v. Post*, 662 N.Y.S.2d 982 (App. Term-1st 1997).
67. *Gordon v. Eshagoff*, No. 6246-04, 2007 WL 2815546, (N.Y. Sup.Ct. Nassau Co. Sept. 04, 2007).
68. *Spohn v. Fine*, 479 N.Y.S.2d 139, 140 (County Ct. Yates Co. 1984).
69. *Parkwood Realty Co. v. Marcano*, 353 N.Y.S.2d 623 (Civ. Ct. Queens Co. 1974).
70. *29 Holding Corp v. Diaz*, 3 Misc. 3d 808, 817-18, 775 N.Y.S.2d 807, 814 (Sup. Ct. Bronx Co. 2004).
71. *Id.*
72. *Id.*
73. Flynn, *supra* note 1, at 729.
74. *29 Holding Corp.*, 3 Misc. 3d 808.
75. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 133, 661 N.E.2d 694, 696 (1995).
76. *Id.*
77. Flynn, *supra* note 1, at 730.
78. *Id.*
79. *Id.*
80. *Holy Props.*, 87 N.Y.2d 130.
81. Flynn, *supra* note 1, at 730.
82. Sheff, *supra* note 6, at 675.
83. *Id.*
84. Flynn, *supra* note 1, at 726.
85. *Id.*
86. *Id.*
87. Sheff, *supra* note 6.
88. RESTATEMENT (SECOND) OF PROPERTY 12.1(3) cmt. i (1977).
89. Sheff, *supra* note 6, at 675.
90. *Id.*
91. *F. Enters., Inc. v. Kentucky Fried Chicken Corp.*, 351 N.E.2d 121 (Ohio Sup. Ct. 1976).
92. *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977).
93. *See supra* at 26.
94. Flynn, *supra* note 1, at 726.
95. *Id.* at 727.
96. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 134, 661 N.E.2d 694, 696 (1995).
97. Flynn, *supra* note 1, at 728.
98. See table 1.
99. Sheff, *supra* note 6, at 678.
100. *Holy Props.*, 87 N.Y.2d at 134.
101. *Id.*
102. Flynn, *supra* note 1, at 757.
103. 72 Am. Jur. Proof of Facts 3d §1 (2003).
104. *Stern v. Thayer*, 57 N.W. 329 (Minn. Sup. Ct. 1894) (holding that the landlord exercised a personal choice and was therefore not obligated to look for another tenant).
105. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, (Utah Sup. Ct. 1989).
106. *Id.* at 905.
107. New York Housing and Vacancy Survey, Table 1.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Sheff, *supra* note 6.
115. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 133, 661 N.E.2d 694 (1995).
116. *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808, 775 N.Y.S.2d 807 (Sup. Ct. Bronx Co. 2004).
117. *Holy Props.*, 87 N.Y.2d at 133.
118. *Id.*
119. *Id.*
120. *29 Holding Corp.*, 3 Misc. 3d at 810.
121. *Id.* at 813.
122. *Duda v. Thompson*, 169 Misc. 2d 649, 652, 647 N.Y.S.2d 401 (Sup. Ct. 1996).
123. *Id.*
124. *Becar v. Flues*, 64 N.Y. 518 (1876).
125. *Duda*, 169 Misc. 2d at 652.
126. *Whitehouse Estates, Inc. v. Post*, 173 Misc. 2d 558, 662 N.Y.S.2d 982 (1st Dep't App. Term 1997).
127. *Id.*
128. *Id.* at 559.
129. *Id.*
130. *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808 (Sup. Ct. Bronx Co. 2004).
131. *Id.* at 813.
132. *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep't 1984).
133. *Id.* at 664.
134. *Id.* at 664-65; *see also Auto Equity Sales v. Superior Ct.*, 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937 (Cal. 1962); *Chapman v. Pinellas Cnty.*, 423 So. 2d 578, 580 (Fla. App. 1982); *People v. Foote*, 104 Ill. App. 3d 581, 432 N.E.2d 1254 (Ill. App. Ct. 1982); *Lee v. Consol. Edison Co.*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826 (1st Dep't App. Term 1978); *People v. Waterman*, 122 Misc. 2d 489, 495 n.2, 471 N.Y.S.2d 968 (Crim. Ct., N.Y. Co. 1984).
135. *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808 (Sup. Ct. Bronx Co. 2004).
136. *Id.* at 812-813.
137. *Id.* at 812.
138. *Rios v. Carrillo*, 53 A.D.3d 111, 861 N.Y.S.2d 129 (2d Dep't 2008).
139. *Id.*
140. *Id.* at 113
141. *Id.*
142. *Gordon v. Eshaghoff*, 60 A.D.3d 807, 876 N.Y.S.2d 433 (2d Dep't 2009).
143. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions*, Inc., 87 N.Y.2d 130, 134, 661 N.E.2d 694, 696 (1995).
144. *Heyert v. Orange and Rockland Utilities*, 17 N.Y2d 352, 360, 271 N.YS2d 201, 218 N.E.2d 263.
145. *Id.*
146. *See Rios v. Carrillo*, 53 A.D.3d 111, 861 N.Y.S.2d 129 (2d Dep't 2008); *see also Whitehouse Estates, Inc. v. Post*, 173 Misc. 2d 558, 662 N.Y.S.2d 982 (1st Dep't App. Term 1997).
147. Sheff, *supra* note 6, at 674.
148. *Holy Props. Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 134, 661 N.E.2d 694, 696 (1995).

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USSC Cases in State and Local Government Law 2011-2012 Term

By John Martinez

1. *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012) (Local Government Treatise § 27:21, n.19)

No reasonable suspicion is required for touchless strip search of arrestees

In a five-to-four decision through an opinion written by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Alito and in all but Part IV by Justice Thomas, the Court held that search procedures at county jails whereby arrestees entering a jail's general population were subjected to strip searches involving close observation of the private areas of their bodies—without individualized reasonable suspicion that individuals were carrying contraband, were gang affiliated, or were diseased—struck a reasonable balance between inmate privacy and the needs of the institutions.

Albert Florence was subjected to "strip searches"[1] prior to his admission to the general prison population of the Burlington County jail and the Essex County Correctional Facility. He was not touched in any way as part of the searches. At the Burlington County jail, he was required to shower with a delousing agent; officers checked for scars, marks, gang tattoos, and contraband as he disrobed; and he was instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the Essex County Correctional Facility, he was instructed to remove his clothing while an officer looked for body markings, wounds, and contraband; an officer looked at his ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings; he was required to lift his genitals, turn around, and cough in a squatting position as part of the process; and after a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility.

Florence sued the entities, one of the wardens, and other defendants under 42 USC § 1983 for violations of his Fourth and Fourteenth Amendment rights. He contended such searches could not be conducted without an individualized reasonable suspicion that the individual was carrying contraband. The Court held that the correctional facilities had an interest in devising reasonable search policies to detect contraband, gang affiliations and diseases among inmates entering the facilities. In the absence of "substantial evidence in the record to indicate that the officials had exaggerated their response to these considerations"[2] the Court would defer.

The Court held: "Even assuming all the facts in favor of petitioner, the search procedures at the Burlington County Detention Center and the Essex County Correctional Facility struck a reasonable balance between inmate privacy and the needs of the institutions."[3]

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented:

> In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an "unreasonable searc[h]" forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.[4]

2. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012) (Local Government Treatise § 16:60, n.19; Government Takings Treatise § 3:10, n.6)

Title to riverbeds within states is determined by federal constitutional equal-footing doctrine; once title in State is thereby established, public access to waters above those beds for recreational uses is determined by state common law public trust doctrine, subject to federal power to regulate vessels and navigation under Commerce Clause and admiralty power

In a unanimous opinion for the Court written by Justice Kennedy, the Court considered several issues regarding the interaction between the equal-footing and public trust doctrines.[5] The Montana Supreme Court had held that PPL Montana, LLC, a power company, owed the State $41 million in back rent for the use of riverbeds for hydroelectric projects. The Montana court based its decision on its finding that the State owned the riverbeds.

The United States Supreme Court reversed. The Court confirmed that the equal-footing doctrine—premised on principles of sovereignty regarding rights retained by the people of each State "by the Constitu-

tion itself"—provides that upon obtaining statehood, every State gains title to the beds of waters within its borders which are "then navigable."[6] Reversing the Montana court's approach, the Court emphasized that navigability for these purposes is determined on a segment-by-segment basis. Further disagreeing with the Montana court, the Court emphasized that when determining navigability, the necessity for land route portage—the transportation of boats and supplies over land—undermines the navigability of the waters which make such portage necessary. In an additional disagreement with the Montana court, the Court clarified that "Evidence of present-day use may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood."[7]

The State argued that denying State title to the riverbeds here would undermine the State's ability to protect public access to the waters above those beds for purposes of navigation, fishing and other recreational uses. The United States Supreme Court clarified the role of federal and state law in regard to the public trust doctrine as follows:

> [While]…the equal-footing doctrine… is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine [is] a matter of state law…subject…to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public…the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.[8]

The Court reversed the Montana court and remanded for application of the proper legal standards.

3. *Armour v. City of Indianapolis, Inc.*, 132 S. Ct. 2073 (2012) (Local Government Treatise §18:5, n.17; § 23:14, n.16; § 23:34, n.2; 24:30, n.1)

Forgiving future installment tax payments of some taxpayers, while refusing to provide equivalent refunds to those who had previously paid tax assessment in full, did not violate equal protection, because supported by administrative convenience

In a six-to-three decision through an opinion written by Justice Breyer, joined by Justices Kennedy, Thomas, Ginsburg, Sotomayor and Kagan, the Court held that a city did not violate Equal Protection by forgiving future installment tax payments of some taxpayers, while refusing to provide equivalent refunds to taxpayers who had previously paid sewer tax assessments in full.[9]

As authorized by state statute, Indianapolis, for many years, had imposed upon benefited lot owners the cost of sewer improvement projects. The city allowed owners to pay either immediately in a lump sum or over time in installments. In 2005, however, the city restructured the manner in which it paid for sewer improvement projects, lowering the city's costs, and passed on some of the savings by forgiving future installments of owners who had chosen to pay in installments, but refusing to provide equivalent refunds to owners who had chosen to—and had already paid the full amounts—in lump sum.

Applying rational basis review, the Court held that the city's use of the classification was reasonably likely to achieve the objective of the city's administrative convenience: "To have added refunds to forgiveness would have meant adding yet further administrative costs, namely the cost of processing refunds."[10] The Court distinguished *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.* as a case in which "a clear state law requirement [had been] clearly and dramatically violated."[11]

Chief Justice Roberts, joined by Justices Scalia and Alito, argued that *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.* prohibits "gross disparity" in the treatment of taxpayers and that here, some taxpayers ended up paying 10 to 30 times as much for sewer hook-ups as their neighbors. Such disparity, argued the dissenters, could not be justified by mere "administrative convenience": "The Equal Protection Clause does not provide that no State shall 'deny to any person within its jurisdiction the equal protection of the laws, unless it's too much of a bother.'"[12] But even if such an objective might be legitimate, the dissenters argued, the city in fact already produced records showing exactly how much each lump-sum payer was due: "What the city employees would need to do, therefore, is cut the checks and mail them out."[13]

4. *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) (Local Government Treatise § 9:14, n.3; §18:34, n.24)

Private attorney retained by city to assist in internal affairs investigation is entitled to qualified immunity against claims brought under Section 1983

In a unanimous opinion for the court written by Chief Justice Roberts, the Court held that a private attorney with 29 years of specialized experience in labor, employment and personnel matters who was retained by the city on a temporary basis to assist in conducting

an internal affairs investigation into potential wrongdoing by a city employee was entitled to a qualified immunity defense against claims brought under § 1983. The Court emphasized that affording such immunity serves to ensure talented candidates are not deterred by the threat of damages suits from providing such public service and it satisfied the government's need to attract such talented individuals on a part-time basis. The Court distinguished *Richardson v. McKnight*, 521 U.S. 399 (1997), as a situation in which "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [undertook] that task for profit and potentially in competition with other firms."

5. *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) (Local Government Treatise § 27:7, n.10; §28:12, n.5)

Congress did not properly abrogate states' sovereign immunity from damages suits for violation of Subparagraph (D), the "self-care" provision, of the Family and Medical Leave Act of 1993

In an opinion announcing the judgment of the court written by Justice Kennedy, joined by Chief Justice Roberts and Justices Thomas and Alito, with Justices Thomas and Scalia concurring in separate opinions, the Court held that Congress did *not* properly abrogate states' sovereign immunity from suits for damages for violation of Subparagraph (D) of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(D) ("FMLA"), regarding denial of leave for an employee's own serious health condition which interferes with the employee's ability to perform at work ("self-care" provision).[14]

Subparagraph (D), the FMLA's self-care provision, requires employers, including state employers, to grant unpaid leave for self care for a serious medical condition, under certain statutory prerequisites. Daniel Coleman requested sick leave from the Court of Appeals of the State of Maryland, where he was employed, but was informed he would be terminated if he did not resign. Coleman sued the state court in federal district court alleging a violation of Subparagraph (D).

The Court reasoned: (1) As a beginning proposition, States are immune from suits for damages. (2) Congress may abrogate such immunity if it makes its intent to abrogate unmistakably clear, as it did in the FMLA. (3) Such abrogation is authorized, if properly exercised, by Section 5 of the Fourteenth Amendment, which empowers Congress to "enforce" the substantive guarantees of the Fourteenth Amendment's Section 1. (4) "To ensure Congress' enforcement powers under § 5 remain enforcement powers, as envisioned by the ratifiers of the Amendment, rather than powers to redefine the substantive scope of § 1, Congress 'must tailor' legislation enacted under § 5 'to remedy or prevent' conduct transgressing the Fourteenth Amendment's substantive provisions. And '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[15]

The Court distinguished *Nevada Dep't of Human Resources v. Hibbs*,[16] as a case concerning Subparagraph (C), regarding denial of leave for the care of a spouse, son, daughter or parent with a serious health condition ("family care" provision). In *Hibbs*, the Court had found that Congress relied on "evidence of a well-documented pattern of sex-based discrimination in *family-leave* policies." [Emphasis added] "Faced with 'the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits,' *Hibbs* concluded that requiring state employers to give all employees the opportunity to take family-care leave was 'narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest.'"[17]

In contrast, the Court found no evidence in the Congressional Record leading to the enactment of the FMLA of widespread sex discrimination or sex stereotyping by States in the administration of self-care sick leave policies. Accordingly, the Court concluded, "It follows that abrogating the States' immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed."

Justice Thomas argued that *Hibbs* was wrongly decided because even the family-care provision "was not sufficiently linked to a demonstrated pattern of unconstitutional discrimination by the States." Justice Scalia argued that the "congruence and proportionality" "test makes no sense," aptly supported outcomes either way here, and is a "flabby test [which] is 'a standing invitation to judicial arbitrariness and policy-driven decisionmaking.'"

Justice Ginsburg wrote a dissenting opinion joined by Justices Breyer, Sotomayor and Kagan (except as to footnote 1 arguing that Congress could abrogate state sovereign immunity under the Commerce Clause, or under a "reasonably conclude" standard under Section 5 of the Fourteenth Amendment). Justice Ginsburg contended that Congress had met the "congruence and proportionality" standard here, arguing that evidence of gender-based discrimination in the workplace, documented in *Hibbs*, supported both the family-care and the self-care provisions of the FMLA.

6. *Arizona v. U.S.*, 132 S. Ct. 2492 (2012)

Upholding preliminary injunction against three sections of Arizona statute regarding immigration because sections were preempted by federal immigration law; preliminary injunction overturned in regard to fourth, "show me your papers," section of statute

Through an opinion written by Justice Kennedy joined by Chief Justice Roberts and Justices Ginsburg, Breyer and Sotomayor, the Court upheld a preliminary injunction against three sections of an Arizona statute regarding immigration because those sections were preempted by federal immigration law, but overturned the preliminary injunction in regard to a fourth section.[18]

The "Support Our Law Enforcement and Safe Neighborhoods Act" ("S.B. 1070") was enacted in Arizona in 2010. Four provisions of S.B. 1070 were before the United States Supreme Court. Two provisions created new state offenses: § 3 made failure to comply with federal alien-registration requirements a state misdemeanor and § 5(C) made it a misdemeanor for an unauthorized alien to seek or engage in work in the State. The two other provisions gave specific arrest authority and investigative duties to state and local law enforcement officers: § 6 authorized state and local officers to arrest without a warrant a person "the officer has probable cause to believe…has committed any public offense that makes the person removable from the United States"[19] and § 2(B), dubbed the "show me your papers" provision, required officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the Federal Government.

The United States sued to enjoin S.B. 1070 as preempted by federal immigration law. The U.S. District Court for Arizona issued a preliminary injunction against the four provisions. The preliminary injunction was upheld by the Ninth Circuit and Arizona sought review in the United States Supreme Court.

The Court first set out three circumstances under which state law must bow to federal law under the Supremacy Clause: (1) When Congress withdraws specified powers from the States by enacting a statute containing an express preemption provision; (2) when Congress, acting within its proper authority, has determined conduct in a field must be regulated by its exclusive governance; and (3) when state laws conflict with federal law.

Reviewing the four S.B. 1070 provisions under those preemption principles, the Court overturned the first three provisions, but upheld the fourth. In regard to the first three, the Court held: (1) The entire field of alien registration had been occupied by Congress, so S.B. 1070's § 3, making failure to comply with federal alien-registration requirements a state misdemeanor, was preempted; (2) Congress made a deliberate choice not to impose criminal penalties on aliens who seek or engage in unauthorized employment, and S.B. 1070's § 5(C), making it a misdemeanor for an unauthorized alien to seek or engage in work in the State, was preempted because it conflicted with Congress' choice not to criminalize such conduct; and (3) under federal immigration law, it is not a crime for a removable alien to remain present in the country, but only triggers a federal administrative procedure during which the United States Attorney General can exercise discretion to issue a warrant for the alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States," so S.B. 1070's § 6, authorizing state and local officers to arrest without a warrant a person "the officer has probable cause to believe…has committed any public offense that makes the person removable from the United States" was preempted because it created an obstacle to the full purposes and objectives of Congress.

The Court upheld the fourth, "show me your papers" provision, S.B. 1070's § 2(B), which required officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the Federal Government. The Court emphasized that three limits were built into the state provision: "First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers 'may not consider race, color or national origin…except to the extent permitted by the United States [and] Arizona Constitution[s].' Third, the provisions must be 'implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.'" Accordingly, the Court held: "It was improper…to enjoin § 2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives."[20]

The Court noted, however, that its "opinion [did] not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."

7. *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Local Government Treatise § 27:21, n.10)

The "cruel and unusual punishment" clause of the Eighth Amendment forbids a sentencing scheme that mandates life without parole for juvenile homicide offenders

In a five-to-four decision through an opinion written by Justice Kagan, joined by Justices Kennedy,

Ginsburg, Breyer and Sotomayor, the Court held that the Eighth Amendment's "cruel and unusual punishment" clause prohibits the State from maintaining a sentencing scheme that mandatorily imposes life without parole for juvenile homicide offenders.[21]

The decision resolved two cases, each involving a 14-year-old defendant. In the Arkansas case, defendant Kuntrell Jackson accompanied two other boys to commit a robbery at which one of the other boys shot and killed the store clerk. An Arkansas jury convicted Jackson of capital felony murder and aggravated robbery, and the trial court imposed the statutorily mandated sentence of life imprisonment without the possibility of parole. In the Alabama case, defendant Evan Miller, along with a friend, beat the defendant's neighbor and set the neighbor's trailer on fire, causing the neighbor's death. An Alabama jury convicted Miller of murder in the course of arson, and the trial court imposed the statutorily mandated punishment of life without parole.

The Court noted that Eighth Amendment jurisprudence implicates two strands of precedent reflecting the concern with proportionate punishment. The first involves categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. The second involves the prohibition against mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. The Court concluded that this case lay at the confluence of these two lines of authority, reasoning that life without the possibility of parole for juveniles is akin to the death penalty itself.

The Court held that in neither of these cases did the trial court have any discretion to impose a different punishment. Thus, "State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,'…and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[22]

8. *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (Local Government Treatise § 14:36, n.3.50)

Citizens United applies to the States as well as to Congress: neither may suppress political speech based on the speaker's corporate identity

In *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876 (2010), in an opinion for the court written by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Alito, and in substantial part by Justice Thomas, the Court held that the government may not suppress political speech based on the speaker's corporate identity, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Court further held that the prohibition in the federal Bipartisan Campaign Reform Act of 2002 on corporate expenditures for "electioneering communications," or for speech expressly advocating the election or defeat of a candidate (2 U.S.C. § 441b), violated the corporations' free speech rights, overruling *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003). The plurality of the Court upheld the parts of the statute regulating corporate political speech through disclaimer and disclosure requirements. Justice Thomas disagreed with that part of the plurality's opinion.

In *American Tradition Partnership*, in a brief *per curiam* opinion, the Court granted a petition for certiorari and reversed the judgment of the Supreme Court of Montana which had upheld a state statute prohibiting corporations from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Citing the Supremacy Clause, the United States Supreme Court concluded there was "no serious doubt" that *Citizens United* applied to the states, that Montana's arguments had already been rejected in that case, and that Montana had failed to "meaningfully distinguish that case."

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented. Justice Breyer argued that corporate expenditures in general, and in light of the record compiled by Montana in particular, can indeed "become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements," and consequently should be subject to limitation or prohibition. Justice Breyer would have granted the petition for certiorari to reconsider *Citizens United*, or at least its application here. Alternatively, he would have denied the petition and let the Montana Supreme Court's judgment stand.

9. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012)

The Taxing Clause authorized Congressional enactment of the "individual mandate" provision of the Patient Protection and Affordable Care of 2010; the Spending Clause authorized Congressional enactment of the "Medicaid expansion" provision, which can be enforced through refusal to provide new Medicaid funds for that purpose, but not through withholding of all existing Medicaid funding

In an opinion announcing the judgment of the Court written by Chief Justice Roberts, the Court held that Congress has constitutional authority under the Taxing Clause to enact the "individual mandate" provision of the Patient Protection and Affordable Care Act of 2010, which requires individuals to maintain "minimum essential" health insurance coverage and imposes a "shared responsibility" payment on those who do not. The Court also held that the Spending Clause gave Congress authority to enact the "Medicaid expansion" provision of the Act, whereby states may be required to provide specified health care to all citizens whose income falls below a certain threshold.[23] However, although the "Medicaid expansion" provision can be enforced through denial of new Medicaid funds that would have been provided for such programs, Congress cannot take away existing Medicaid funding from states that refuse to participate in such programs.

Justices Ginsburg, Breyer, Sotomayor and Kagan joined in Parts I, II and III-C of Chief Justice Roberts' opinion. Part I set out the background of the case. Part II concluded that the Anti-Injunction Act, which prohibits suits to restrain the assessment of collection of any "tax," did not apply to deprive the Court of jurisdiction because, in part, the Patient Protection and Affordable Care Act described the individual mandate's "shared responsibility" payment as a "penalty," not as a "tax."

Part III-C concluded that, in contrast to the *statutory* analysis under the Anti-Injunction Act, the individual mandate's "shared responsibility" payment, for *constitutional* purposes, was a "tax," not a "penalty," and therefore Congress had the authority to enact it under the Taxing Clause. U.S. CONST. Art. I, §8, cl. 1. The court reasoned that (1) the payment for most Americans would be far less than the price of insurance; (2) no scienter requirement was included; and (3) the payment was collected by the IRS through the normal means of taxation, not through punitive sanctions such as criminal prosecution. The court acknowledged that although the "shared responsibility" payment sought to influence individual conduct and was plainly designed to expand health insurance coverage, it nevertheless would raise considerable revenue. The court noted that it was estimated that four million people each year will choose to pay the IRS rather than buy health insurance. This suggested, the court concluded, that the shared responsibility payment merely imposed a tax citizens may lawfully choose to pay in lieu of buying health insurance. Thus, the court held: "Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it."

Part III-C further concluded that the shared responsibility payment was not a "direct" tax which had to be apportioned among the states pursuant to Article I, §9, clause 4, which provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

Part III-C also addressed the concern that the shared responsibility payment imposed a tax for an omission, not an act. First, unlike the Commerce Clause, which does not authorize congressional regulation of inactivity, "the Constitution has made no such promise with respect to taxes."[24] Second, noting that the taxing power to influence conduct has its limits, the shared responsibility payment was within the narrowest interpretation of the taxing power. Third, the shared responsibility payment, although motivated by a regulatory purpose, was within the limits of the taxing power because "imposition of [the] tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay [the] tax levied on that choice."

In regard to the "Medicaid expansion" provision of the Act, Part IV of Chief Justice Roberts' opinion concluded that Congress lacked authority to take away *existing* Medicaid funding from states that fail to provide specified health care to all citizens whose income falls below a certain threshold. Part IV held that Congress' power under the Spending Clause, U.S. CONST. Art. I, §8, cl.1, "rests on whether the State voluntarily and knowingly accepts the terms of a 'contract'" whereby Congress secures state compliance with federal objectives. Thus, although Congress may offer new funds to expand the availability of health care and refuse to provide such funds to States that refuse to comply with the conditions on their use, Congress "is not free to... penalize States that choose not to participate in that new program by taking away their existing Medicaid funding." Only Justices Breyer and Kagan formally joined in Part IV, agreeing that the remedy should be to invalidate only the portion of the Act which authorized Congress to enforce the states' failure through withdrawing existing Medicaid funding. Justices Ginsburg and Sotomayor, writing separately, apparently agreed with that remedy as well.

Justice Scalia, in an opinion joined by Justices Kennedy, Thomas and Alito, dissented, arguing that

Congress lacked constitutional authority to enact the Act, and that it should be struck down in its entirety.

Endnotes

1. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 182 L. Ed. 2d 566, 2012 U.S. LEXIS 2712, 80 U.S.L.W. 4299, 23 Fla. L. Weekly Fed. S 248 (U.S. 2012).
2. *Id.* at 1512.
3. *Id.* at 1523.
4. *Id.* at 1525.
5. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77, 2012 U.S. LEXIS 1686, 80 U.S.L.W. 4177, 42 ELR 20045, 23 Fla. L. Weekly Fed. S 144 (U.S. 2012).
6. *Id.* at 1229.
7. *Id.* at 1233.
8. *Id.* at 1235.
9. Armour v. City of Indianapolis, 132 S. Ct. 2073, 182 L. Ed. 2d 998, 2012 U.S. LEXIS 4131, 80 U.S.L.W. 4409, 23 Fla. L. Weekly Fed. S 336, 2012 WL 1969350 (U.S. 2012).
10. *Id.* at 2081.
11. Allegheny Pittsburgh Coal Co. v. County Com., 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688, 1989 U.S. LEXIS 433, 57 U.S.L.W. 4095 (U.S. 1989).
12. *Armour,* 132 S. Ct. at 2087.
13. *Id.* at 2087.
14. Coleman v. Court of Appeals, 132 S. Ct. 1327, 182 L. Ed. 2d 296, 2012 U.S. LEXIS 2315, 80 U.S.L.W. 4206, 162 Lab. Cas.
15. *Id.* at 1330.
16. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953, 2003 U.S. LEXIS 4272, 71 U.S.L.W. 4375, 148 Lab. Cas.
17. *Id.* at 738.
18. Arizona v. United States, 132 S. Ct. 2492, 183 L. Ed. 2d 351, 2012 U.S. LEXIS 4872.
19. *Id.* at 2494.
20. *Id.* at 2510.
21. Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 2012 U.S. LEXIS 4873, 80 U.S.L.W. 4560, 23 Fla. L. Weekly Fed. S 455.
22. *Id.* at 2461.
23. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 2012 U.S. LEXIS 4876, 80 U.S.L.W. 4579.
24. *Id.* at 2600.

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Supreme Court Fortifies Qualified Immunity for Law Enforcement Officers in Warrant Cases

By Martin A. Schwartz

The Civil Rights Act of 1871, 42 U.S.C. §1983, affords a judicial remedy to individuals who suffered deprivations of their federal constitutional rights under color of state law. The §1983 remedy, however, is subject to an array of immunity and other defenses. Officials who carried out a judicial, prosecutorial or legislative function are protected from personal monetary liability by absolute immunity.[1] Officials who carried out executive and administrative functions are protected by qualified immunity.[2]

Qualified immunity shields state and local law enforcement officers from personal monetary liability under §1983 so long as the officer acted in an objectively reasonable manner. An officer will be found to have acted in a reasonable manner so long as she did not violate clearly established federal law.[3] Thus, an officer who acted unconstitutionally, but did not violate the plaintiff's clearly established constitutional rights, will be protected from liability by qualified immunity. Although less potent than the absolute immunities, qualified immunity is a very formidable defense and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[4]

The United States Supreme Court in *Messerschmidt v. Millender*[5] held that police officers who sought and executed a very broad warrant authorizing them to search a residence for guns and gang related material were protected by qualified immunity. The Court assumed that the warrant violated the Fourth Amendment, yet found that the officers acted in an objectively reasonable manner. The Court relied heavily upon the facts that the warrant was issued by a neutral magistrate, and the officers who applied the warrant secured approval for it from their superior officers. Chief Justice John G. Roberts, Jr. wrote the opinion for the Court. Justice Stephen Breyer filed a brief concurrence. Justice Elena Kagan concurred in part and dissented in part. Justice Sonia Sotomayor dissented, joined by Justice Ruth Bader Ginsburg. My major purpose here is to analyze the significance of the decision in *Millender* upon §1983 Fourth Amendment claims asserted against state and local law enforcement officers who apply for and enforce warrants.

To accomplish this goal, it is necessary, for starters, to identify several basic principles of Fourth Amendment and qualified immunity law. Section 1983 Fourth Amendment claims challenging arrests, searches, and uses of force by law enforcement officers are normally governed by an objective reasonableness standard. For example, an officer has probable cause for an arrest when based upon the facts and circumstances known to the officer, a reasonably prudent person could have concluded that the suspect committed or is committing a crime.[6] Probable cause is essentially a reasonableness standard.[7] Similarly an officer's use of force in carrying out an arrest or investigatory stop will comport with the Fourth Amendment if, under all of the circumstance facing the officer, it was objectively reasonable.[8]

Fourth Amendment objective reasonableness standards give substantial deference to the judgment of the law enforcement officer.[9] Furthermore, an officer who violated the Fourth Amendment because she did not act in an objectively reasonable manner may still escape personal liability under qualified immunity. This is so even though the qualified immunity standard itself is one of objective reasonableness.[10] Thus, a law enforcement officer who violated the §1983 plaintiff's Fourth Amendment rights will be shielded from liability unless those rights were clearly established when the officer acted. Liability will attach only if the officer violated the plaintiff's clearly established Fourth Amendment rights.

This means that a law enforcement officer sued under §1983 for violating the Fourth Amendment is effectively granted two levels of reasonableness protection, one under the Fourth Amendment and another under qualified immunity. To recover damages on a §1983 Fourth Amendment claim the plaintiff has to overcome both levels of reasonableness protection. This is because an officer found to have acted unreasonably for the purpose of the Fourth Amendment could nevertheless be found to have acted reasonably for the purpose of qualified immunity.[11] To avoid the linguistic awkwardness of an officer having acted "reasonably unreasonably," courts normally prefer different language, for example, that the officer had "arguable probable cause," or made a "reasonable mistake," or used force at the "hazy border" of reasonable and unreasonable force.[12]

Prior to its decision in *Millender* the controlling Supreme Court precedent on the immunity of officers who apply for warrants was *Malley v. Briggs*.[13] The

Malley Court held that law enforcement officers who were sued under §1983 for applying for arrest warrants were not protected by absolute immunity, even though the magistrate who issued the warrant was shielded by absolute judicial immunity. The officers, however, were entitled to assert qualified immunity. The *Malley* Court stated that the pertinent qualified immunity question "is whether a reasonably well-trained officer in [the defendant officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."[14] Although a magistrate's issuance of a warrant does not *automatically* establish the officer's protection under qualified immunity, "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable…will the shield of immunity be lost."[15] *Malley* dealt specifically with arrest warrants, but its rationale applies fully to applications for search warrants as well.[16]

With this background in place we are ready to tackle *Messerschmidt v. Millender*. After a romantic relationship between Shelly Kelly and Jerry Ray Bowen turned sour, Bowen physically assaulted Kelly and fired a sawed-off shotgun at her car. Ms. Kelly informed the police about this abuse, and told Detective Messerschmidt that she thought Bowen was staying at the home of his foster mother, Augusta Millender. After confirming Bowen's connection to Ms. Millender's residence, and that Bowen was a member of two gangs, Detective Millender obtained approvals from his supervisors and a deputy district attorney to seek a warrant to search the Millender residence for guns, ammunition and gang related material. The magistrate issued the warrant, and the search uncovered Augusta Millender's shotgun and ammunition.

Ms. Millender (and her daughter and grandson) brought suit in federal court under §1983 against Detective Messerschmidt and other officers who applied for and executed the search warrant. The plaintiffs alleged that the warrant did not comport with the Fourth Amendment because "there was no basis to search for all guns simply because the suspect owned and had used a sawed off shotgun [in the shooting of Ms. Kelly], and no reason to search for gang material because the shooting at the ex-girlfriend for call[ing] the cops was solely a domestic dispute."[17] The officers asserted qualified immunity.

The United States Supreme Court defined the issue as whether, assuming that the warrant was invalid and thus should not have been issued, the officers who applied for and executed it were protected by qualified immunity because they acted in an objectively reasonable manner. When a §1983 defendant asserts the defense of qualified immunity, a court has discretionary authority to first decide the constitutional merits—in *Millender* whether the warrant violated the Fourth Amendment—*or* to bypass the merits and jump right to the immunity question of whether the defendant officer violated clearly established federal law.[18] The Court in *Millender* took this latter course and proceeded directly to qualified immunity. In other words, the Court did not decide whether the warrant was valid, but held that even if it was invalid, the officers who applied for and executed it were protected by their immunity defense.

The Court acknowledged that under *Malley v. Briggs* the magistrate's issuance of the warrant was not dispositive of the defendant officers' qualified immunity defense. The Court, however, articulated greater weight to the magistrate's issuance of the warrant than appears to have been contemplated by *Malley*. The *Millender* Court ruled that "[w]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner [i.e.,] in objective good faith.'"[19] At another point in his opinion Chief Justice Roberts went even further, stating:

> The question…is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued, [but] whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions in which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions.[20]

The Court has thus informed the legal world in no uncertain terms that §1983 plaintiffs who challenge magistrate issued warrants will be able to overcome qualified immunity only in "rare" cases. This is very strong medicine indeed! And that is not all. There is more in this opinion for which state and municipal law enforcement officers should be grateful. As discussed below, the line officers were afforded an additional dose of qualified immunity protection for having secured approval from superior officers.

Although *Malley v. Briggs* recognized that in some circumstances a magistrate's issuance of a warrant will not shield the law enforcement officer from liability, none of the "*Malley* exceptions" applied in *Millender*. For example, it could not be said that the affidavit in support of the warrant was so lacking in probable cause that an officer's reliance on the warrant was plainly unreasonable.[21] Nor was the warrant obviously deficient on its face. The *Millender* Court distinguished *Groh v. Ramirez*[22] on the ground that the warrant's fail-

ure in that case to describe the person or property to be seized was a "'glaring deficiency'" that rendered the warrant invalid on even a "cursory reading" of it.[23]

By contrast to *Groh v. Ramirez*, in *Millender* even if the officers were mistaken that the scope of the warrant was supported by probable cause, their conclusion was not unreasonable. As to the search for guns, "given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned."[24] As to the search for evidence of "gang material," "[a] reasonable officer could certainly view Bowen's attack [on Kelly] as motivated not by the souring of his romantic relationship with Kelly but instead by a desire to prevent her from disclosing details of his gang activity to the police."[25] In other words, the Court gave all benefits of doubt to the defendant officers.

That still leaves the most important aspect of the Court's decision. The lower federal courts have been struggling with whether, in evaluating a qualified immunity defense, weight should be given to the fact that the defendant officer sought advice of counsel or approval from a superior officer before engaging in the contested conduct and, if so, how much weight to afford.[26] As a matter of first impression in the United States Supreme Court, the *Millender* Court held that the "fact that the officers sought and obtained approval of the warrant application from a superior provides *further support* for the conclusion that the officer could reasonably have believed that the scope of the warrant was supported by probable cause."[27] At another point the Chief Justice said that this factor "is certainly pertinent in assessing whether [the defendant officers] could have a reasonable belief that the warrant was supported by probable cause."[28] The Court did not decide how much weight should be given to this factor, but, in the author's view, the tenor of the Court's opinion ("certainly pertinent") indicates that it may well be a significant factor. How significant this factor is will likely depend upon the facts and circumstances of the particular case, for example, the thoroughness of the information the defendant gave her superior, the firmness of the superior's approval, the supervisor's hierarchal position, and whether the superior possessed legal expertise.[29] In other words, it must be determined whether reliance on a superior's approval or advice of counsel was reasonable.[30]

The Court's decision in *Millender* may well encourage more line officers to seek approval from their superiors. This, of course, would be a good thing. The legal question will then become the impact of that approval on the line officer's qualified immunity defense.

The various opinions of the justices in *Millender v. Messerschmidt* illustrate that application of the qualified immunity defense in a particular case can generate significant judicial disagreement. Justice Kagan, concurring in part and dissenting in part, sharply disagreed with the Court's reliance on the defendant officers securing approval from their superior and a deputy district attorney. She stressed that all of these public officials are "teammates," i.e., part of the same prosecution team and, therefore, should not be able to confer qualified immunity on each other.[31] She found the officers protected by qualified immunity to the extent the warrant authorized a search for firearms, but not with respect to its authorization to search for gang material. Like Justice Kagan, Justice Sotomayor (joined by Justice Ginsburg) thought it is "passing strange to immunize an officer's conduct…based upon the approval of other police officers and prosecutors…. Under the majority's test four wrongs [i.e., magistrate, prosecutor, superior police officer, and line police officers] apparently make a right."[32] Justice Sotomayor would have rejected the officers' qualified immunity defense en toto. Thus, while the Court granted the officers qualified immunity, Justice Kagan would have granted them only partial qualified immunity, while Justices Sotomayor and Ginsburg would have denied them immunity altogether.

When all of the pieces of the *Messerschmidt v. Millender* immunity puzzle are viewed together, the following picture emerges:

1. The defendant law enforcement officer starts out with two levels of reasonableness protection, one under the Fourth Amendment, and an added level under qualified immunity.

2. The officer gets another healthy layer of protection from the fact that a neutral magistrate issued the warrant.

3. If the line officer secured approval from a superior or an official with legal expertise (e.g., an assistant district attorney), that will further support the conclusion that the officer acted in an objectively reasonable manner.

4. In evaluating the immunity defense, the Supreme Court draws no distinction between officers who applied for a warrant and those who executed it.

State and local law enforcement officers should be elated with the Court's decision. On the other side of the equation, this is not a pretty picture for §1983 plaintiffs who seek to recover damages based upon either the application or execution of an allegedly unconstitutional warrant. It puts them behind the eight ball, as they face the uphill battle of attempting to overcome these various layers of immunity protection. It is not impossible, but it will take a mighty strong case, like *Groh v. Ramirez*,[33] where the search warrant was obvi-

ously deficient on its face, for the §1983 plaintiff to overcome qualified immunity.

Endnotes

1. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtmann*, 424 U.S. 409 (1976) (prosecutorial immunity), *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity).
2. *See, e.g., Reichle v. Howards*, 132 S.Ct. 2088 (2012); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 500 (1982).
3. Some three decades ago the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 500 (1982) reformulated qualified immunity by defining it in wholly objective terms. An officer who acted unconstitutionally, but did not violate clearly established constitutional law, acted in an objectively reasonable manner and will be shielded from liability. Under this formulation, the officer's subjective motivation is irrelevant in determining her protection under qualified immunity. *Harlow's* goal was to enable qualified immunity to be decided as an issue of law by the court as early in the litigation as possible. *See Hunter v. Bryant*, 502 U.S. 224 (1991). Despite this attempt in *Harlow* to simplify and streamline qualified immunity, the Supreme Court is still struggling to resolve a seemingly unending array of qualified immunity issues. *See generally* Martin A. Schwartz 1A Section 1983 Litigation: Claims and Defenses Ch. 9A (4th ed. 2012). Since *Harlow* the Supreme Court has decided approximately 25 cases attempting to flesh out the various aspects of qualified immunity, and issues still remain to be resolved. In the 2011-12 term alone the Court decided four cases dealing with various aspects of qualified immunity. *Reichle v. Howards*, 132 S.Ct. 2088 (2012); *Filarsky v. Delia*, 132 S.Ct.1657 (2012); *Messerschmidt v. Millender*; 132 S.Ct. 1235 (2012); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (per curiam). In the author's view, *Harlow's* attempt to pigeonhole qualified immunity into the issue of law cubicle has not succeeded; the reality is that determining whether an official violated clearly established federal law frequently requires resolution of disputed issues of fact.
4. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Qualified immunity provides an "immunity from suit rather than a mere defense to liability," that is, from the litigation burdens of having to defend at trial and, in many cases, even from discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As a result, if the district court denies defendant's summary judgment qualified immunity motion, defendant may take an immediate appeal to the court of appeals so long as the immunity defense can be decided as a matter of law. *Mitchell v. Forsyth*, 474 U.S. at 530. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 671-675 (2009). The right to an immediate appeal does not lie if the immunity appeal presents disputed issues of fact. *Johnson v. Jones*, 515 U.S. 304 (1995).
5. 132 S.Ct. 1652 (2012).
6. *See, e.g., Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).
7. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (substance of probable cause is reasonable ground for belief of guilt). The officer's subjective intent is irrelevant in determining whether there was probable cause. *Whren v. United States*, 517 U.S. 806 (1996).
8. *Graham v. Connor*, 490 U.S. 386 (1989).
9. *See Graham*, 490 U.S. at 396-97.
10. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001) (excessive force claim); *Anderson*, 483 U.S. 635 (warrantless search).
11. *Anderson*, 483 U.S. at 643-44 (possible for officer to reasonably act unreasonably).
12. *See, e.g., Brosseau v. Haugen*, 125 S.Ct. at 596, 599 (2004) (per curiam) (force at "'hazy border between excessive and acceptable force'"); *Saucier*, 538 U.S. at 205 (referring to officers making reasonable mistakes); *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (officer who did not have probable cause to arrest will be protected by qualified immunity if she had "arguable probable cause" to arrest).
13. 475 U.S. 335 (1986).
14. *Id.* at 345.
15. *Id.* at 344-45.
16. *See* Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses §9A .11[B] (Aspen Law Publishers, 4th edition 2012).
17. *Messerschmidt v. Millender*, 132 S.Ct. at 1241.
18. *Pearson v. Callahan*, 555 U.S. (2009).
19. *Messerschmidt*, 132 S.Ct. at 1245 (quoting *United States v. Leon*, 468 U.S. 897, 922-23 (1984)).
20. *Messerschmidt v. Millender*, 132 S.Ct. at 1250.
21. There was no claim in *Messerschmidt* that the affidavit in support of the warrant was misleading because it omitted material facts. 132 S.Ct. at 1245 n.2.
22. 540 U.S. 551 (2004).
23. *Messerschmidt*, 132 S.Ct. at 1250 (quoting *Groh v. Rameriz*, 540 U.S. 551 (2004)).
24. *Messerschmidt*, 132 S.Ct. at 1246.
25. *Id.* at 1247. "In addition, a reasonable officer could believe that evidence demonstrating Bowen's membership in a gang might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial." *Id.*
26. *See* Schwartz, *supra* note 16 at §9A.05 [C].
27. 132 S.Ct. at 1241 (emphasis added).
28. *Id.* at 1250.
29. *See, e.g., V-1 Oil Co. v. Wyoming Dep't. of Envtl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990).
30. *See, e.g., Kelly v. Borough of Carlisle*, 622 F.3d 248, 251-259 (3d Cir. 2010); *Cox v. Hainey*, 391 F.3d 25, 34-36 (1st Cir. 2004).
31. "To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each for unreasonable conduct-like applying for a warrant without anything resembling probable cause." 132 S.Ct. at 1252 (Kagan, J., concurring in part, dissenting in part).
32. 132 S.Ct. at 1260. (Sotomayor, J., dissenting).
33. 540 U.S. 551 (2004).

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Private Covenants—Public Obligations: The Enforceability of Private Easements and Declarations Before Public Land Use Boards

By Michael H. Donnelly

Conservation Easements

An instrument known as a "conservation easement" is a rather narrowly constrained legal document that accomplishes both a land use preservation aim and, if properly drawn and executed, a tax planning aim of the grantor as well, for under Internal Revenue Code Section 170 (h)(1)(A)–(C), a tax deduction is allowable for granting a conservation easement upon compliance with the particular requirements of that section. A conservation easement is a document in which a landowner agrees to restrict the use of his property for conservation purposes and gives to a *grantee*—a land trust or municipality[1]—the authority and duty to enforce[2] the restriction on behalf of the public at large. Despite the simplicity of its purpose, a conservation easement is, in fact, a complex legal document that must comply with real property law, state law[3] and federal tax law.[4]

Often, the term conservation easement, however, is used outside of this specific and precise meaning. Thus, a condition contained in a land use approval resolution prohibiting disturbance within a defined area shown on the approved plans is often referred to as a conservation easement whether or not recorded. Similarly, a declaration of restrictive covenant recorded simultaneously with the filing of a subdivision map that announces a development restriction is sometimes referred to as a conservation easement. Neither is, strictly speaking, a conservation easement at all, however.

Enforcement

A true conservation easement may only be enforced by its grantor, by its grantee or permitted assignee, or by a public body or not-for-profit conservation organization *designated in the easement* as having a third party enforcement right. Unlike with a private restrictive covenant (which, as noted below, is subject to a short list of well-established defenses), enforcement of a conservation easement cannot be defeated by subsequent adverse possession, laches, estoppel or waiver.[5] Thus, conservation easements are of a character wholly distinct from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement.[6]

Restrictive Covenants

What then is a restrictive covenant and how does it differ from a conservation easement? The difference between a true conservation easement and a restrictive covenant relates, primarily, to (1) who the restriction intends to benefit, and (2) who has the right to enforce the restriction. A conservation easement must advance a true, public-benefit conservation or preservation goal. It must further have a specifically designated grantee (a land trust or municipality) and that grantee is given the primary authority to enforce on behalf of the public at large (as noted above, authority to enforce may also be extended to additional qualifying entities if specifically designated in the instrument). The grantee must execute the conservation easement and, by doing so, becomes legally bound to enforce its terms.

A restrictive covenant, on the other hand, may advance a purely private or selfish aim. The power to enforce a restrictive covenant belongs only to those with *standing* to enforce the covenant (most often that handful of property owners intended to be benefitted by its restrictions). A party need not have executed the covenant for him to have standing. Whether a particular person has standing to enforce depends (unless his or her standing is specifically announced in the terms of the covenant) upon the circumstances of the creation of the covenant. Standing to enforce affords only the authority—not the obligation—to enforce. Thus, one with standing has the option to enforce or not as he or she chooses.

It is important to recall that restrictive covenants are disfavored in the law. The Appellate Division, Third Department, in *Haldeman v. Teicholz*,[7] noted the law carries this disfavor forward by imposing a "clear and convincing evidence" standard upon those who seek to enforce such covenants:

> In examining the declaration of restrictions made by plaintiff to determine the intent and purpose of the restrictive covenants, we are guided by the general principle that because the law favors free and unencumbered use of real property, covenants purporting to restrict such use are strictly construed

> and restraints will be enforced only when their existence has been established by clear and convincing proof by the owner of the dominant estate.[8]

The law also imposes stringent rules of standing upon challengers, which rules are designed to allow only those who were—by examining the circumstances under which the restriction was created—*intended* to be benefited by the restriction to bring claims for enforcement. Strangers to the covenant have no standing to enforce it. The rules of standing depend upon the class of the covenant in question; and the class to which the covenant belongs flows, as noted in *Haldeman v. Teicholz*,[9] from the circumstances of its creation:

> In determining who can enforce covenants which run with the land, the courts have recognized three classes of covenants. [citations omitted]. The first are those entered into with the design to carry out a general scheme for the improvement or development of real property, which are enforceable by any grantee. The second class are those created by the grantor, presumptively or actually, for the benefit and protection of contiguous or neighboring lands retained by the grantor. The grantor and his assigns of the property benefited by the second type of covenant may enforce it, and there is no need to show a common scheme or plan. [citations omitted]. The third class of restrictive covenants concerns mutual covenants between owners of adjoining lands…[10]

Most often restrictive covenants linked or related to land use approvals fall into the first class. Such covenants are created at the time of a land use approval (but not always as a part of the approval process) "with the design to carry out a general scheme for the improvement or development of real property."[11] Such covenants are often recorded contemporaneously with subdivision map filing and the context of that filing and recording identifies those who have the authority to enforce—usually, the lot owners within the subdivision, sometimes adjoining property owners.

At other times the covenant may, as demonstrated by the context of its creation, have been created to benefit only the developer and his retained lands. In this second class of covenant, the authority to enforce resides solely with the developer or with the subsequent owners of his retained lands.[12] It is, of course, possible for a covenant, if the circumstances of its creation suggest it, to fall into both the first and second classes.

Rarely, in the land use approval-related context, the covenant falls within the third class, i.e., "mutual covenants between owners of adjoining lands."[13] In such circumstances, the covenant is enforceable by either as against the other. However, there is no authority to enforce by anyone other than those two lot owners (and their successors in interest).

Land Use Approval Conditions

It is important to distinguish a conservation easement and a private restrictive covenant from an administratively imposed restriction such as those imposed by municipal boards in their resolutions of approval. Such restrictions—often crafted as *conditions* of approval—are enforceable only by the municipality. A town or village has the authority to enforce conditions of resolutions of approval issued by its zoning board or planning board[14] even when the condition sought to be enforced has not been memorialized in an instrument recorded with the county clerk,[15] at least when the objective of such enforcement is "to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the [municipality's] zoning code…."[16]

In *O'Mara v Town of Wappinger*,[17] New York's Court of Appeals, in a decision issued upon a certified question posed by the United States Court of Appeals for the Second Circuit ("Is an open space restriction imposed by a subdivision plat under New York Town Law § 276 enforceable against a subsequent purchaser, and under what circumstances?"),[18] ruled that a restriction "placed on a final plat pursuant to Town Law § 276 when filed in the Office of the County Clerk pursuant to Real Property Law § 334 is enforceable against a subsequent purchaser."[19] The court also intimated that the authority to enforce against a subsequent purchaser may be even broader and not necessarily tied to statutes requiring recording and filing:

> In conclusion, we note that towns are separately bestowed with the authority to regulate land use within their borders (*see* Town Law § 261). This grant of authority is broad and encompasses a town's ability to impose reasonable conditions… The ability to impose such conditions on the use of land through the zoning process is meaningless without the ability to enforce those conditions, even against a subsequent purchaser.[20]

The jurisdiction to enforce conditions of planning board approvals rests with the building inspector (or code enforcement officer in those municipalities that have created this separate office) by way of a quasi-criminal proceeding brought in the local justice court[21] or with the village or town board by way of action in

the New York State Supreme Court. A justice court prosecution authorizes the imposition of a fine as punishment for the violation. The objective of a supreme court action is different—such an action usually seeks an order directing that the violation be cured, with contempt penalties (including jail) as a follow-up if the order of the court is not followed. A private citizen is not authorized to bring either a justice court or a supreme court proceeding to enforce an alleged violation of a condition of planning board approval except for town residents in special circumstances.[22]

May a town or village enforce the terms of a private covenant intended to benefit adjoining landowners that was not included as a condition within a planning board approval resolution? The answer is no, it may not enforce such a covenant.[23] This is so for the obvious reason that deed restrictions of record not mandated to be recorded by a planning board resolution are private in nature. Indeed, not only may a town or village not enforce such covenants, a planning board, in reviewing an application made in regard to property burdened by a private covenant, would be best served by not even considering such covenants during its review of that application. In this regard, the New York Court of Appeals, in *Friends of Shawangunks, Inc. v. Knowlton*,[24] ruled as follows:

> The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement [citations omitted]. Thus, a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance [citations omitted] and the issuance of a permit for a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant [citations omitted].[25]

The rationale here is rather direct and obvious. Private covenants are private matters. They are created privately and may be privately abandoned or bargained away. Enforcement of such covenants by private parties is subject to waiver, estoppel and laches defenses[26] that are often easily proved. When a municipality enters the arena, everything changes. Government is now taking sides. Unburdened by most defenses, and having no incentive to pay for or accept money for a release of the covenant, the originally private relationship becomes distorted. For instance, if a planning board insists that a developer honor the rights granted by a purely private, recorded access easement that may have been abandoned or that might be unenforceable by waiver or laches by incorporating the rights under that access easement into a site plan approval, it may well have revived private rights that are either dead or unenforceable and it may make it impossible for the private parties to agree to undo that covenant.

Enforcement; Conflicting Restrictions

As the foregoing suggests, it is not hard to imagine a conflict between a private restrictive covenant and a planning board condition of approval. How should such conflicts be resolved? What should a planning board do when faced with such conflicts? Below are three examples of such conflicts: one generic and two real-life. The ins-and-outs of these three examples will hopefully provide guidance in such matters.

Example #1: "No Further Subdivision"

A difficult (yet recurring) scenario helps to illustrate the crucial difference between a private covenant and a municipally imposed land use approval condition. Assume that subdivision approval over a piece of land was granted many years ago. The planning board included a condition within its resolution of approval prohibiting further subdivision of the lots in the subdivision. The developer, seeing marketing potential in the idea, recorded a private restrictive covenant to the same effect although he was not required by the planning board to do so.

Now fast forward. A lot owner with a house on a large lot in our now built-out subdivision wants to divide his lot into two. He comes to the planning board seeking subdivision approval. May the planning board grant such an approval? If it does, may the property owner living next door successfully prevent the subdivider from filing his map by court order? What will happen if that neighbor waits until after the map is filed, the lot is sold and a new house is constructed before he seeks to enforce the private covenant? What if this is the third time that the planning board—without objection or a lawsuit—approved further subdivision of a lot in this subdivision?

An Attempt at Answers

The first question is easily answered: a planning board that imposed a condition on a developer as part of its resolution of approval is always free to release the restriction of that condition when it deems such a release appropriate. And because, as noted above, the municipality's authority to review a land use permit and to attach (or release) conditions is an issue "separate and distinct" from the existence or enforceability of a private restrictive covenant, the planning board may, under the *Knowlton* case mentioned above, ignore the covenant and approve the amended subdivi-

sion releasing or relaxing the no-further-subdivision condition included in its earlier resolution of approval despite existence of the private recorded restriction.

However, that relaxation or release does not alter the right of the adjoining lot owners to enforce the recorded restriction as originally written. Stated another way: while a right of enforcement under the covenant is a "separate and distinct" issue that the planning board is free to ignore,[27] the practical effect of a planning board releasing a condition included in an earlier approval resolution also carried as a restriction in a private covenant is to create an inconsistency between the municipal approval and private enforcement rights under the restrictive covenant. The private parties may (or may not) separately agree to revise their respective rights and obligations—for consideration of some sort.

The remaining questions posed above have no black-and-white answers and will vary with the fact-intensive nature of the defenses of *waiver, abandonment* and *laches*. Importantly, as with the enforcement of conservation easements (as noted above), the defenses of estoppel, waiver and laches are generally not available to an alleged violator in an action brought by a municipality[28] to enforce the conditions of a planning board resolution of approval.

Example #2: Rosko Place Declaration of Restrictive Covenant[29]

Rosko Place Development was built on a former potato field in the Village of Southampton, New York. That potato field was owned by Leo Rosko (1921-1996), who lived in a house then located on the edge of the potato field.

Rosko developed his land (which included the land upon which his house sat) into a 24-acre housing subdivision in three phases, by filing subdivision maps in 1960, 1966, and 1972, respectively. The planning approval resolution imposed no conditions on the development of the land. Before filing the first of those maps, Rosko recorded a declaration of restrictive covenants binding the entire 24-acre parcel. That declaration included, among others, the following restrictions:

1. *Not more than one dwelling house for the accommodation of a single family only shall be erected on any lot with one outbuilding or accessory building which shall be a garage for use in connection with the dwelling and which may or may not be attached thereto. No other accessory buildings of any nature shall be erected, except a children's playhouse in the rear yard at least 25 feet from any property line.*

2. *No portion of any building shall be erected on any lot nearer than 50 feet from the road or street line upon which such lot faces. In the case of a corner lot the owner may elect which street line shall be considered the one upon which such lot faces. In the case of a lot which is less than 175 feet in depth this setback restriction shall not apply but that contained in the then Zoning Ordinance of the Village of Southampton[30] shall apply.*

* * * *

6. *In order to preserve the character and value of the subject property in general and that of individual purchasers as well as the investment of the undersigned parties and their successors in interest, prior to erection of any buildings on any part of said property the plans and elevations and locations on sites shall be approved by Leo Rosko or the designee hereinafter referred to, including, but not by way of limitation, drainage, plumbing and sewage disposal. Neither cost nor square nor cubic footage shall be arbitrarily controlling factors in the matter of approval, but rather esthetic suitability of plans and elevations to the individual site and to the area as a whole and sound building such as is currently found in usual first-class house construction and no plan so conforming with their requirements shall be arbitrarily rejected.*

* * * *

8. *The undersigned Leo Rosko hereby reserves and is granted to himself or his designee hereinafter mentioned the right to modify and amend the foregoing provisions hereinabove set forth EXCEPTING AND PROVIDED, however, that no such modification or amendment shall alter or modify the provisions above set forth concerning use of premises and character of such use, required area in plots individually conveyed or held and/or subdivided and such right is hereby expressly reserved so that the aforesaid provisions may be altered, waived or modified in accordance herewith by a written instrument duly executed by the foregoing person and recorded in the Suffolk County Clerk's Office.*

9. *The covenants and restrictions above provided shall run with the land.*

10. *The designee above referred to shall be one appointed by said Leo Rosko or, in the event of his death, by his personal representatives, by a document in the nature of an amendment to this Declaration in proper form for recording and recorded in the County Clerk's Office, to be effective until revoked by a like document similarly executed and recorded. The power given to the personal representatives shall terminate five (5) years after the date of death of said Leo Rosko.*

Today, Rosko Place is nearly fully developed. While most existing homes honor the 50-foot front yard setback requirement of the restrictive covenant, some sit only 30 feet from the road (the Southampton front yard bulk requirement[31] in this zone is 25 feet).

A homeowner now wishes to subdivide his lot. One lot will be 176 feet in depth, the other 174 feet. Each new house will sit 30 feet from the road, satisfying the village's front yard setback requirement of 25 feet but not the 50-foot restriction set forth in covenant #1. The homeowner also proposes to build multiple accessory structures on each lot as permitted under the local zoning law. Some of these accessory structures are proposed to sit closer to side and / or rear lot lines than the 25-foot restriction set forth in covenant #1. The village accessory structure setback requirement of 10 feet will not, however, be violated.[32] The homeowner has not submitted building plans or architectural elevations to the planning board. Nor does the village zoning law require that he do so.

Can the planning board approve the proposed re-subdivision? May it allow the proposed 30-foot front yard setback where the declaration requires 50 feet? May it *require* 50 feet? Does the planning board have the authority to require the submission of building plans and elevations? Is there anyone who has standing to enforce the covenants in question? Would the answers be different if the planning board had incorporated the language of each restrictive covenant into its approval resolution as a specific condition of approval?

An Attempt at Answers

Because the planning board resolution of approval did not incorporate the various restrictions of the restrictive covenant as conditions of approval, the restrictive covenant is not now enforceable by the village because these limitations are purely private matters beyond the jurisdiction or concern of the village.

The restrictive covenant is likely of both the first and second class within the meaning of *Haldeman v. Teicholz*.[33] Most of the individual covenants appear to have been recorded with the design to carry out a general scheme for the improvement or development of the Rosko Place subdivision. The restrictive covenant does not enforce itself, however; someone with standing must go to court to enforce it. Thus, the violation of any one of the covenants (except that portion of covenant #6 dealing with the requirement of prior plan approval) is enforceable by any owner of a lot in the subdivision for all such lot owners are intended beneficiaries of the covenant. Enforcement is, however, subject to the well-recognized private enforcement defenses noted above.

Because the covenant was also recorded to benefit Leo Rosko (as developer and as owner of retained lands) and because Rosko specifically retained the right under covenant #8 to enforce covenant #6 (dealing with the requirement of prior plan approval), the restrictive covenant is also a covenant of the second class for it reserved to Rosko (while he was living) or to any designee he may have appointed (which right of appointment expired five years after Rosko's death in 1996) the authority to enforce covenant #6. If no designee was appointed (and there is no evidence to suggest that one ever was), there is now no one with standing to enforce the prior plan approval requirement of covenant #6. Had the planning board imposed a condition of prior building plan approval (for some appropriate aesthetic or environmental reason) in its resolution of approval, the planning board would have the authority to require the submission of building plans. The source of the authority to do so would flow, however, from its resolution and would be unrelated to the restrictive covenant.

The prior building plan approval covenant (covenant #6) is a covenant-of-the-second-class power to enforce reserved personally to Leo Rosko (or his designee for a fixed period of five years) and was not intended to last forever. As a result, a lot owner, if charged in a private lawsuit with a violation of the prior plan approval requirement of covenant #6, would likely be successful in defending upon standing grounds and by demonstrating that the reservation of the authority to approve is no longer in force. An action to enforce the other covenants by a current Rosko Place lot owner would have validity but would, of course, be subject to the defenses of abandonment, waiver and laches. These defenses might be extremely difficult to overcome here.

If the village (through its planning board or building department) had earlier authorized accessory buildings or setbacks at odds with those contained in the covenant (and the village certainly had the power and authority to do so), such approvals would be irrelevant in an action to enforce the covenants brought by a Rosko Place lot owner. However, the failure of a current challenger to have sought enforcement of the covenant in the past as against those who had built such accessory buildings will probably doom his current enforcement action to failure.

Example #3: Gerta Sandnes Restrictive Covenant[34]

Years ago, Gerta Sandnes owned a large home sitting on a hill in the Village of Cornwall-on-Hudson overlooking the Hudson River. It is a grand and majestic home located on the aptly named Grandview Avenue and has sweeping views of the river below. Sandnes also owned two lots directly across Grandview Avenue between her house and the Hudson River. In 1948, Sandnes sold her lots across the street, retaining her home. Desiring to protect her view of the river, Sandnes included in each of the deeds conveying her across-the-street lots, a recorded restrictive covenant that reads as follows:

> The parties of the second part further agree that in the event of the erection

> of any structure on the premises above described, the said structure shall be not more than one story in height above the street level of Grandview Avenue.

Sandnes continued to own her home located on the large parcel intended to be benefited by the restriction for a period of years after selling the land across the street. All of Sandnes's properties are now in other hands. The Sandnes home is now owned by Margaret McLaughlin. One of the parcels across the street is now owned by Edward and Floranne Moulton; the other by Simon Hornman. All of these parcels have changed hands several times leading up to their present ownership. In each conveyance of the "grand house" parcel now owned by McLaughlin, reference was made in the deed to the restrictive covenant.

Sandnes also originally owned the entire block upon which the grand house sits. Over the years, that single-parcel block was slowly subdivided and the lots cut free from the grand house were sold. The deeds to those lots make no mention of the restrictive covenant.

The lots on either side of the Moulton and Hornman lots were never owned by Sandnes. The current owners of those parcels thus came into ownership under a chain of title having no privity with Sandnes.

In 2005, the Moultons proposed to build a single family home on their then-vacant lot. Under the local village zoning law, site plan approval (public viewshed protection) was required. Certain area variances (setbacks and steep slopes) were also required.

As often happens when change is proposed, the neighborhood became energized by the proposal. While some neighbors were pleased with the design and size of the proposed home, others objected and incorporated—as the centerpiece of their objection—a claim that the house violated the restrictive covenant. Those opposed included Hornman, other neighbors on the Moulton / Hornman side of Grandview Avenue and many of those living in homes built on the block where the Sandnes home originally sat alone. They appeared at the public hearings before both the planning board and the zoning board and, after variances were granted and site plan approval was obtained, turned to the courts for redress. Eight neighbors, including Simon Hornman, banded together in that lawsuit.

Margaret McLaughlin, the present owner of the Sandnes home, did not join the legal challenge. Indeed, she spoke in favor of the Moulton proposal at the planning board and zoning board public hearings. She also submitted an affidavit to the court in the legal proceeding in which she reported the following:

> I have seen the plans and architectural elevations for the home the Moultons intend to build. The house is only one story at street level. Moreover it is a handsome and gracious home that does not in any way interfere with my views of the Hudson River. On the contrary, this home complements and enhances those views.
>
> I have no objection to the Moultons constructing the home of their dreams. Indeed, I encourage them to move on with the task.
>
> I submit this affidavit knowing that it will be used to oppose the lawsuit some of my neighbors have brought against the Moultons and that it will, specifically, be used to prevent those claiming the benefit of the restrictive covenant protection belonging to me from doing so.

The planning and zoning boards ignored the existence of the restrictive covenant during its review of the application. Were those boards correct in doing so? Do any of the challengers have standing to enforce the restriction?

An Attempt at Answers

For the obvious reason of protecting her view of the Hudson River, Ms. Sandnes included in the 1948 conveyance of the lands that are now owned by the Moultons and Hornman, a restriction prohibiting construction of a home of more than one story above street level. Reference to the restrictive covenant appears in the deeds to both grantees. There is nothing in the record of title to suggest any intent on the part of Sandnes to extend any right of enforcement of the covenant to anyone other than herself. The restrictive covenant does not appear in any of the chains of title for surrounding parcels of land.

The covenant in question is not of the first class referred to above. The covenant was not created "with the design to carry out a general scheme for the improvement or development of real property."[35] It was not recorded as part of a subdivision. Nor was it recorded simultaneously with a series of conveyances, the pattern of which might reveal a general scheme. The covenant limits construction upon only two lots and did so for the benefit of contiguous land retained by the creator of the covenant.

Nor is the covenant one covered by the third class, *i.e.*, a class concerning "mutual covenants between owners of adjoining lands." The covenant in question runs only one way: from Moulton and Hornman to McLaughlin. The covenant is one created solely for the benefit of the views of McLaughlin. The required ele-

ment of mutuality necessary to demonstrate existence of a covenant of the third class is absent.

The covenant, therefore, by both process of elimination and defining characteristics, falls into the second class—a covenant "created by the grantor, presumptively or actually, for the benefit and protection of contiguous or neighboring lands retained by [him or her]."[36] What does categorizing the covenant as belonging to this class mean here? Simply, it defines who has standing to enforce its terms, for only the grantor (or the successors in interest to the grantor) may enforce covenants falling into this class.

> The second class embraces those cases in which the grantor exacts the covenant from his grantee, presumptively or actually, for the benefit and protection of contiguous or neighboring lands which the former retains. In such cases the grantees, if there are more than one, cannot enforce the covenant as against each other, although the grantor and his assigns of the property benefited may enforce it against either or all of the grantees of the property burdened with the covenant.[37]
>
> One who imposes a restriction upon buyers of his land may have in mind benefit to himself, or benefit to others (*Korn v. Campbell*, 192 N. Y. 490). If all that he has in mind is benefit personal to himself, the buyers, though subject to the restrictions, do not succeed to the right to enforce it *inter se*.[38]

Thus, the covenant, being one falling into the second class of restrictive covenants because it was created "for the benefit and protection of contiguous or neighboring lands… retain[ed]"[39] by its creator, may only be enforced by its creator (or that creator's successor in interest). It may not be enforced as between grantees and it may not be enforced by strangers to the conveyance.[40]

The planning board, recognizing, under *Knowlton*, that the existence of this private restrictive covenant was a matter "separate and distinct" from its jurisdiction to review site plans and that "it may not… den[y] [approval] because the proposed use would be in violation of [the] restrictive covenant,"[41] was correct in ignoring the existence of the covenant during its review of the Moulton site plan application. The court ruled in favor of the Moultons and dismissed the hybrid action / proceeding brought against the Moultons and the village on standing grounds.

It would also have been correct for the planning board, under *Knowlton*, to ignore the covenant had Mrs. McLaughlin appeared at the public hearing and complained that her views were being adversely affected by construction of the Moulton home and that she insisted upon the planning board enforcing the covenant created for her benefit, for that issue and McLaughlin's rights are matters separate and distinct from the planning board's authority to review the site plan.

While not all factual scenarios will involve the level of complexity and conflict set forth in these examples, the governing principles will remain the same. The rights under privately recorded restrictive covenants are private in nature and are separate and distinct from local zoning law restrictions. Planning and zoning boards have no authority to enforce private covenants. Municipal boards and officials should be aware, however, that parties with standing may seek to enforce their rights in court. Such enforcement may render projects authorized by municipal approvals unbuildable because a party with standing has enforced its private rights.

Endnotes

1. As of January of 2010, there were no fewer than ninety land trust organizations in New York capable of holding such easements, authority each shares with every municipality in the state.
2. Obviously, then, a true conservation easement can only be utilized when a willing grantee exists. This is important in formulating and implementing municipal policy for it is questionable whether it is wise for a municipality to agree to be the enforcer of every "no above ground swimming pools" (or other self-imposed) condition that a developer might wish to impress on future residents of his subdivision. Utilization of a true conservation easement should be reserved for those circumstances where the public importance of what is to be conserved or preserved, a developer's volunteerism, and the municipality's willingness to enforce all come together.
3. See, New York Environmental Conservation Law, Article 49, Title 3 [sections 49–0101 through 49–0111].
4. As an aside, it is significant to note that a tax deduction is not available to the grantor if the grant of the conservation easement was a *quid pro quo* for a land use approval. Thus, a legislative or administrative mandate that a conservation easement be granted likely takes away the tax deduction that is often the primary reason a landowner might be motivated to grant a conservation easement in the first instance.
5. ECL §49-0305 (5).
6. *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc*. 73 A.D.3d 1257, 1261 (3d Dep't 2010).
7. *Haldeman v. Teicholz*, 197 A.D.2d 223 (3d Dep't 1994).
8. *Id.* at 226.
9. *Haldeman v. Teicholz*, 197 A.D.2d 223 (3d Dep't 1994).
10. *Id.* at 224-225.
11. *Id.*
12. *Id.*
13. *Id.*
14. Boards of architectural review are not creatures of state law. Thus, any authority to enforce conditions embedded in the

resolutions of such boards must be set forth with careful particularity in the local code of the municipality that created such board.

15. *O'Mara v. Town of Wappinger*, 9 N.Y.3d 303 (2007).

16. *Matter of Commerce Bank v. Planning Board of the Town of Bedford*, 47 A.D.3d 810 (2d Dep't 2008).

17. *O'Mara v Town of Wappinger*, 9 NY3d 303 (2007).

18. *Id.* at 309.

19. *Id.*

20. *O'Mara v. Town of Wappinger*, 9 NY3d 303, 310–11 (2007).

21. Specific provisions of the Town Law and Village Law of the State of New York [Section 268 of the Town Law and Section 7-714 of the Village Law] enable towns and villages to bring such enforcement actions. However, in order to exercise that authority a municipality must, by adopting local legislation, *implement* that authority. Not every municipality in this state has implemented all of the authority that the state has *enabled* and very few have implemented their authority as fully as it has been enabled.

22. See Town Law Section 268 (2). This section allows "any three taxpayers of the town residing in the district wherein [a] violation [of code or a planning board resolution condition (if the power authorized by state law has been implemented)] exists, who are jointly or severally aggrieved by such violation… [upon] the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed… [to] institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do." An "appropriate action" does not include a justice court quasi-criminal proceeding; rather, only an action in the Supreme Court may be commenced under authority of this Section. *See Phair v. Sand Lake Corp*, 56 A.D.3d 449 (2d Dep't 2008). There is no parallel provision in the Village Law of the State of New York. Thus, village taxpayers are not given this option.

23. See, *Vandnos v. Hatzimichalis*, 131 A.D.2d 752 (2d Dep't 1987); *Chambers v. Old Stone Hill Road Associates*, 1 N.Y.3d 424 (2004).

24. *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387 (1985).

25. *Id.* at 392. *See also Chambers v. Old Stone Hill Road Associates*, 1 N.Y.3d 424 (2004); *Hejna v. Board of Appeals of Village of Amityville*, 105 A.D.3d 843 (2d Dep't 2013); *Shuttle Contracting Corp. v. Planning Board of the Incorporated Village of Great Neck*, 73 A.D.3d 789 (2d Dep't 2010); *Gersten v Cullen*, 203 A.D.2d 744, 747 (3d Dep't 1994)("Petitioner's remaining argument that the Board's determination granting Mayfair's application for a conditional use permit lacked substantial evidence because it ignored the injurious effect the permit would have upon petitioner's existing easement over the subject property. Petitioner's sole remedy for an alleged violation of the easement is a private action against [the developer] and not the denial of a use allowed by the Zoning Ordinance."); *Vandnos v. Hatzimichalis*, 131 A.D.2d 752 (2d Dep't 1987); *Perrin v. Bayville Village Board*, 70 A.D.3d 835 (2d Dep't 2010) (article 78 proceeding against village for alleged violation of terms of restrictive covenant converted to declaratory judgment action because rights under a private restrictive covenant are separate from issues of municipal authorization to erect a microwave dish antennae on village-owned land).

26. Generally, the only viable defenses to suits seeking to enforce restrictive covenants are *abandonment*, *waiver* and *laches*. Laches is a defense best described as sleeping on one's rights. Thus, the failure to challenge a violation of a covenant at the earliest stage might bar a belated attempt at enforcement of the covenant. As an example, should the lots in a subdivision be bound by a covenant restricting the type, style and size of homes that may be built and should a lot owner build a home of a type, style or size prohibited by the covenant, an enforcement action commenced years after construction has been completed might be barred under this doctrine. Waiver is a doctrine that bars enforcement of a covenant where past violations of the same covenant were not enforced. A past failure to enforce results in a *waiver* of the benefits the covenant grants. Thus, had the owner of a lot in a subdivision violated a covenant in the past and had no one enforced the terms of the covenant against that violation, that fact might prevent enforcement in all future instances. Abandonment occurs when the holder of rights under an easement or covenant fails to act (or acts overtly contrary to his rights) in a fashion that demonstrates an intent that the easement holder has permanently relinquished all rights under the easement. *Gerbig v. Zumpano*, 7 N.Y.2d 327, 330–331 (1960).

27. *See Vandnos v. Hatzimichalis*, 131 A.D.2d 752 (2d Dep't 1987).

28. *Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 178 (1988) is a fascinating real-life example of this legal principle.

29. I thank Sally Spanburgh, a Southampton village resident who documents the history of Southampton properties surviving, endangered and no longer existing in her *Southampton Village Review* blog [http://shvillagereview.blogspot.com/], for bringing this interesting matter to my attention. I enjoyed my exchange of emails with this local activist of keen intelligence, tireless energy and mature vision.

30. Section 116-11.1 [Yard regulations in certain residence districts] establishes, for lots of the size in this subdivision, a front yard setback requirement of 25 feet and a side yard setback requirement of 10 feet.

31. See, Section 116-11.1 [Yard regulations in certain residence districts].

32. See, Section 116-11.1 [Yard regulations in certain residence districts].

33. *Haldeman v. Teicholz*, 197 A.D.2d 223 (3d Dep't 1994).

34. The facts set forth here—though somewhat simplified—come from a matter litigated by the author on behalf of the Moultons in Orange County Supreme Court entitled: *Cliffside Neighborhood Group, et al. v. Village of Cornwall On Hudson Planning Board, Edward Moulton & Floranne Moulton* [Orange County Index Number: 2004-7196].

35. *Haldeman v. Teicholz*, 197 A.D.2d 223, 224–225 (3d Dep't 1994).

36. *Id.*

37. *Korn v. Campbell*, 192 N.Y. 490, 495–496 (1908).

38. *Bristol v. Woodward*, 251 N.Y. 275, 284 (1929).

39. *Haldeman v. Teicholz*, 197 A.D.2d 223, 224–225 (3d Dep't 1994).

40. Thus, the remaining challengers do not have standing to enforce the restrictive covenant, because: (1) the restrictive covenant does not appear in the chain of title of any of them, and (2) there is (as a result) no privity between those challengers and either the Moultons or McLaughlin, and (3) because—given the myriad of dates under which their predecessors took title—no common scheme to afford them a benefit under the restrictive covenant can be shown, and (4) perhaps most simply, because none of those challengers have standing to enforce the restrictive covenant for the obvious reason that the covenant was recorded, as noted already, solely to protect the views of Sandnes and not to protect the views of other landowners.

41. *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387 (1985).

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Courts Push Back Against Municipalities in State Environmental Quality Review Act Cases

By Eric L. Gordon

Legal commentators have observed that lawsuits contesting actions taken by municipalities under the State Environmental Quality Review Act (SEQRA) are often unsuccessful because courts must defer to the discretion enjoyed by local boards acting as lead agency under SEQRA. However, recent cases confirm that courts will not passively rubber stamp SEQRA determinations and carefully examine whether a municipality has overstepped its review authority:

- Two years ago, the Environmental Claims Part of the Westchester County Supreme Court issued an order and judgment annulling an Environmental Findings Statement (EFS) issued by the Village of Mamaroneck Planning Board restricting the number of seasonal residential units that could be constructed on property owned by the Mamaroneck Beach & Yacht Club within a marine recreation zoning district. The court held the seasonal residential units were a permitted accessory use and therefore, the Planning Board could not, on the premise of exercising its environmental review authority, limit the number of seasonal residences without consideration of appropriate environmental and socio-economic as factors required under SEQRA.[1]

- Similarly, in *Fortress Bible Church v. Feiner, et al.*, a federal district court, among other determinations, nullified findings made by the Town of Greenburgh under SEQRA with respect to the proposed construction of a church and school.[2] Although the Town's SEQRA findings were overturned based upon the violation of a federal statute, the Religious Land Use and Institutionalized Persons Act, the case confirms that courts will not uphold SEQRA determinations that are not based on legitimate environmental or socio-economic factors. The U.S. Court of Appeals for the Second Circuit recently affirmed the lower court decision in this case. The Second Circuit held environmental review by a municipality that is intertwined with, and a primary vehicle for, zoning decisions is considered application of a zoning law under the statute. The court reasoned that, to hold otherwise would be to allow a municipality to evade liability by simply re-characterizing its zoning decisions as environmental determinations.

This past year also saw legal victories for applicants who went to court over municipal agencies' delays or denials of their applications based on environmental reviews undertaken pursuant to SEQRA. Here are a few examples.

- In *Center of Deposit, Inc. v. Village of Deposit*, a New York state appeals court overturned a lower court decision and determination by the Village of Deposit Planning Board requiring the petitioner to submit a draft environmental impact statement (DEIS) when seeking a simple subdivision of a single parcel of his property.[3] The court ruled the planning board "had completely failed to articulate" how the proposed action could potentially alter drainage flow or patterns or surface water runoff, affect air quality, affect public health and safety, result in the diminution of open space or affect the character of the existing community by changing the density of land use, thereby requiring a DEIS.

- In *Kinderhook Development, LLC v. City of Gloversville Planning Board*, 18 N.Y.3d 805, 963 N.E.2d 791 (2012), a New York state appeals court overturned a planning board's denial of a special use permit for a housing project based on alleged environmental impacts.[4] The court found that the planning board's decision was not based on substantial evidence when the planning board ignored its own preliminary study and determination that no environmental impact statement was required under SEQRA.

- In another case, *Costco Wholesale Corp. v. Town Bd. of Town of Oyster Bay*, a New York state court of appeals held that the Town of Oyster Bay failed to comply with SEQRA procedural requirements concerning the timely filing of a final EIS and required the town to proceed with the SEQRA review.[5]

Of course, not all challenges under SEQRA are successful in light of the deferential standards a court must apply. In one unusual twist involving a dispute between two Westchester municipalities, rather than an applicant and a municipal agency, an unsuccessful

challenge under SEQRA recently resulted in a large development project going forward.

- The Village of Sleepy Hollow and General Motors recently prevailed in a lawsuit brought by the neighboring Village of Tarrytown contesting the SEQRA findings made by the Village of Sleepy Hollow with respect to the redevelopment of the former GM assembly plant. The Village of Sleepy Hollow's approval of the Lighthouse Landing mixed-use development project followed an eight-year review process that entailed more than 50 public meetings and hearings and the adoption of a detailed Environmental Findings Statement. Tarrytown challenged the project approvals, claiming that Sleepy Hollow had failed to take a "hard look" at its traffic impacts in Tarrytown pursuant to SEQRA. The Supreme Court, Westchester County, adopted many of Sleepy Hollow's arguments and held it was "unreasonable" for Tarrytown to dispute the traffic mitigation measures specified in the Sleepy Hollow's Environmental Findings Statement when Tarrytown had incorporated the same measures in approving a significant waterfront development within its borders. The court, in upholding the SEQRA Environmental Findings Statement, held that Sleepy Hollow had engaged in a comprehensive review and taken the required "hard look" at environmental impacts associated with the redevelopment of the GM property.[6]

As current developments illustrate, applicants should take heart that actions taken, or not taken, by municipal agencies acting as lease agency under SEQRA must be based upon legitimate environmental and socio-economic factors, as confirmed by the administrative record developed before the local agencies, or the determinations may not be upheld in court.

Endnotes

1. *Mamaroneck Beach & Yacht Club, et al. v. Galvin*, West. Cty. Sup Ct. Index No. 24348/07 (June 18, 2010).
2. *Fortress Bible Church v. Feiner, et al.*, 734 F. Supp. 2d 409, 414 (S.D.N.Y. 2010), *aff'd*, 694 F.3d 208 (2d Cir. 2012).
3. 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011).
4. 88 A.D.3d 1207, 931 N.Y.S.2d 447 (3d Dep't 2011).
5. 90 A.D.3d 657, 934 N.Y.S.2d 430 (2d Dep't 2011).
6. *Mayor and the Board of Trustees of the Village of Tarrytown v. Mayor and the Board of Trustees of the Village of Sleepy Hollow*, West. Cty. Sup. Ct. Index No. 11630/11 (Sept. 12, 2012).

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The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclose Under FOIL and the OML

By Steven G. Leventhal and Carol L. Van Scoyoc

Logic and experience demonstrate that most government officers and employees are honest, and truly wish to do the right thing. Yet, honesty alone may not always offer sufficient protection from inadvertent misconduct. In particular, the different and sometimes contrary standards of conduct applicable in the public and private sectors can sometimes make prohibited conduct appear innocent.

One obvious example of a standard of conduct applicable in the public sector that differs markedly from the practices prevalent in the private sector is the rule restricting the solicitation or acceptance of gifts and favors by municipal officers or employees. In the private sector, gifts are freely exchanged to promote business. The practice is so widely accepted that the Internal Revenue Service recognizes business entertainment as an ordinary and necessary business expense.[1] However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.[2]

Another area of distinct difference between the cultures of the private and public sectors is in the extent to which information may be withheld as "confidential."

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. But, beginning in the 1960s with the enactment by Congress of the Freedom of Information Act (FOIA),[3] and continuing in the post-Watergate era, we have come to view openness and transparency in government as a fundamental public policy, essential to keep government accountable, and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law (FOIL)[4] which makes most government records available for public inspection and copying, and the Open Meetings Law (OML)[5] which makes most government meetings open to attendance by the public.

New York General Municipal Law §805-a provides, in pertinent part, that no municipal officer or employee shall disclose confidential information acquired by him or her in the course of his or her official duties or use such information to further his personal interests. However, the term "confidential information" is neither defined in the General Municipal Law (GML), nor in a similar provision of the Public Officers Law applicable to state employees.[6] Moreover, there appears to be no consensus as to the meaning of "confidential information" as that term is used by GML Article 18.

In this article, we will explore the meaning of the term "confidential information" as applied in various government contexts, including the confidentiality of matters discussed in executive session, the confidentiality of proceedings before a local municipal board of ethics, the scope of the attorney-client privilege in the government setting, and the broader duty of confidentiality owed by government attorneys under the New York Rules of Professional Conduct.

May a Local Law Prohibit Disclosure of Matters Discussed in Executive Session?

In the year 2000, the Attorney General was asked whether a municipality has the statutory authority under GML §806 to adopt a code of ethics that prohibits its members of the legislative body from disclosing matters discussed in executive session, and whether such a prohibition would be consistent with the Open Meetings Law and the Freedom of Information Law. The Attorney General opined that a local municipality has the statutory authority to prohibit members of its legislative body from disclosing matters discussed in executive session, and that such a prohibition would be

consistent with the Freedom of Information Law and the Open Meetings Law.[7] The Attorney General noted that "any such restriction on speech would, of course, be subject to further state and federal constitutional requirements."

The Attorney General reasoned that the purpose of an executive session is to permit members of public bodies to discuss sensitive matters in private, and that the matters that are permitted to be discussed in executive session are matters which, if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety.[8] The Attorney General cited a 1997 decision of the Third Department,[9] finding that disclosure of matters discussed in executive session would defeat the parallel legislative purposes of the Open Meetings Law and the Freedom of Information Law, and effectively applying the statutory grounds for meeting in executive session as exceptions to mandatory disclosure under the Freedom of Information Law. The Attorney General concluded that the GML §806(1)(a) authorization to adopt municipal codes of ethics that prohibit disclosure of information is consistent with and reinforces the fact that records of discussions properly taking place in executive session may be withheld from public disclosure.

In a series of staff advisory opinions,[10] the Executive Director of the Department of State Committee on Open Government reached a different conclusion. In response to a 2007 inquiry from a local school board member who received a memo from the school district citing GML §805-a and Board Policy to prohibit the disclosure of information acquired in executive session, the Executive Director opined that:

> … [I]n most instances, even when records may be withheld under the Freedom of Information Law or when a public body…may conduct an executive session, there is no obligation to do so. The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to disclose records or to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."[11]

Citing a 1986 decision by the New York Court of Appeals,[12] the Executive Director observed that the characterization of records as "confidential" must be based on statutory language that specifically confers or requires confidentiality; and that to confer or require confidentiality, a statute must leave no discretion to an agency (*i.e.*, the agency *must* withhold the records). Because the exemptions from mandatory disclosure set forth in the Freedom of Information Law are permissive (*i.e.*, the agency *may* withhold the records), the Executive Director concluded that the only situations in which an agency must withhold records would involve instances in which a statute other than the Freedom of Information Law prohibits disclosure. The Executive Director concluded that "[s]ince a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not 'confidential.'"

New York State Attorney General Opinion—A Closer Look

The Attorney General's Office issued its April 6, 2000 opinion in response to an inquiry from the Corporation Counsel of the City of Rome. There, the Attorney General opined that a local legislative body has the statutory authority by local law or in its code of ethics to prohibit a legislator from disclosing matters discussed in executive session.[13] The Attorney General noted that "while nothing in the New York Public Officers Law directly prohibits such disclosure, such a prohibition is entirely consistent with provisions of the Open Meetings Law and the Freedom of Information Law."

The Attorney General observed that §806 of the New York General Municipal Law requires that each local government and school district must adopt a code of ethics setting forth the standards of conduct reasonably expected of its officers and employees, and that §806(1)(a) expressly provides that such codes of ethics may prohibit disclosure of information.[14]

The Attorney General further noted that a local government is also authorized by §10 of the Municipal Home Rule Law to enact local laws relating to the powers, duties and other terms and conditions of employment of its employees; its property, affairs or government; and the public health, safety and welfare.[15]

The Attorney General reasoned that a restriction on disclosure of information discussed in an executive session would further the statutory purposes of executive sessions, as set forth in the Public Officers Law. A local legislative body may only conduct an executive session upon a majority vote of its total membership taken in an open meeting in accordance with a motion identifying the area or areas of subjects to be considered. The underlying rationale for an executive session is to permit members of public bodies to discuss sensitive matters in private. A review of the statutorily enumerated subjects that may be discussed in executive session, set forth in Public Officers Law §§105 (1)(a)-(h), clearly recognizes that there are matters, which if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety:

1. Matters which will imperil the public safety if disclosed;
2. Any matter which may disclose the identity of a law enforcement agent or informer;
3. Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
4. Discussions regarding proposed pending or current litigation;
5. Collective negotiations under the Taylor Law;
6. The medical, financial, credit or employment history of a particular person or corporation or matters leading to the appointment, employment, promotion or discipline of a person;
7. Preparation, grading or administration of examinations;
8. Acquisition, sale, or lease of real property or the proposed acquisition of securities or sale or exchange of securities held by such public body but only when publicity would substantially affect the value thereof.[16]

The Attorney General further reasoned that disclosure of matters discussed in executive session would defeat the apparent legislative intent of authorizing local legislative bodies to discuss these matters in private and that disclosure would be contrary to the public welfare.[17] A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and would promote the public interest. The Attorney General cited a 1997 Appellate Division, Third Department decision in *Kline v. County of Hamilton*, 235 AD2d 44 (3d Dep't 1997), holding that a legislative body may withhold from public disclosure tape recordings, transcripts and minutes of discussions conducted in executive session. The Attorney General quoted the Third Department:

> It makes little sense to permit government bodies to meet in private under clearly defined circumstances only to subsequently allow the minutes of those private meetings to be publicly accessed under FOIL. Only in the event that action is taken by a formal vote at an executive session do both FOIL and the Open Meetings Law require a public record of the manner in which each Board member voted.[18]

The Attorney General further quoted the Court in stating that:

> In our view, memorialized discussions at duly convened executive sessions, which do not result in a formal vote, whether consisting of privileged attorney-client communications or otherwise (*see*, Public Officers Law §105), are not the type of governmental records to which the public has to be given access. While the purpose of FOIL is to lift the "cloak of secrecy or confidentiality" (Public Officers Law §84) from governmental records which are part of the governmental process, where, as here, confidentiality has been specifically sanctioned by Public Officers Law §§105 and 106, the records at issue fall within the exemption of Public Officers Law §87(2)(a) and should be shielded from public disclosure.[19]

It is the Attorney General's view that since a governing body of a municipality may withhold any records of discussion properly taking place in an executive session, §806(1)(a) of the General Municipal Law, authorizing municipal codes of ethics that prohibit disclosure of information is consistent with and reinforces this fact, and thus a local legislative body has the statutory authority to prohibit a legislator from disclosing matters discussed in executive session. The Attorney General noted, however, that the decision to enter into executive session is discretionary and that any prohibition on speech would be subject to State and Federal Constitutional requirements.[20]

New York State Committee on Open Government Opinions—A Closer Look

As a result of the opinion received by its Corporation Counsel from the Attorney General, the City of Rome adopted an ordinance prohibiting City officers or employees from disclosing "by any means" certain information "discussed or deliberated during a properly convened executive session," and further provided that a violation "shall be punishable pursuant to the general penalty provision of the Code of Ordinances." The Mayor of Rome also issued an executive order prohibiting the disclosure of "any sensitive matter or information that if disclosed would disrupt the efficient and effective operations of the City government or would impair the public officer's close working relationship with the Mayor."

A member of the City of Rome's government then sought an advisory opinion from the Committee on Open Government concerning the propriety of those actions.

In FOIL-AO-12558, Executive Director Robert Freeman opined that the actions were of questionable legality, and offered the following analysis as set forth herein.

Giving "due respect" to the Appellate Division and the Attorney General, Executive Director Freeman stated that the conclusion they reached with regard to the notion of "confidentiality" and the scope of §87(2)(a) is inconsistent with more detailed analyses by the New York of Appeals in *Capital Newspapers v. Burns*, 67 NY2d 562 (1986) and by federal courts in construing the Freedom of Information Act (FOIA). The Executive Director opined that a record is not "confidential" under FOIL, unless the record is specifically exempted from disclosure by state or federal statute in accordance with §87(a) of the Public Officers Law. Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal statute as "exempt" from the provisions of that statute.

According to Executive Director Freeman, both the New York Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on federal or state statutory language that explicitly confers or requires confidentiality.[21]

In *Capital Newspapers v. Burns*, the Court of Appeals declared that: "Although we never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection."[22]

In construing the equivalent exception to the right of access conferred by the FOIA (the federal Freedom of Information Act), Executive Director Freeman observed that it has been found that:

> Exemption 3 excludes from its coverage only matters that are: specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3) (emphasis in original).[23]

Records sought to be withheld under the authority of another statute thus escape the release requirements of FOIA if—and only if—that statute meets the requirements of Exemption "3," including the threshold requirement that the statute specifically exempt matters from disclosure. In other words, a statute that is claimed to qualify as an Exemption "3" withholding statute must, on its face, exempt matters from disclosure.[24] In the words of the Executive Director of the Committee on Open Government, to be "exempted from disclosure by statute, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records."[25]

When records are not exempted from disclosure by a separate statute, both FOIL and FOIA are permissive. Although an agency may withhold records in accordance with the grounds for denial set forth in §87(2) of the Public Officers Law, the Court of Appeals in *Capital Newspapers* held that the agency is not obliged to do so and may choose to disclose—it has the discretion to do either.[26]

The only situations in which an agency would be required to refrain from disclosure would involve matters in which a statute other than FOIL prohibits disclosure (the same is true under FOIA). There is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).[27]

The Committee on Open Government employs the same analysis in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in §105(1)(a)-(h) of the Public Officers Law, there is no requirement that an executive session be held even though the public body has the right to do so. Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be "confidential," a federal or state statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.[28]

For example, if a discussion by a board of education concerns a record pertaining to a particular student *(e.g.* disciplinary action), the matter must be discussed in private and the record must be withheld to the extent that public discussion or disclosure would identify the student. The Family Educational Rights and Privacy Act, a federal statute, 20 USC §1232(g), generally prohibits an educational agency from disclosing educational records or information derived from those records that are identifiable to a student, absent parental consent. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from disclosure by statute (OML §108(3)). Similarly, in the context of FOIL, an

education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both instances, a board of education would be prohibited from disclosing same, because a statute requires confidentiality.[29]

The published opinions of the Committee on Open Government recognize that the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. In a similar fashion, the grounds for withholding records under FOIL relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Moreover, a unilateral disclosure by a member of the public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.[30]

Further, disclosures made contrary to, or in the absence of consent by the majority of the members of a deliberative body, could, in some cases, result in an unwarranted invasion of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and to the functioning of government and disclosures should, in the view of the Executive Director, be cautious, thoughtful and based on an exercise of reasonable discretion.[31]

Opinions of the New York State Commissioner of Education

In a 2007 opinion,[32] the Executive Director expressed his disagreement with opinions of the Commissioner of Education finding that disclosures by school board members of "confidential information" obtained at an executive session of a board meeting violated §805-a-(1)(b) of the General Municipal Law. One decision in particular, the *Application of Patrick A. Nett and Ronald R. Raby for the Removal of Tina Marie Weeks as a Member of the Board of Education of the Patchogue-Medford Union Free School District*, issued on October 24, 2005, is of interest in examining the difference of opinion between the Committee on Open Government and the Department of Education as to the confidentiality of discussions properly held in executive session.[33]

In 2003, the School District began an investigation into allegations of misconduct against a school district employee. The district brought disciplinary charges against the employee and a hearing was conducted pursuant to §75 of the Civil Service Law. At the conclusion of the hearing, the employee was found guilty of 17 charges of misconduct and termination of his employment was recommended. By a 4-3 vote, the board adopted the hearing officer's findings and recommendations, and terminated the employee. Board member Tina Weeks voted against it. The terminated employee commenced a federal civil action challenging his termination and seeking, among other things, damages, reinstatement, back pay and benefits. The board members voting in favoring of the termination, the school district and others were named as defendants in the lawsuit.

During the deposition of the terminated employee in his civil suit, it was revealed that board Member Tina Weeks provided the terminated employee with recordings of four or five executive sessions at which his possible termination was discussed. The other board members did not know that Weeks surreptitiously recorded the sessions and did not consent to the recording. The school district did not have its own policy prohibiting the disclosure of confidential information.

The other board members maintained that the statements made in executive session were confidential and that Weeks violated the fiduciary duty that she owed to the District as a board member, her oath of office, and the prohibition against unauthorized disclosure of confidential information set forth in GML §805-a. They asserted that Weeks should be removed from the Board.

Board member Weeks admitted that she recorded the executive sessions without the knowledge of her fellow board members and gave the recordings to the employee, but denied that she willfully violated the law, likened herself to a whistleblower, and asserted that she acted in good faith based on the advice of counsel.

Citing previous Departmental opinions, the Commissioner of Education found that Weeks' unilateral taping and disclosure of the executive session material was a violation of her fiduciary duty as a board member, her oath of office and the GML. The Commissioner observed that while the term "confidential information" is not defined in the GML, notably absent from GML §805-a (1)(b) is any express statement that the basis for confidentiality be statutory, and thus it is reasonable to assume that the State legislature intentionally meant to omit such a requirement. The Commissioner concluded that in the absence of a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of "confidential information" in the school context is a matter best left to the Commissioner.[34]

However, the Commissioner stated that he was constrained from removing Board member Weeks,

in part, due to her reliance upon opinions from the Committee on Open Government. The Commissioner opined:

> While I respectfully disagree with the Executive Director's narrow interpretation, I find that his advisory opinions gave Weeks a reasonable basis to believe that her actions were legal. Therefore, on the record before me, I cannot find the requisite willfulness to justify Weeks' removal from office.[35]

Can "Confidential Information" Have a Different Meaning for Purposes of GML Article 18 Than It Does for Purposes of FOIL and the OML?

GML §805-a is redundant if it merely prohibits the disclosure of information already prohibited from disclosure by federal or state law. Presumably, however, the Legislature intended to impose some duty in enacting the statute. To reconcile the ethical duty of confidentiality under GML Article 18 with the duty to disclose under FOIL and the OML, we must conclude that the term "confidential information" has a different meaning for purposes of the GML than it does for purposes of FOIL and the OML; and that GML §805-a would be violated if a municipal officer or employee made an unauthorized disclosure of information that the municipality withheld from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.

Thus, we propose the following definition of the term "confidential information" as used by GML §805-a:

> **Confidential Information**. Information in any format that is either: (i) prohibited from disclosure to the public by federal or state law; or (ii) withheld from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.[36]

The open question remains whether the discretion to withhold information from public disclosure may be exercised by categorical legislative fiat as the Attorney General's opinion suggests, or whether it must be exercised by the municipal information officer or government body on a case by case, document by document and meeting by meeting basis consistent with Executive Director Freeman's interpretation of *Capital Newspapers v. Burns, supra.* Under this approach, each discretionary denial of access would be subject to Article 78 review to determine whether the municipality abused its discretion.[37] As we will see, recent trial level rulings suggest the latter.

"Confidential Government Information": New York Rules of Professional Conduct

While there appears to be no consensus as to the meaning of "confidential information" as that term is used by Article 18 in regulating the conduct of municipal officers and employees, government information is presumptively subject to public disclosure.[38] However, the same information may be presumptively confidential if the custodian of that information is a government attorney.

Government attorneys must adhere not only to the standards of conduct applicable to their conduct as government officers or employees, they must also adhere to the standards of conduct applicable to attorneys engaged in the practice of law.

The Appellate Divisions of the New York Supreme Court promulgated joint Rules of Professional Conduct[39] effective April 1, 2009, in which they adopted a definition of "confidential government information" for the purpose of regulating the professional conduct of current and former government attorneys.[40] Unlike the meaning given to the term "confidential information" by the Committee on Open Government for purposes of the Freedom of Information Law, the Rules of Professional Conduct require current and former government attorneys to refrain from disclosing government information that a municipality "may" withhold from public disclosure unless it is otherwise available to the public.

Rule 1.11 of the Rules of Professional Conduct applicable to current and former government attorneys defines "confidential government information" as "information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public."

May a Local Law Prohibit Disclosure of Records of Proceedings Before the Local Board of Ethics?

In 2011, the Board of Ethics of the City of White Plains dismissed as moot a *sua sponte* complaint alleging non-compliance by the then Mayor with certain provisions of GML Article 18 and the City Code of Ethics. After a preliminary investigation, the Board of Ethics served the Mayor with formal charges. The Mayor resigned his office before a hearing was conducted. After the complaint was dismissed, the *Journal News* submitted a FOIL request for the entire record

of proceedings before the Board of Ethics. The FOIL request was granted in part and denied in part. The *Journal News* then filed a proceeding pursuant to CPLR Article 78 seeking disclosure of the record including, among other things, the statement of formal charges. The Westchester Supreme Court (Hubert, J.) granted the petition in part, and denied it in part.

Before discussing the 2012 decision *In the Matter of the Application of the Journal News v. City of White Plains*,[41] it is useful to consider the competing policies favoring confidentiality and transparency in an ethics investigation.

Why Confidentiality?

Confidentiality at the preliminary stages of an ethics investigation serves to protect the privacy and reputation of a presumptively innocent municipal officer or employee who is the subject of an ethics complaint that has not yet resulted, and may never result, in the filing of formal charges. It encourages the reporting of suspected ethical violations by protecting the identity of whistleblowers in the preliminary stages of an investigation; it avoids subornation of perjury, witness tampering and spoliation of evidence; and it fosters freedom of deliberation among an ethics board without fear that the board's preliminary view of a matter will be made public before formal charges are filed and a due process hearing is conducted.

Confidentiality is no less important in the rendering of ethics advice by a local municipal ethics board. Municipal officers and employees are more likely to seek ethics advice when they are assured that the inquiry and the answer will be held in confidence.

Why Transparency?

In the post-Watergate era, it is the settled consensus that open government is a fundamental value in a democratic society, and that to hold government officials accountable, the public must know what they are doing. This is no less applicable to a local municipal ethics board than it is to any other government agency.

Application of Exceptions under FOIL and OML

Under FOIL, government records are presumed to be open to public inspection and copying, except to the extent that records or portions thereof are properly the subject of one or more of the limited exemptions that are set forth in §§87(2)(a)-(j) of the Public Officers Law.

In *Journal News* v. *City of White Plains*, the Board of Ethics relied on two distinct statutory exceptions to mandatory disclosure under FOIL in partly denying the newspaper's request for access to the entire record of its preliminary investigation. The Board of Ethics withheld documents that it determined would, if disclosed, result in an unwarranted invasion of personal privacy, and documents that were intra-agency and inter-agency materials which were not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations.

The City of White Plains Board of Ethics is vested with the power and duty, among others, to investigate complaints involving alleged violations of the City Code of Ethics and Article 18 of the General Municipal Law. However, the Board of Ethics is authorized only to make recommended findings and conclusions of law for consideration by the governing body. The Board has no authority to make a final determination.

In 2010, the Board of Ethics initiated an inquiry into the alleged non-compliance of then Mayor Adam Bradley with certain provisions of the City Code of Ethics and Article 18 of the General Municipal Law. The investigation concerned allegations that the Mayor rented an apartment at below market cost from a developer who was actively engaged in business with the City of White Plains.[42]

After a preliminary review of documents, the Board made a finding of probable cause that the Mayor had violated the City Code of Ethics and GML Article 18, and initiated a full investigation. The Board's investigation consisted of reviewing documents obtained from the City departments and agencies, the Mayor and from other sources through voluntary disclosure and through subpoena, and conducting sworn interviews, including interviews of the Mayor, City employees, and others.

The purpose of the investigation by the Board of Ethics was to determine whether formal charges were warranted, in which case a public hearing would be conducted under §2-5-112 of the Code of Ethics. At a public hearing after formal charges are filed, the Board would have had the burden of proving the charges by clear and convincing evidence. The Mayor would have been entitled to the assistance of counsel, and to copies of all documents introduced at the hearing, written documents of witnesses who would be called to testify, and any exculpatory evidence known. After the hearing, the Board would have issued recommended findings of fact and conclusions of law to the Common Council and its report would have been filed with the City Clerk for public review.

While the investigation was pending, Mayor Bradley was found guilty of the attempted assault and harassment of his wife, and criminal contempt following a non-jury trial.[43]

In late January 2011, after conducting a full investigation, the Board served a statement of formal charges

on Mayor Bradley. The charges alleged that the Mayor had solicited and accepted an improper gift in the form of his discounted rent in violation of the City Code of Ethics and GML §805-a. On February 18, 2011, less than 30 days after being served, and prior to any answer or public hearing on the charges, the Mayor resigned from office. In a written decision dated March 1, 2011, the Board dismissed the complaint on the grounds that it no longer had jurisdiction over former Mayor Bradley.

The Board's investigation was closely followed by the *Journal News*, which published several articles about the investigation. The *Journal News* submitted a FOIL request to the Board seeking, among other things, any and all documents related to the ethics probe of the former Mayor, including any written complaint, legal analysis of the complaint, any formal charges and any answers to formal charges, and any information and documentation including photographs, e-mails, subpoenas and transcripts of testimony from Mayor Bradley and witnesses. The *Journal News* also requested a copy of any paperwork relating to the dismissal of the investigation and a breakdown of payments made to outside counsel in connection with the matter.

The Board of Ethics granted in part and denied in part the FOIL request. The *Journal News* was provided with a copy of the Board's Dismissal for Lack of Jurisdiction which by then had been filed with the City Clerk, and was also provided copies of all bills for legal services rendered by the Board's special counsel with the appropriate attorney-client redactions. The request for the remaining documents was denied, based on the unwarranted invasion of personal privacy and the inter-intra agency exceptions under FOIL. The Board argued that the City's Common Council had exercised the discretion afforded to the City under FOIL to withhold from public disclosure the "pre-decisional" materials developed by the Board of Ethics in a investigation resulting in a dismissal when the Common Council enacted §2-5-111(a)(14) of the Code of Ethics, which provides that "the complaint, records and other proceedings related thereto prior to the filing of charges or dismissal of the complaint for lack of jurisdiction are deemed confidential."

The *Journal News* filed an appeal of the partial denial to the Corporation Counsel, the City's records access appeals officer under FOIL. The Corporation Counsel upheld the Board's determination based on a review of Article 6 of the Public Officers Law, advisory opinions from the Committee on Open Government, the advisory role of the Board and the plain language of the Code of Ethics provision deeming pre-decisional material in the context of a proceeding confidential.

The *Journal News* then filed an Article 78 proceeding against the City, the Board of Ethics and the Corporation Counsel seeking disclosure of all of the documents that it requested, including the statement of the formal charges. The City respondents voluntarily provided the documents to the Court for *in camera* review. In a decision dated March 20, 2012, the Hon. James Hubert of the Westchester County Supreme Court granted the Article 78 petition in part and denied it in part.

Decision of the State Supreme Court, Westchester County

In its ruling, the Court found that FOIL's statutory requirements preempt any conflicting confidentiality requirements in a local ordinance such as the one at issue in White Plains, citing Public Officers Law §87(2)(a), which provides that agencies may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute." Because a local agency cannot immunize a document from disclosure by designating it as confidential, the Court concluded that, to the extent that the City Code created a confidentiality exemption that did not exist under the Public Officers Law, it was unenforceable.[44]

Next, the Court looked to see whether the particular documents requested by the *Journal News* fell within one of the enumerated exemptions set forth in FOIL. Based upon its *in camera* review, the Court grouped the documents into three categories:

> (1) the Mayor's calendar, cancelled checks, invoices from Con Ed, a deed for real property, correspondence and e-mails to and from the Mayor, correspondence among City employees, and print-outs from publicly available sources, such as multiple listing service reports and the Department of State;
>
> (2) sworn interviews conducted by the Board with the Mayor and the landlord;
>
> (3) the statement of formal charges, a document issued by the Board dismissing the investigation for lack of jurisdiction, and correspondence among the members of the board.[45]

As to the first category, the Court found that some of the documents were exempt because their disclosure would result in an unwarranted invasion of personal privacy. These documents included cancelled checks, financial records and other bills of the Mayor. "[Even assuming these documents fell within the statutory

definition of] records, the public interest in these records… [did] not outweigh the privacy interest of the former mayor."[46] These documents were not co-mingled within the Mayor's public office but rather were produced by the Mayor personally, pursuant to the investigation by the Board of Ethics. Correspondence to and from the Mayor, the Mayor's calendar, and correspondence from and between City employees were subject to disclosure, and the fact that they were now in the possession of the Board did not render them immune from disclosure.[47]

As to the second category of documents, including sworn testimony from the Mayor, the landlord and others, because these documents were relied upon the Board in the course of its decision-making process, and were an integral part of the deliberative process of the Board, they were entitled to the protection offered by the deliberative process privilege and could be withheld from disclosure.[48]

As to the third category of documents, all correspondence among the Board members was exempt from disclosure as intra-inter agency deliberative materials.[49] However, the statement of formal charges was not found to be exempt under the intra-inter agency theory. Despite the fact that the sole object of an investigation by the Board of Ethics is to provide advice to the Common Council, the Court rejected the City's argument that the statement of formal charges was pre-decisional, intra-agency or deliberative, finding that it reflected the determination of the Board following a full investigation.[50] Moreover, the Court pointed to a provision in the City Code of Ethics providing that "thirty (30) days after charges have been served, the charges and answer, if any, shall be made public, unless otherwise stipulated by the parties or extended by an order of the court of competent jurisdiction" as the basis for a presumption that the formal statement of charges would become public after 30 days.[51]

This case stands for the proposition that, unless the State legislature acts to provide otherwise (as it has done in exempting the New York State Joint Commission on Public Ethics from the disclosure requirements of FOIL), a local government may not categorically protect the confidentiality of an ethics board's proceedings, but may only exercise its discretion to withhold particular documents pursuant to the FOIL exceptions upon a case-by-case, document-by-document basis.

Investigation into the Conduct of the Suffolk County Ethics Commission

In 2010, it was widely reported that the then Suffolk County Executive had satisfied his County financial disclosure obligation by filing with the County a copy of the State form that he had filed as a member of a State commission, rather than the different form used by the County of Suffolk.[52] Amid allegations that the Suffolk County Ethics Commission was subject to "influence" by the then County Executive, a special Committee of the County Legislature was established to investigate the conduct of the Commission.

The Special Legislative Committee's counsel requested that the Ethics Commission produce the following records of the Commission:

(1) all FOIL requests seeking Financial Disclosure reports made to the commission from January 1, 2006 to September 1, 2010,

(2) all ethics complaints made against any public official from January 1, 2006 to the date of the request,

(3) all legal analysis, legal memoranda or advisory opinions, including any and all legal memoranda or analysis provided by the County Attorney's Office, outside counsel or any experts, and any legal determinations made by the Commission prior to May 15, 2007 concerning the issue involving whether the filing of the New York State disclosure forms exempts a county official from filing the county form,

(4) all legal opinions, memoranda or legal analysis provided to the Commission by the County Attorney's Office, outside counsel, or expert consultants after May 15, 2009,

(5) a list of county officers and employees who had filed the State Financial Disclosure form in lieu of the county form, and any related legal memoranda, legal analysis or advisory opinions, and

(6) all advisory opinions, decisions and or determinations made by the Commission regarding potential conflicts of interest issues arising from the county employment of the spouses or other family members of current or former County officials.

The Ethics Commission responded that it would cooperate fully with the investigation by the Special Legislative Committee, and would provide the information and documents requested to the fullest extent permitted by law. The Commission indicated that it would produce the FOIL requests sought by the Special Legislative Committee but, as to the other records requested, the Commission noted that the Suffolk County Legislature had designated the information obtained by the Ethics Commission in the performance of its duties as confidential and had prohibited the Ethics Commission and its staff from disclosing such

confidential information. The Commission noted that the County Legislature had made the disclosure of confidential ethics information punishable as a Class A misdemeanor. The Ethics Commission also responded that the advice that it received from its counsel was protected by the attorney-client privilege.

At that time, the County Code of Ethics provided, in pertinent part, that "[i]t shall be unlawful for a member of the Commission or other individual to disclose any information contained on a [financial] disclosure statement except as authorized by law[,]… [a]ll… proceedings [i.e. investigations by the Commission of alleged Code violations] shall be confidential[,]… and any violation of the confidentiality provisions of this Article [i.e. the Code of Ethics] shall… be punishable as a Class A misdemeanor with a fine of up to $1,000 and a term of imprisonment of up to one year."

In order to protect the privacy interests of the individuals identified in the requests by the Special Legislative Committee and to discharge its duty of confidentiality under the County Charter, the Commission requested that the Special Legislative Committee issue a subpoena for the confidential records, thus enabling the Commission to seek judicial guidance as to which of the documents it could lawfully disclose. Thus, the Commission asked that the Special Legislative Committee subpoena certain of the records so that the Commission could move to quash the subpoena and, in that way, obtain judicial guidance as to its apparently conflicting duties under the County Code of Ethics and pursuant to the subpoena. As requested by the Ethics Commission, the Special Legislative Committee served a subpoena seeking disclosure of the Commission's records, and the Commission moved to quash the subpoena on various grounds, including that the records of the Commission were confidential under the County Code of Ethics.

Decision of the State Supreme Court, Suffolk County

In *Suffolk County Ethics Commission v. Lindsay, et al.*, the Suffolk County Supreme Court granted the Commission's motion to quash the Special Legislative Committee's subpoena on procedural grounds. The Special Legislative Committee had failed to authorize the issuance of the subpoena by a majority vote of its membership as required by the resolution of the County Legislature from which the Special Legislative Committee derived its power to issue subpoenas.

However, the Court rejected the Commission's other arguments, noting that the Commission was prohibited from disclosing information reported on the financial disclosure forms filed with the Commission "except as provided by law." Because the County Charter provided that the disclosure forms would be available for public inspection "except that the categories of value shall remain confidential, as shall any other item of information authorized by the Board to be deleted from an individual's disclosure form," the forms were not confidential under local law except as to the categories of amounts and other information deleted by the Commission.[53]

The Court then found that the County Charter authorized the County Legislature to conduct investigations into any matter within its jurisdiction and to delegate investigations to a committee, and that the Charter also authorized the legislature or any delegated committee to issue subpoenas requiring attendance by the recipient at an examination and the production of books, records, papers and documents. Therefore, the Court concluded that the subpoena issued by the Special Legislative Committee was authorized by law and that compliance with the subpoena would not subject the Ethics Commission and its staff to the criminal penalties for disclosure of matters considered confidential under the Suffolk County Code or other Local Law.[54]

The Court also rejected the Commission's argument that production of ethics complaints and advisory opinions issued by the Commission should be confidential as a matter of public policy. "The… [Commission] failed to demonstrate [that] the public policy of this State precludes the dissemination of documents relating to the internal workings of an ethics commission to the County Legislature, a committee thereof or other public officer or official charged with oversight and investigative powers. Indeed, public policy appears to dictate just the opposite, as the call for transparency in government seemingly sounds everywhere…."

The Court found that the Commission had failed to establish that certain documents sought by the subpoena were protected by the attorney-client privilege, finding that the claims of privilege were not sufficiently particularized.

Further, the Court concluded that any claims of privilege in connection with complaints filed with the Commission "appear [to be] inconsistent with… the Suffolk County Code…which mandates that the… [Commission] prepare annual reports for the County Executive and the County Legislature summarizing the activities of the…[Commission] and recommend changes in the law governing the conduct of local elected officials and others…." The Court reasoned that because the Ethics Commission had a duty to report to the County Executive and the County Legislature, the complaints received by the Commission were not confidential communications.

This same reasoning would not apply to the communications made between the Commission and its counsel, the predominant purpose of which was for the Commissioners to obtain legal advice. The attorney-client privilege is codified by the New York Civil Practice Law and Rules, which provide, in pertinent part, that a client shall not be compelled to disclose confidential communications made between the client and his or her attorney "in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government agency or by the legislature or any committee or body thereof."[55] Thus, records protected by the attorney-client privilege are exempt from disclosure by state statute and may be withheld from disclosure pursuant to the Freedom of Information Law.[56]

Investigation by the Suffolk County Grand Jury

The Suffolk County District Attorney's Office convened a Grand Jury to take over the investigation of the Special Legislative Committee. A Grand Jury subpoena was served on the Commission for its records, and on the Commissioners and their counsel for testimony before the Grand Jury.

The extent to which a government attorney may be compelled to testify before a grand jury about conversations with a client has been the subject of several significant decisions by Federal Circuit Courts of Appeal. The majority view was expressed in a decision that arose out of a subpoena issued by Special Prosecutor Ken Starr to White House Counsel Bruce Lindsay in the investigation leading to the impeachment of President Bill Clinton. The White House asserted that the testimony was protected by the attorney-client privilege, and moved to quash the subpoena. The D.C. Circuit Court of Appeals concluded that:

> When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence…. The proper allegiance of the government attorney is contemplated by the public's interest in uncovering illegality among its elected and appointed officials….[57]

The Second Circuit reached a different conclusion in a case arising out of a subpoena issued to the counsel for former Connecticut Governor John Rowland in an investigation leading to the Governor's resignation and conviction on charges of public corruption. The Second Circuit opined:

> …[I]f anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.[58]

Just as the attorney-client privilege only protects conversations between an attorney and a client, so too the privilege is limited to communications had for the purpose of obtaining legal advice. However, a government lawyer sometimes gives more than legal advice. On occasion, the government lawyer may provide policy, political, or strategic advice. Does the attorney-client privilege protect communications between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light? In the Second Circuit, the answer is yes, provided that the "predominant purpose" of the conversation is to obtain legal advice.[59]

Here, the Suffolk County District Attorney respected the attorney-client privilege and limited the scope of its examination questions to counsel, and thus it was not necessary for counsel to assert the privilege in the Grand Jury.

The Grand Jury investigation resulted in a report, but no indictments.

Audit by the Suffolk County Comptroller

As this controversy was stirring, the Suffolk County Comptroller undertook an audit of bills rendered by the Commission's special counsel, pursuant to the Comptroller's authority under Article 14 of the County Law and applicable provisions of the County Charter, and demanded that the Commission's counsel produce all documents referenced in counsel's invoices, including correspondence, notes, research and attorney work product. In response, counsel informed the Comptroller that he could not comply with the request because the Suffolk County Code prohibited disclosure of confidential matters pending before the Commission; the attorney-client privilege prohibited disclosure of the confidential communications made between an attorney and a client, absent a waiver by the client; and Rule 1.6 of the New York Rules of Professional Conduct prohibited an attorney from revealing confidential information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege or that the client has requested be kept confidential.[60]

The Comptroller responded stating, in part, that:

> In your letter, you also cite attorney client privilege as another reason why the requested information could not be provided. However, your services were retained by the County to represent the Ethics Commission which is a county Commission. Therefore, as the County's Chief Fiscal Officer, the county Comptroller is waiving the client confidentiality and directing you to provide the previously requested information by October 1, 2010. The requested information is necessary so that we can determine the regularity, legality and correctness of the claimed expenses as required by the County Charter….
>
> The County Comptroller has a fiduciary responsibility to the taxpayers of Suffolk County to ensure the propriety of County expenses; therefore, no future vouchers from…[your firm] will be processed until such time the Comptroller's Office is satisfied that services were billed in accordance with the terms of the agreement. Failure to comply with this request may result in the demand for repayment of services previously billed and paid.

This purported waiver by the Comptroller of the attorney-client privilege raised the familiar and often thorny question of "who is the client of a municipal attorney?" A careful analysis and accurate determination of this question is essential, because only communications between an attorney and a "client" are subject to the attorney-client privilege. Commentators have identified five possible clients of the government lawyer: (1) the responsible official, (2) the government agency, (3) the branch of government (executive or legislative), (4) the government as a whole, and (5) the public.[61]

Rule 1.13 (Organization as Client) of the Rules of the New York Rules of Professional Responsibility provides, in pertinent part, that:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

But what if the interests of one government agency (here, the County Ethics Commission) appear to conflict with the interest of another agency or official (here, the County Comptroller)?

Comment 9 (Government Agency) to Rule 1.13 provides, in pertinent part, that:

> The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified….

Here, special counsel was engaged solely to represent the Ethics Commission. On these facts, the Ethics Commission was the "client," and the purported waiver of the attorney-client privilege by the Comptroller was ineffective. After the passage of time, the Comptroller approved the payment of counsel's bills in their entirety, and closed the audit without pressing his demand for the disclosure of confidential client information, thus avoiding a judicial resolution of the apparent conflict between the Comptroller's authority to audit bills rendered to the Ethics Commission and the attorney-client privilege enjoyed by the Commission.

Conclusion

It is high time that GML Article 18 be revised, and that the standards of conduct related to the personal

use or unauthorized disclosure of confidential information be clarified. Until this happens, local municipalities should exercise the authority granted to them by GML §806 to adopt their own clear standards of conduct in the form of a local ethics code, including the two prong definition of "confidential information" recommended in this article.[62] Further, the State Legislature should act to exempt the records of local boards of ethics from the disclosure requirements of FOIL to the same extent, and to achieve the same policy goals, as in the case of the New York State Joint Commission on Public Ethics. For now, municipal officers and employees must continue to navigate their way between the Scylla and Charybdis of transparency and confidentiality.

Municipal attorneys must carefully identify their clients and be mindful that the attorney-client privilege will only protect conversations between an attorney and a client, the "predominant purpose" of which is to obtain legal advice.

Endnotes

1. *See*, 26 U.S.C. §274 (Disallowance of certain entertainment, etc., expenses).
2. *See*, N.Y. Penal Law, art. 200 (Bribery involving public servants and related offenses), *et seq.*
3. 5 U.S.C. §552 (1966).
4. *See*, N.Y. Pub. Off. Law, art. 6 (Freedom of Information Law).
5. *See*, N.Y. Pub. Off. Law, art. 7 (Open Meetings Law).
6. *See*, N.Y. Pub. Off. Law §74 (Code of Ethics).
7. *See*, 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
8. *See*, Pub. Off. Law §105 (Conduct of executive sessions).
9. *See*, Wm. J. Kline & Sons v. County of Hamilton, 235 A.D.2d 44 (3d Dep't 1997).
10. *See, e.g.*, FOIL-AO-16799, FOIL-AO-12558, FOIL-AO-18476.
11. *See*, N.Y. Dep't of State, Comm. Open Govt., FOIL-AO-16799 (Sept. 20, 2007).
12. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986).
13. *See*, 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Additionally, it should be noted that Public Officers Law §108(3) exempts from the coverage of the Open Meetings Law (OML) "any matter made confidential by federal or state law" *(e.g.*, information protected by the attorney-client privilege).
18. *Id.*
19. *Id.*
20. *Id.*
21. *See*, FOIL-AO-12558.
22. *See*, FOIL-AO-12558, citing *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 567 (1986).
23. *See*, FOIL-AO-12558.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See*, FOIL-AO-12558.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See* FOIL-AO-16799.
33. *Application of Patrick A. Nett and Ronald R. Raby for the Removal of Tina Marie Weeks as a Member of the Board of Education of the Patchogue-Medford Union Free School District*, Decision No. 15,315, October 24, 2005.
34. *Id.*
35. *Id.* In *Appeals of Hoefer*, Decision No. 15,263, July 29, 2005, the Commissioner of Education removed a board member who disclosed information concerning an employee and teacher contract negotiations that were discussed in executive session. The school board had its own code of ethics provision prohibiting disclosure of confidential information obtained during executive sessions.
36. This proposed definition of "confidential information" for purposes of General Municipal Law §805-a is similar to the definition of "confidential government information" for purposes of Rule 1.11 of the New York Rules of Professional Conduct. *See infra.*
37. *See Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557 (1984).
38. *Id.*
39. *See* 22 N.Y.C.R.R. Part 1200 (Rules of Professional Conduct), *et seq.*
40. *See*, N.Y. Rules of Prof'l Conduct R. 1.11 (2009).
41. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.*, Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012.
42. Mayor Bradley had been the focus of intense media scrutiny, as less than two months in his term as mayor he had been charged in February of 2010 with misdemeanor assault, after his wife filed a domestic violence charge against him. In April of 2010, additional misdemeanor charges and violations were brought against him related to his arrest.
43. On October 17, 2012, former Mayor Adam Bradley's judgment of conviction was reversed by the Second Department and the matter was remitted to the Westchester County Supreme Court for a new trial. On June 21, 2013, after a new trial, a jury acquitted former Mayor Bradley of all charges.
44. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.*, Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012 at 5-6.
45. *Id.* at 9.
46. *Id.* at 11-12.
47. *Id.* at 12.
48. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.*, Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012 at 13-14.
49. *Id.* at 15.
50. *Id.* at 15-16.
51. *Id.* at 16. Executive Director Robert Freeman indicated in a discussion concerning the Court's holding that absent the thirty day provision in the City Code, he would have advised that charges that had never been proven or admitted may be

withheld, both as intra-agency material (neither factual nor a determination), and as an unwarranted invasion of personal privacy.

52. N.Y. Gen. Mun. Law §811(1) mandates that a local municipality accept the State form for filing by officers and employees who are subject to the State financial disclosure requirements.

53. Here, the Court seems to implicitly find that a record may be confidential under Local Law. *See* the discussion, *supra*, of the contrary opinion of the Committee on Open Government.

54. Here again, the Court seems to implicitly find that a record may be confidential under Local Law.

55. *See*, CPLR §4503(a)(1).

56. *See*, Public Officers Law §87(2)(a).

57. *In re Bruce R. Lindsay*, 158 F.3d 1263 (D.C. Cir. 1998).

58. *In re Grand Jury Investigation v. John Doe*, 399 F.3d 527 (2d Cir. 2005).

59. *See Pritchard v. County of Erie (In re The County of Erie)*, 473 F.3d 413 (2d Cir. 2007), *vacated, mandamus granted*, 546 F.3d 222 (2008).

60. The contract pursuant to which special counsel was retained provided that all information obtained by special counsel in the course of the engagement would be and remain confidential, except that special counsel was authorized to make disclosures to the County Attorney's Office.

61. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 Urb. Law 283 (2003).

62. N.Y. Gen. Mun. Law §806-1(a) provides, in pertinent part, that "the governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them…. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited…."

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Official Animus Still Drives Municipal Land Use Liability

By Robert B. Koegel

Indignant property owners, frustrated by municipal delay in the processing or outright denial of their applications for land use activities of one sort or another, often turn to their attorneys for relief. Sometimes these clients simply want the approvals to move forward with their projects, sometimes they want damages for lost opportunities, and sometimes they want both. Municipalities are sometimes simply wrong in their discretion of applying the law to the facts of a land use matter. But when municipalities are wrong, property owners often meet with limited success, or no success at all, in the claims they have asserted or the courts they have chosen. Manifest municipal hostility opens the door to municipal liability.

Two recent federal cases before the Western District of New York and the Second Circuit Court of Appeals illustrate these principles. In *Natl. Fuel Gas Supply Corp. v. Town of Wales*, the plaintiff utility sought to build a natural gas compressor station within the defendant town.[1] The utility filed an application with the Federal Energy and Regulatory Commission ("FERC") for a certificate of public convenience under the federal Natural Gas Act as a prerequisite to construction, and at the town's request, the utility also sought a special use permit under the town's zoning ordinance. FERC issued the certificate with certain noise limitations; then the town issued a special permit with conflicting, more stringent noise limitations. Although the town issued the utility a building permit and the compressor station was built, the building permit incorporated the terms of the special use permit, which were more stringent than the terms of the FERC certificate. The utility promptly brought a federal action for declaratory and injunctive relief, alleging that the town's actions deprived the utility of its substantive and procedural due process rights under the Fourteenth Amendment and amounted to a regulatory taking of its property under the Fifth Amendment.

The gravamen of the utility's complaint was that FERC has exclusive jurisdiction to regulate natural gas facilities and that its regulations preempt state law. The utility had good reason to assert this position. More than twenty years before this case, the same utility had sued the New York State Public Service Commission ("PSC") for requiring the utility to obtain a PSC certificate of environmental compatibility before it built a replacement line and regulator station in another western New York town. The Second Circuit held that FERC's regulatory authority preempted the PSC's authority, including the authority to conduct concurrent, site-specific environmental review.[2] The district court in the *Wales* case cited this Second Circuit authority and conceded that FERC regulations preempted state law. Yet, when the town moved to dismiss the utility's constitutional claims, the court granted the motion.

With respect to the utility's procedural due process claim, the court recited the rule that the utility had to show that it had a property right, that the state deprived it of that property right, and that the deprivation was brought about without due process. The court further observed that the utility could have challenged the objectionable special permit terms in an Article 78 proceeding, which is an adequate post-deprivation state remedy, but failed to do so. Accordingly, the court found that the town had not denied the utility procedural due process.

With respect to the utility's substantive due process claim, the court expounded the rule that the utility had to show it had a valid property interest protectable by the Fourteenth Amendment, that it was deprived of this interest, and that the town's conduct in denying that right was "so outrageously arbitrary as to constitute a gross abuse of governmental authority."[3] The court did not decide whether the utility's FERC certificate amounted to a protectable property interest. Instead, it concentrated on the town's conduct. It noted that the utility did not allege that the town, by inserting more stringent noise limitations in the permit than those contained in the certificate, had acted in an arbitrary, irrational, or abusive fashion. The town may have acted contrary to the principles of preemption, or been incorrect on the law, the court observed, but its conduct was not "outrageously arbitrary."[4] Thus, the substantive due process claim was dismissed.

When a state regulation goes so far that it in effect takes private property for public use without just compensation, there is a regulatory taking claim under the Fifth Amendment, the court explained. However, the court noted that such a claim is not ripe for review where there is an adequate state procedure for seeking just compensation and the property owner has not sought and been denied such compensation. Here, again, the court found that an Article 78 proceeding was not only an adequate state procedure for challenging the terms of the permit, but also a means to receiving compensation as well. Thus, the court refused to

sustain the utility's regulatory taking claim. The utility apparently sought to have the court hear an Article 78 proceeding claim and then go on to review its regulatory taking claim. However, the court, citing abundant district court authority, declined to exercise its supplemental jurisdiction to hear an Article 78 proceeding claim, which it described as a "novel and special creation of state law."[5]

In short, the town issued the utility a special permit with noise limitations which are preempted by federal law. But because the town's conduct in overregulating the utility was not outrageous, the utility's constitutional claims against the town could not be sustained.

Official animus was the glaring factor which drove the Second Circuit's decision in *Fortress Bible Church v. Feiner*.[6] In this case, the plaintiff, a Pentecostal church, sought to build a worship facility and school on land it owned within defendant town, a suburban community located in Westchester County. The church filed an application for site plan approval and a side-setback variance, and the town board requested the church to study the project's impact on local traffic. The church hired a consultant and submitted a comprehensive traffic study, and the town planning commissioner advised the town board that it could issue a conditional negative declaration under the New York State Environmental Quality Review Act ("SEQRA").

Later, during a town board work session with the church, the town supervisor stated that he was concerned with the church's tax-exempt status and asked the church to donate a fire truck or make some other payment in lieu of taxes. Other town board members stated that they did not want the property to be used as a church. The church declined to donate a fire truck or make another payment in lieu of taxes, and the town board rendered a SEQRA positive declaration, triggering full SEQRA review.

Over the next several years, the church provided the information requested by the town as part of the SEQRA process, including a scoping document and a draft environmental impact statement ("DEIS") that was accepted as complete, and it participated in two public hearings. But the town continued to resist the project. The town supervisor told the church it could make annual contributions to the fire department to expedite the process. Another town board member told the town planning commissioner on many occasions that he should kill the project. Instead, he got fired. The church submitted a final environmental impact statement ("FEIS"), but the town refused to act on it. The town retaliated with requests for new information on new issues, and when the church objected and refused to pay disputed process review fees, the town took the unorthodox step of taking over the preparation of the FEIS and amending it to include additional problems without the church's input.

The church then sued, alleging that the town violated the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the free exercise clause of the First Amendment and the equal protection clause of the Fourteenth Amendment, and Article 78 of the CPLR. Later, the town denied the church's application on the grounds that it violated the town's steep slope ordinance, would stress police and fire departments, featured retaining walls that were an attractive nuisance, and would create traffic and parking problems. After trial, the district court ordered that the site plan and other applications be approved and a building permit be issued, that the town be enjoined from any interference with the project and pay sanctions of $10,000 for spoliation of evidence, and that the parties submit additional information on damages.

On appeal, the circuit court affirmed all of the district court's findings. With respect to RLUIPA, the town argued that RLUIPA only bars states from implementing a "land use regulation" so as to impose a "substantial burden" on religious exercise, and that SEQRA is not a land use regulation and that the permit denial did not impose a substantial burden on the church because it could always modify the project and reapply.[7] The court held that where a government uses a statutory environmental review process such as SEQRA as its primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are subject to RLUIPA. The court also found that where, as in this case, the opportunity to modify and reapply is disingenuous, a permit denial is a substantial burden.

With respect to the church's First Amendment free exercise clause claim, the issue on appeal was whether the town's actions in substantially burdening the church's exercise of sincerely held religious beliefs were subject to "strict scrutiny," or only had to have a "rational basis" for the enforcement of a law that is "neutral and of general applicability."[8] The court found that it did not matter which test was applied, because under the facts of this case, there was no rational basis for the town's actions.

A Fourteenth Amendment equal protection clause claim may arise for a single plaintiff who has been intentionally treated differently from others similarly situated and there is no rational basis for the difference, the court explained, relying on *Vil. of Willowbrook v. Olech*.[9] But the single plaintiff must still prove "an extremely high degree of similarity between itself and its comparators."[10] Here, the church really did its homework.

Recall that the town's stated reasons for denying the church's application were violation of the steep

slope zoning ordinance, stress on police and fire departments, retaining walls which were an attractive nuisance, and traffic and parking problems. A prestigious, secular prep school sought to double its size by a proposal having the same steep slope concerns as the church's project. Although the prep school proposal was submitted to the town almost three years after the church's project was submitted, the town waived the moratorium on steep slope construction for the prep school and expedited review of its proposal so that it was approved before the ordinance was adopted. The prep school proposal also had retaining walls similar to the church proposal, but the town did not raise this concern with the prep school and continued to hector the church with this issue even after the church offered to erect a fence on top of its walls to eliminate any danger. Building proposals by another, more conventional church and a separate private school were approved, even though both proposals failed to have the required amount of parking spaces, while the church's proposal did. As for the town's biggest concern, traffic, the town granted a SEQRA negative declaration for a proposal to build a commercial office building near the same major intersection as the church's proposal even though the town's traffic consultant indicated the same traffic concerns for both projects. Similar vehicle and pedestrian traffic concerns existed for both the private school and the church proposals, but the town approved the private school's application without traffic mitigation. It's not surprising that the court found "overwhelming" evidence that the church had been singled out for disparate treatment.[11]

The Second Circuit also upheld the district court's Article 78 proceeding findings that the town's stated reasons for denying the church's application were "unsupported" or "wholly fabricated."[12] Wholly absent from the Second Circuit's affirmance was any discussion of the appropriateness of Article 78 proceedings in a federal case, which was so prevalent in the *Wales* case first described.

It's tempting to distinguish these two cases as one replete with overt religious discrimination and the other, not. But they provide valuable lessons for both landowners and municipal officials alike. Landowners should dispassionately consider what they have lost from permit denial or delay and what means will get them back on track. Municipal officials should remember that their authority is limited to legal standards of review. Counsel can help them both.

Endnotes

1. *Natl. Fuel Gas Supply Corp. v. Town of Wales*, 904 F.Supp.2d 324 (W.D.N.Y. 2012).
2. *Natl. Fuel Gas Supply Corp. v. Pub. Serv. Commn.*, 894 F.2d 571 (2d Cir. 1990).
3. *See Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999).
4. *Natl. Fuel Gas Supply Corp.*, 904 F.Supp.2d at 334.
5. *Id* at 28.
6. *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012).
7. *Id* at 215-220.
8. *Id* at 220-221.
9. *Vil. of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).
10. *Fortress Bible Church*, 694 F.3d at 222.
11. *Id.* at 224.
12. *Id.*

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The Sewage Pollution Right to Know Act: Another Regulatory Requirement for POTW Operators

By Michael J. Lesser

Introduction

The Town of East Greenbush recently faced the consequences of neglecting its sewer treatment system. That system was recently described in the Albany *Times Union* variously as "overused," "overwhelmed," "leaky" and as having "fouled the Hudson River for more than a decade."[1] The state sanctions for these transgressions included a hefty penalty and an economically devastating moratorium on future system hookups unless the offending leaks were remedied by costly system upgrades.[2] Unfortunately, East Greenbush is not alone among state municipalities operating decrepit sewage treatment systems (which are commonly known by the acronym "POTW," short for Publicly Operated Treatment Works) on tight budgets. To compound these costly operating expenses and liabilities, New York has enacted new and more stringent sewage spill reporting requirements that may entail additional costs for the operation of leaky POTW.

A recent report issued by the New York State Department of Environmental Conservation ("NYSDEC") identified approximately 642 permitted POTW operating statewide.[3] Human exposure to even small amounts of raw sewage can lead to serious illnesses, especially for children, the elderly and people with compromised immune systems. Furthermore, the United States Environmental Protection Agency estimates that at a minimum 1.8 million Americans become ill annually from contact with sewage in recreational waters.[4]

To compound the potential for water quality and human health impacts, most if not all of New York's POTW are operating beyond their life expectancy and are prone to release untreated sewage to the waterways of New York for various reasons. Many have also been constructed to operate as combined sewage overflows ("CSO") that allow for the automatic release of mixed untreated or partially treated sewage and storm drain water if the system cannot handle the increased water volume created by too much rain or snow.[5] Given the likelihood of unauthorized sewage discharges, it behooves the savvy municipal counsel to be aware of the regulatory burdens and likely failures inherent in most local sewer treatment systems. Therefore, it is the purpose of this brief article to familiarize counsel for POTW operators about the requirements of this new law and related legal issues.

The Sewage Spill Right to Know Act

The "Sewage Spill Right to Know Act," A.10585A / S.6268D (the "Act") was signed by Governor Cuomo on August 9, 2012, and became effective on May 1, 2013. The Act amends the current conservation law by adding a new ECL § 17-0826-a, to the New York State Environmental Conservation Law (the "ECL"). The primary purpose of this newly enacted law is to alert the public about potentially harmful releases of untreated sewage[6] into New York's waterways.[7] The Act will also serve to raise awareness in New York about the shortcomings of the State's sewage treatment infrastructure. These goals will be accomplished by expanding the requirements for reporting sewage releases to include the public and local government.[8]

To enhance the knowledge and response of state government regarding such releases, the Act also imposes additional record keeping and regulatory requirements on the NYSDEC. The current laws and regulations merely require the reporting of certain types of releases to specific state and local agencies and not the general public at large.[9]

Specifically, the Act provides that effective May 1, 2013, all sewage discharges, including CSO discharges, must be reported to DEC and the local department of health (or the state department of health if there is no local health department) within two hours of their discovery.[10]

To the extent possible, this report must include the following information:

- the volume of the discharge and the extent, if any, of its treatment;
- the expected duration of the discharge;
- the steps being taken to contain the discharge (unless it results from a combined sewer overflow);
- the location of the discharge;
- and the reason for the discharge.[11]

Most importantly, the Act then requires the POTW operator to give notice to the general public and the chief elected officials (or their designated representative) of the municipality where the discharge occurred and any other municipalities that may be affected *within four hours of discovery of the discharge* (emphasis added).[12]

NYSDEC will also be required to promulgate new regulations specifying the form of this notice "through appropriate electronic media."[13] The new regulations, however, are only to require public notice of sewage discharges that may affect public health.[14]

NYSDEC will also be required to post notice of sewage discharges on its website and to compile an annual report on sewage discharges, which must include details on their location, duration, volume, and any measures taken to mitigate impacts or avoid future releases of sewage.[15]

Obviously, these broad mandates will provide NYSDEC with some latitude in the establishment of sewage discharge reporting thresholds and notice procedures via the administrative rulemaking process mandated by the new law.

Existing POTW Discharge Reporting Requirements

A comprehensive review of all of the potential state and federal discharge, spill and release reporting requirements that may apply to New York's POTW is beyond the scope of this article. However, there are several important state reporting requirements and procedures that remain unchanged by the new ACT and are likely to be applicable to POTW facilities. These include the broad reporting requirements for liquid bulk storage facility operators and the existing POTW permit requirements. The practitioner should also note that New York's definition of a state waterway also includes ground waters.[16]

It is also good to recall that the new law does not supersede or revoke the old reporting law which requires notification by the NYSDEC within 14 days of all "public water purveyors" within three miles of the discharging SPDES facility. However, this notice requirement is restricted only to discharges in areas designated as a sole source aquifer. Furthermore, notice shall be made only if the violation (including unauthorized discharges) "could have a significant impact on the water resources of the area."[17] Of course, even this rather limited notice requirement assumes that the discharging POTW offender complies with the other state reporting requirements by alerting the government oversight agencies in the first place.

A POTW facility would also likely be classified as a bulk storage facility for discharge reporting purposes. Regarding bulk storage facility owners, the ECL provides in relevant part that the "owner of or in actual or constructive possession or control of more than one thousand one hundred gallons, in bulk, of any liquid, which, if discharged, would be likely to pollute the lands or waters of the state including the ground waters thereof shall, as soon as he has knowledge of the discharge, to immediately notify the department [NYSDEC]."[18] Note that this requirement applies to owners, rather than operators. In addition, the "constructive possession" element of this law potentially broadens the scope of the reporting obligation.[19] A failure to provide notice under this provision is subject to a criminal fine of up to $2,500.00, and up to one year imprisonment or both.[20]

To add further confusion, the NYSDEC permit regulations add additional and redundant discharge reporting requirements. The applicable NYSDEC permit regulations for POTW operators mandate five additional categories of potential sewage discharge reporting obligations.[21] By state and federal law, each POTW operator must also hold a state pollution discharge elimination system or "SPDES" permit. All of these reports by SPDES permittees must be made to the NYSDEC Regional Water Engineer with the information and format specified unless otherwise noted.[22] These POTW permit discharge reporting categories include:

- Anticipated noncompliance that requires at least 45 days advance notice to the NYSDEC Regional Water Engineer of any changes that would occur as part of a construction project, as part of routine maintenance program, or 60 days if very likely or certain to result in a bypass or other noncompliance with permit requirements;[23]
- Two-hour oral reporting of a bypass, upset or other incident for discharges that would affect bathing areas (in season), shell fishing or public drinking water intakes;[24]
- Twenty-four hour oral reporting of a bypass, upset or other incident for other categories of discharge incidents;[25]
- Five-day written reports to follow for any of the oral reports;[26] and,
- The permittee shall additionally report all instances of noncompliance with permit conditions with each submitted copy of its discharge monitoring reports ("DMR") until such noncompliance ceases.[27]

Hopefully, when promulgating new regulations NYSDEC will use the opportunity to consolidate and simplify some of these redundant reporting requirements.

Enforcement, Sanctions and Miscellaneous Obligations

It is notable that the Act does not specify a new or revised enforcement provision for violations. Therefore, the existing sanctions for all violations of ECL Article 17, Title 8, of the ECL and any derivative rules, regulations and permit conditions will apply to violations of the new reporting law.

The standard civil sanction for any person who violates this section of the ECL is a penalty not to exceed

$37,500.00, per day for each violation.[28] The ECL also provides for injunctive relief against violators that can be commenced by the Attorney General on the request of the NYSDEC Commissioner[29] and a series of criminal violations which escalate in severity and fines depending upon the category of culpable mental state of the violator.[30] However, as a defense, the ECL does include a force majeure clause for an "act of God, war, strike, riot or other catastrophe" where negligence or willful misconduct was not a proximate cause.[31] Therefore, it is easy for a single unreported multi-day sewage discharge to accrue potential fines or penalties upwards of six or even seven figures. Of course, these penalties or fines would be added to any already accrued for the underlying legal violations related to the actual discharge.

While the new Act does not specifically provide for state cost recovery, the ECL does allow the state to recover from owners the actual costs incurred for discharges derived from the bulk storage of liquids that are "likely to pollute the lands or waters of the state," subject to certain conditions.[32]

Finally, while beyond the scope of this article, those counseling POTW operators should also be aware that the new reporting law may ease the ability of private plaintiff's to file suits using the citizen's suit authority of various federal environmental and public heath laws such as the Clean Water Act and Safe Drinking Water Act.[33] The new record keeping requirements imposed on NYSDEC will make concise and comprehensive POTW discharge information publicly available via an annual report or as posted on the agency's website. Therefore, the NYSDEC will be conveniently performing much of a private party's pre-suit discovery as a by-product of the agency's compliance with the new law.

Conclusion

The New York Legislature, with the support of Governor Andrew Cuomo, has chosen to impose additional layers of legal obligations upon POTW operators via this new law to raise awareness of the threat of unauthorized sewage releases. Given the potential for increased public accountability and severe state penalties, POTW operators and their counsel must ensure that their facilities comply with the new law or face both an angry public as well as the financial losses associated with the failure to report unauthorized sewage discharges.

Endnotes

1. Nearing, *DEC to Town: Fix the Sewers*, Albany Times Union, July 29, 2012, at A-1.
2. *Id*.
3. *Biosolids Management in New York State*, New York State Department of Environmental Conservation, Division of Materials Management, June 2011, at 4.
4. Seiler, *Law Forces Sewage Alerts*, Albany Times Union, August 10, 2012, at A-3.
5. *Id*.
6. ECL § 71-0105(4) defines sewage as "the water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface water as may be present. The admixture with sewage as above defined of industrial wastes or other wastes as hereafter defined, shall also be considered "sewage" within the meaning of this article."
7. *Governor Cuomo Signs Bill to Protect Public Health by Requiring Sewage Plants to Notify Public When Discharge Occurs*, Press Release, Office of Governor Andrew Cuomo, Albany, N.Y., August 9, 2012.
8. *Id*.
9. *Id*.
10. *Id*.
11. ECL § 17-0826-a. For the complete text of this law, see the New York State Legislative website at http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ENV17-0826-A$$@TXENV017-0826-A+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=33431938+&TARGET=VIEW.
12. ECL § 17-0826-a(1).
13. ECL § 17-0826-a(2).
14. ECL § 17-0826-a(4).
15. *Id*.
16. ECL § 17-0826-a(3).
17. ECL § 17-0105(2) defines a waterway of the state for purposes of ECL Article 17, to include "lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction."
18. ECL § 17-0826.
19. ECL § 17-1743.
20. ECL § 71-1943.
21. Title 6, New York Code of Rules and Regulations, Part 750-2.7 (6 NYCRR Part 750-2.7).
22. NYSDEC designates a supervising Regional Water Engineer to each of the nine NYSDEC Regional offices. To contact the NYSDEC Regional offices, see the agency's contact web page at: http://www.dec.ny.gov/about/558.html.
23. 6 NYCRR Part 750-2.7(a).
24. 6 NYCRR Part 750-2.7(b).
25. 6 NYCRR Part 750-2.7(c).
26. 6 NYCRR Part 750-2.7(d).
27. 6 NYCRR Part 750-2.7(e).
28. ECL § 71-1929.
29. ECL § 71-1931.
30. ECL § 71-1933.
31. ECL § 71-1935.
32. ECL § 71-1941.
33. 33 U.S.C § 1365 and 42 U.S.C § 300j-8, respectively.

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