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Municipal Lawyer

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Message from the Chair

As I continue to collect information for my second message on human trafficking, let me discuss two other issues of significant concern to municipalities and their counsel. The first is the difficulty in recruiting highly qualified entry-level municipal attorneys, whether directly for an in-house municipal legal department or indirectly by outside municipal counsel. The second issue is the Chief Judge's proposal for mandatory pro bono reporting.

Recruitment. Two barriers impede the recruitment of qualified entry-level municipal attorneys: the enormous debt load carried by many law school graduates, combined with the relatively low starting salaries of municipal lawyers, and the failure of many law schools to prepare law students for practice. Much has been written about the need to restructure law school education to mitigate these concerns, and certainly municipalities, their attorneys, and the Section must be active in those debates. But any such restructuring, if it occurs, may take years. In the meantime, the recruitment issue must be addressed.

First, debt relief. Although the federal government offers some loan forgiveness for law students entering municipal service, that program applies only to direct federal loans, requires full-time municipal employment, and kicks in only after the attorney has timely paid the full amount of each monthly installment for ten years.[1] Some law schools (the renowned and richer ones) offer far more generous programs.[2] However, municipalities, and their counsel often find recruitment from those schools difficult.

Some municipalities may be able to offer some version of their own loan forgiveness program—either out of public money or funded by a private sector partner—for each year in municipal service, perhaps even implementing a scholarship program for 3L students who enter service with the municipality. Some law schools, such as New York Law School, will work with municipalities to fund a fellowship during law school to reduce the student's debt. (Incidentally, the Section is discussing with New York Law School ways in which to involve their students in the work of the Section.)

Some municipalities may be able to partner with law schools to offer a tuition subsidy to current municipal employees who are transitioning to the law. For example, New York City partners with Fordham Law School, New York Law School, and Touro Law Center, which offer qualified City employees one-third to full tuition reduction.[3] Municipalities may also be able to work with public universities (SUNY or CUNY) to create public service programs that subsidize tuition for students who then work for the municipality for five to ten years.

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Second, preparation of students for municipal practice. Here, too, municipalities themselves must take an active role. New York Law School, which has become a leader in the preparation of law students for practice, has partnered with the City of New York to create year-long clinics in New York City agencies. These clinics involve real legal work. For example, 2L and 3L students are placed with the New York City Law Department's Torts Division, performing actual legal work for an entire year and even joining new Assistant Corporation Counsels in their attorney training boot camp. Similar programs exist in the Manhattan and Brooklyn DA's offices. Students thus gain real hands-on legal training (and some compensation to help defray law school costs if they are accepted into the Law Department Summer Honors Program), and the agency gains much needed legal assistance and the opportunity to assess a potential attorney's legal work over an extended time.

New York Law School has also partnered with the Legal Aid Society, the New York City Law Department's Legal Counsel Division, and the New York City Health Department to provide a clinical year program in which students, similar to medical students, dedicate their entire year of academic work to skills training and rotate in their clinical practice through three rounds of ten weeks each. Again, the work involves real meat and potatoes practice, with case assignments and actual legal work. Program supervisors at the agencies also serve as clinical adjunct professors at the Law School, which trains them. Thus, students in the program attend classes tied directly to their clinical practice, classes that are taught by their supervisors in that practice.

Such programs must be well thought out, but they can be scaled up or down to meet the needs of the particular municipality or municipal law firm and may involve only one or two students and one or two municipal agencies. Students desperately need and desire a career path. Municipalities and municipal law firms desperately need and desire qualified and experienced municipal counsel. Programs such as these can help meet the needs of both.

Mandatory pro bono reporting. Pro bono practice of law raises at least two significant problems for municipal attorneys. First, they have no malpractice insurance. Second, local laws, ethics laws, and agency rules and regulations often preclude the practice of law or the representation of clients in any form.

For example, under New York City's ethics law, a lawyer in the Department of Sanitation may not volunteer to represent clients for the Legal Aid Society if that work requires him or her to communicate with any City agency (including any District Attorney's Office) or be involved in Legal Aid's dealings with the City or if the client has any business dealings with the City, even if the pro bono lawyer is not involved in those business dealings. Thus, the City's ethics law prohibits a City lawyer from communicating with any City agency on behalf of a private person or firm or from counseling anyone against the interests of the City in any action in which the City is a party or a complainant. To be sure, any use of City time and resources is strictly prohibited, so any permitted pro bono work would have to be done at home on one's own time. Similar ethics restrictions exist in other municipalities as well.

Likewise, in New York City, the Administrative Code provides that

> [i]t shall be unlawful for the corporation counsel or any of the corporation counsel's assistants to appear as attorney or counsel in any action or litigation except in the discharge of his or her official duties, or to accept an appointment as referee or receiver in any action or proceeding.[4]

This provision prohibits attorneys in the New York City Law Department from being involved in *any* litigation. Moreover, even in a counseling role, they cannot be involved where the City has any interest, such as in a matter involving battered women or the New York City Police Department. The opportunities for pro bono work are thus very limited for attorneys in the Law Department. Such laws exist in other municipalities as well.

Finally, many agencies in municipalities around the state, including the New York City Conflicts of Interest Board, prohibit the practice of law by their attorneys, whether compensated or pro bono, because of the dangers of divided loyalty and misuse of municipal resources. That said, many municipal attorneys do provide seemingly endless hours of pro bono *non*-legal service, such as service to bar associations and on not-for-profit boards.

In view of such severe restrictions on the provision of pro bono legal services by attorneys in municipal service, one must question why they should disclose the number of hours they have devoted to (largely prohibited) pro bono practice.

Endnotes

1. U.S. Dep't of Educ., Federal Student Aid: Public Service Loan Forgiveness Program 2 (2013), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&cad=rja&uact=8&ved=0CDMQFjAC&url=http%3A%2F%2Fstudentaid.ed.gov%2Fsites%2Fdefault%2Ffiles%2Fpublic-service-loan-forgiveness.pdf&ei=40VNU_eJH4rLsATZqoCYAg&usg=AFQjCNEbqH8klxjEz3bSaDuegxFDK4ExaQ.
2. *See, e.g., Loan Repayment Assistance Program (LRAP) for Public Interest Lawyers*, Columbia Law School, http://web.law.columbia.edu/financial-aid/lrap-public-interest-lawyers (last visited Apr. 26, 2014).
3. *See Mayor's Graduation Scholarship Program*, NYC: Citywide Administrative Services, http://www.nyc.gov/html/dcas/html/employees/mgsp.shtml (last visited Apr. 26, 2014).
4. N.Y.C. Admin. Code § 7-103.

Mark Davies

From the Editors

As we emerge from a long a winter, we are reminded that spring is a time of energy and creativity. So, what better time than now to brush up on the latest news and innovating thinking in municipal law? This issue of *Municipal Lawyer* dives into a broad array of issues of importance to municipal lawyers. We begin with articles on two recent New York Court of Appeals opinions, one on zoning law and the other on the obligation of public employees to cooperate in their own defense. We then turn to a pair of articles on more general subjects. The first provides guidance on the rights and responsibilities of provisional employees in positions in the competitive class, while the other examines the ethical and professional responsibility considerations that municipal lawyers should take into account when dealing with the press. Finally, in a book review, we take a brief look at innovative approaches to consider in order to aid distressed municipalities.

We start with Maureen Liccione's article on the Court of Appeals, November 2013 decision in *Rocky Point Drive-In, L.P. v. Town of Brookhaven*. Liccione, who represented the Town of Brookhaven in the case, explores the Court's ruling on the "special facts exception" to a general rule of zoning law that governs which law an applicant for land use approval is subject to when a zoning law is amended after the submission of the application, but before a decision is rendered on the application. As Liccione explains, in considering whether the special facts exception applied in *Rocky Point*, New York's highest court examined and reaffirmed the principle that an applicant must have a right to a permit under the zoning that existed prior to the amendment (the first prong of the special facts exception). The Court did not reach the applicant's argument that a municipality's negligence in processing an application could establish the second prong of the exception.

Focusing on another November 2013 decision by the Court of Appeals, Jessica Baquet's article on *Lancaster v. Incorporated Village of Freeport* drills down into a topic introduced in the last issue of *Municipal Lawyer*—the defense and indemnification of public employees. As Baquet, who represented the Village of Freeport, explains, the *Lancaster* Court sheds light on a number of previously unanswered questions regarding the obligation of public employees to fully cooperate in their defense, including: What must a public employee do to fulfill his duty to cooperate? What are the public entity's obligations in the event the employee fails to cooperate? What are the consequences of a public entity's failure to withdraw an employee's defense after he refuses to cooperate?

Harvey Randall helps us bone up on another aspect of the duties of municipal employers and rights of municipal employees. Randall's article provides a primer on provisional appointments of employees to positions in the competitive class. Randall addresses a number of subjects, including how to effect a provisional appointment, how to remove a provisional appointee from his or her position without notice and hearing, how a provisional employee may attain tenure in the position, and what impact a collective bargaining agreement may have on the continuation of a provisional employee in service.

Steven Leventhal begins his article on the ethics of dealing with the press with the warning that, "[T]oday there may be no political, governmental or professional activity that requires a more cautious exercise of judgment than the perilous press interview." As he explains, a municipal lawyer must consider a number of legal and professional obligations that will influence what a lawyer may and, in some cases, may not reveal. His article examines some of the issues that a municipal attorney should consider when responding to press inquiries—including protected forms of expression, compulsory disclosure, permissive privacy and mandatory confidentiality—and also provides practical advice for dealing with press inquiries.

Tapping into the creativity of spring, we end this issue with Michael Lewyn's examination of innovative approaches to assisting distressed municipalities. He does so while reviewing Lewis Solomon's *Detroit: Three Pathways to Revitalization*. Lewyn notes that Solomon's book on Detroit "focuses on three possible saviors for that city: public education, private investment, and community agriculture." He concludes that although the author's "analysis is sometimes incomplete, he does address some topics of relevance to depressed upstate cities such as Buffalo and Rochester."

Sarah Adams-Schoen and Rodger Citron

Rocky Point Drive-In, L.P. v. Town of Brookhaven: The Special Facts Rule

By Maureen Liccione

In November of last year, the Court of Appeals decided *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, and affirmed the long-established rule that where a zoning law is amended after the submission of an application for land use approval, but before a decision is rendered on the application, the courts are bound to apply the amended law.[1]

The Court of Appeals has established two exceptions to this general rule. The first is known as the vested rights exception, which was not asserted in *Rocky Point*. The vested rights exception is applicable where an applicant has established: (1) that it possessed a valid permit prior to the change in the zoning law; (2) substantial construction had been completed in reliance upon the valid permit; and (3) substantial expenditures were made in furtherance of the substantial construction.[2]

The second exception, which was the centerpiece of the *Rocky Point* appeal, is known as the "special facts" exception. Under this exception to the general rule, the amended law will be found inapplicable where the amendment was proposed and enacted after the applicant filed an application for a land use approval and two prongs are satisfied.[3] Specifically, to prove the special facts exception, the applicant must prove: (1) that it was entitled to a permit as a matter of right by virtue of its full compliance with the permit requirements under the law in effect at the time of the application and that proper action upon the permit by the municipal entity would have given the applicant time to acquire a vested right; and (2) that the reviewing municipality or board unduly and deliberately delayed the application as a result of bad faith, malice, oppression, manipulation or corruption.[4] This two-pronged rule has been applied consistently statewide.[5]

In considering whether the exception applied to the *Rocky Point* facts, New York's highest court reaffirmed the principle that an applicant must have a right to a permit under the zoning that existed prior to the amendment.[6] The Court then declined, on the facts of this case, to consider whether negligence could substitute for malicious or deliberate delay to satisfy the second prong of the exception.

Background Facts

The property which was the subject of the Court of Appeals' ruling is located on Route 25A in the hamlet of Rocky Point and consists of approximately 17.7 acres. The parcel has been used for recreational purposes for decades, first as a drive-in theatre and then, during the applicable time period, as a golf driving range. It has never been used for retail purposes.

On October 22, 2002, the Brookhaven Town Board voted to apply the Commercial Recreational or CR "floating zone"[7] designation to the property. The floating CR zone had been created by the Brookhaven Town Board in 1997 in furtherance of the Town's Comprehensive Plan. The Comprehensive Plan was adopted in 1996 in accordance with N.Y.S. Town Law § 263, which also mandates that zoning laws be enacted in accordance with comprehensive land use plans.

The Comprehensive Plan contained a number of proposals in an attempt to preserve and protect the dwindling supply of land utilized for recreational purposes. To that end, it provided:

> The Town contains a number of various private recreational facilities including golf driving ranges, indoor sports facilities and roller rinks. These facilities provide a much needed recreational outlet for Town residents. However, there may be pressure from the private sector to redevelop these recreational properties with more intensive commercial uses such as shopping centers and big box developments which may make for greater use of the parcel and may be more profitable especially if the existing recreational use is seasonal only. Furthermore, the existing recreational use may not be in a zoning district which allows it to remain commercially viable or which provides for all of its needs. Currently these uses would require either commercial or industrial zoning that have no specific regulations for these specific uses. In addition, many people currently go outside the Town to visit many of these types of recreational uses instead of the Town being a destination for visitors, especially tourists. Accordingly the Town may wish to consider the creation of a Commercial/Recreation

> or Commercial Entertainment zoning district.[8]

On February 15, 2000, the Town Board first proposed to apply the CR zone to the appellant's property. The next day, the Brookhaven Town Clerk, on behalf of the Town Board, notified the appellant's predecessor-in-interest that a public hearing was going to be held on March 7, 2000, to consider the adoption of a change of zone for the subject property from J-2 to the CR district, consistent with the then-current use of the property as a driving range and the Comprehensive Plan.

On March 3, 2000, approximately three weeks *after* the zone change notice[9] and just prior to the March 7, 2000 public hearing on the CR District proposal, the Appellant submitted a site plan application to the Planning Department staff for site plan approval to construct a Lowe's Home Improvement Center.

The proposed Lowe's was not a permitted, "as of right," use in the J-2 District because it was a commercial center utilizing more than five acres. At the time, such a commercial center was permitted as of right only in the J-3 District or in the D-1 Residential District by special exception permit. A commercial center was defined in Brookhaven Town Code § 85-1 as:

> Any building or buildings, structure or structures or premises used by one (1) or more enterprises for a commercial purpose specifically permitted within the particular use district in which this term is applied, where the proposed use occupies a site of five (5) or more acres, whether built at one (1) time as a unit or in two (2) or more construction stages.[10]

As a result of these provisions, in order to construct a commercial center within J-2, Rocky Point was required to obtain either a variance from the Board of Zoning Appeals ("BZA") or a change of zone from the Town Board. Additionally, the Town Code required all applicants to submit variance applications to the BZA simultaneously with the filing of a site plan approval application with the Planning Board. A BZA determination approving the variance application, however, was necessary *prior* to the Planning Board considering any site plan approval application.[11] In other words, the Planning Board had no jurisdiction to review the Lowe's site plan application unless or until the BZA approved a variance application or the Town Board changed the zone.

On March 22, 2000, three weeks after delivery of the Lowe's site plan application to the Planning Department and two months prior to the eventual May 18, 2000 Town Board vote to apply the CR designation, planning department staff wrote a letter informing Rocky Point that the proposed Lowe's was prohibited in the J-2 District and asking how it wished to proceed. In other words, the staff sought to learn whether the applicant preferred to seek a variance from the BZA or a zone change from the Town Board. Rocky Point never responded to the March 22, 2000 letter.

Notwithstanding the lack of a response, staff presumed the applicant would seek a variance such that the BZA would become the lead agency for purposes of the mandatory SEQRA review. The other involved agencies were informed that the BZA was the intended lead agency. The SEQRA regulations do not require that an applicant be copied on lead agency coordinated review letters, letters that notify the other involved agencies of the *intent* of one to take lead agency status.[12] Staff, consistent with the SEQRA regulations and ordinary practice, did not inform the applicant of the notice of intention.

Staff processed the site plan application in good faith as far as possible without an actual BZA application, circulating traffic reports and other information to SEQRA-involved agencies.

Crucially, the zone change to CR was of no consequence to the SEQRA and other reviews, since a variance was necessary under either J-2 or CR. In fact, the SEQRA review process would have been the same whether the application needed a BZA variance, a zone change from the Town Board or just site plan approval from the Planning Board.

However, until the Lowe's application was determined to be either an application for a BZA variance or for a Town Board change of zone from J-2 to J-3, neither the BZA nor that Town board had legal authority to issue a positive or negative declaration. More specifically, the SEQRA regulations at 6 NYCRR § 617.6(3)(b) provide that a lead agency is only authorized to make a determination of significance (i.e., positive or negative declaration) once it receives an application.

On May 18, 2000, five of the seven Town Board members voted to change the parcel's zoning and apply the CR floating zone to the subject property. Since, however, the property owner had filed a protest, an affirmative vote of a super majority of the Board was required under Town Law § 265. Five had voted "yes," one "no," and the seventh had recused himself. The Town interpreted Town Law § 265 as requiring a super majority of those voting, i.e., 5 out of 6, excluding the Town Board member who recused himself.

The Appellant sued on May 25, 2000, alleging the General Construction Law § 41 required a super majority of the full Board, not merely of those voting. The Appellant was successful in the initial effort and the CR rezoning eventually was declared invalid (for the first time) on March 13, 2001.

On September 22, 2000, counsel for the Town and Rocky Point entered into a court stipulation to apply

for a use variance from the CR zoning that was then in effect (the "Stipulation").

The use variance application was not submitted to the BZA until two and one half months after the Stipulation, on December 1, 2000. The Town's position was that the Appellant was responsible for nine months of delay—from the March 22, 2000 Planning staff letter asking how it wished to proceed until the December 2000 BZA application.

Upon receipt of the variance application, the matter promptly was moved up from the originally scheduled February 7, 2001 semi-monthly meeting and placed on the BZA calendar for January 24, 2001. At that meeting the BZA issued a resolution assuming lead agency status, issuing a positive declaration and resolving that a Draft Environmental Impact Statement ("DEIS") was required.

The Applicant submitted its DEIS on August 2, 2001, almost eight months from the date of the positive declaration. Staff completed the DEIS review, notwithstanding that the second resolution to zone the property to CR was enacted on June 16, 2001 and another successful lawsuit to vacate the rezoning was filed on July 2, 2001.[13]

Ultimately, the BZA accepted the DEIS on March 13, 2002 and the required public hearing was held at the next semi-monthly BZA meeting on April 24, 2002. The DEIS hearing was held twenty days *earlier* than required under the SEQRA regulations.

The FEIS was submitted by the Appellant and had been accepted by the BZA on October 2, 2002, unaffected by the fact the CR zoning was vacated for the second time on July 17, 2002. The Town Board rezoned the Subject Property to CR for the third time twenty days later, on October 22, 2002. By this time the Town Board had enacted local superseding Town Law § 265, requiring only a simple majority vote to rezone when a protest was filed.

Lower Court Proceedings

The property owner brought a declaratory judgment action challenging the rezoning. After extensive discovery, the Town was awarded summary judgment by the Suffolk County Supreme Court (Emerson, J.) on the special facts issue because, *inter alia*, the plaintiff had no right to construct a commercial center under the J-2 zoning, i.e., it failed to meet the first prong of the special facts test.[14]

The Second Department reversed, finding there were questions of fact as to selective enforcement and malicious delay, even though the unanimous panel acknowledged that the proposed Lowe's fell within the definition of a commercial center.[15]

A non-jury trial ensued and the Suffolk Supreme Court (Sweeney, J.) held for the property owner, finding that the plaintiff had established bad faith by "the repeated attempts to rezone" and delays prior to the positive declaration and "had selectively enforced the J-2 zoning prohibition."[16] The trial court presumably substituted selective enforcement for the first prong of the special facts test and eliminated the need to show a permitted use because it believed selective enforcement of the commercial center designation had been demonstrated.

The Town appealed the trial judgment to the Second Department and, this time, prevailed. The Second Department reversed on the law and the facts, finding no evidence of selective enforcement.[17]

Rocky Point was granted leave to appeal by way of motion to the Court of Appeals. The Court of Appeals (Rivera, J.) affirmed the Second Department.[18]

Selective Enforcement

The unanimous Court focused on the fact that Rocky Point had not met "the threshold requirement that it was entitled to the requested land use permit under the law as it existed when it filed its application."[19]

As to selective enforcement obviating the need for an "as of right" entitlement to a permit under the first prong, the Court of Appeals found the Second Department's ruling that there was insufficient evidence of selective enforcement was the finding which "more nearly comported with the weight of the evidence."[20] Judge Rivera further found that "[t]he record clearly demonstrate[d] that similarly situated applicants… were not similarly situated at all; they either fell within an exception or were within compliance with the J-2 zoning classification."[21]

The Appellant made its case for selective enforcement by arguing that the Town "historically ignored" the commercial center prohibition, because other shopping center applications had been approved in J-2 and concluding there must have been selective enforcement with respect to the Lowe's application.[22] The Appellant cited fourteen examples of applications which it argued had not been subjected to the J-2 prohibition against 5 acre plus shopping centers.[23] Respondents argued that each of Appellants' examples either: (1) presented insufficient evidence to determine how the application had been treated, because it was 25 years or more prior to the trial; (2) did not fit the Town Code definition of a commercial center; (3) was exempt from zoning; (4) involved a pre-existing use; or (5) was treated in a manner similar to the Appellant's application.

The burden to establish selective enforcement is a heavy one.[24] Selective enforcement is essentially an Equal Protection violation claim and "forbids a public authority from applying or enforcing an admittedly valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.'"[25]

In *Bower Associates v. Town of Pleasant Valley*, the Court of Appeals reiterated this high burden:

> But even different treatment of persons similarly situated, without more, does not establish a claim. What matters is impermissible motive: proof of action with intent to injure—that is, proof that the applicant was singled out with an "evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."[26]

As the Court of Appeals explained in *Plattekill v. Dutchess Sanitation*:

> We find [no] merit to the defendants "selective enforcement" argument. Defendant, at most, has alleged previous nonenforcement and this is not enough. To prevail and thus render the ordinance unenforceable on this principle, it must be demonstrated that its provisions were enforced against the challenger here and not enforced as to others and that there was "arbitrary and intentionally unfair discrimination," "invidious discrimination." No such discrimination has been alleged or demonstrated and the "selective enforcement" argument must fail.[27]

Negligence Standard

The *Rocky Point* Court did not reach the question of whether negligence could substitute for malice or deliberate delay. Judge Rivera noted that Rocky Point's brief had placed "significant reliance on [the] decision in *Matter of Faymor Dev. Co. v. Board of Stds. & Appeals of City of N.Y.* in support of its [negligence] argument."[28] In rejecting the argument, the Court distinguished *Faymor*:

> In *Faymor* the applicant would have had, in the absence of municipal wrongdoing, a vested right. Here, as Rocky Point concedes, it cannot meet the zoning requirements and did not have a vested right. Rocky Point has failed to meet the threshold requirement of entitlement as of right, and we have no reason to upset the Appellate Division's factual findings of a lack of record support for selective enforcement by the Town, because the special facts exception is inapplicable to this case, under any standard.[29]

As a practical matter, it is difficult for this author to fathom how mere negligence in processing a land use application could continue for any meaningful period of time, without the applicant demanding action. If an application were to be accidentally lost or misplaced, a diligent applicant would bring that fact to a staff person's attention. Then, if the municipality still procrastinated, it would open itself to claims of "malice" or "bad faith."[30] Moreover, it is unclear whether under the reduced negligence standard, as was advocated by the *Rocky Point* appellant, a municipality would be deemed "negligent" if it failed to move every application potentially affected by an impending change of law to the head of the line, no matter when filed.

Nevertheless, even if a hypothetical negligence scenario were to result in delay, in this author's view, several sound public policy reasons militate against adoption of a negligence standard. First, the special facts exception implicitly acknowledges that zoning laws are legislative enactments which are presumptively constitutional and that presumption "is not rebutted if the…classification is even 'fairly debatable.'"[31] Legislative enactments are not to be overturned lightly and a negligence standard would do just that.

Second, there are "no assurances[s] that…zoning regulations [will] remain unchanged. '…If there is one thing that the history of zoning regulation has established it is that as time passes and population increases (or decreases) the zoning restrictions change.'"[32] As a result, the heightened malice standard has been established for voiding zoning laws, even if they are enacted while an application under a prior zoning classification is pending.

Third, as acknowledged in Salkin, *New York Zoning Law and Practice*, land use controls have a "profound impact" upon the value of land if for no other reason than they are capable of shaping the character of an entire new and extensive area of a community, dictating the pace of development, influencing the economic and racial character of the community and affecting the kind and amount of development within a specific zone.[33] It is for good reason then that the New York State Legislature has mandated that all land use regulations be established in accordance with a comprehensive plan pursuant to Town Law § 263 and that this Court has required such regulations to be exercised in precise compliance with the powers given to towns under the Town Law.[34] A negligence standard would disrupt the comprehensive planning process by enhancing the ability of an applicant to impede implementation of a zone change intended to implement the comprehensive plan for an entire municipality.

Fourth, in analogous circumstances, the Court of Appeals has refused to estop municipalities from correcting their own mistakes or negligence even in egregious instances.[35]

Allowing a negligence standard would address a hypothetical issue that may not exist in the real world, while also enhancing the ability of an applicant, which

does not claim to have a vested right or a legitimate expectation that the zoning designation of its property would remain in place, to impede implementation of a zone change intended to implement the comprehensive plan for an entire municipality. The prerequisites to the application of the special facts exception should remain as they have for decades: in this writer's opinion they are good law and good policy.

Endnotes

1. 21 N.Y.3d 729, 736, 977 N.Y.S.2d 719, 722 (2013); *see also Alscot Investing Corp. v. Inc. Vill. of Rockville Centre*, 64 N.Y.2d 921, 488 N.Y.S.2d 629 (1985), *aff'g*, 99 A.D.2d 754, 471 N.Y.S.2d 669 (2d Dep't 1984); *Mascony Transp. & Ferry Serv. Inc. v. Richmond*, 49 N.Y.2d 969, 428 N.Y.S.2d 948 (1980), *aff'g*, 71 A.D.2d 826, 419 N.Y.S.2d 381 (2d Dep't 1979); *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 390 N.Y.S.2d 49 (1976); *Demisay, Inc. v. Petito*, 31 N.Y.2d 896, 340 N.Y.S.2d 406 (1972).
2. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996); *Ellington Constr. Corp. v. Zoning Bd. of Appeals*, 77 N.Y.2d 114, 564 N.Y.S.2d 1001 (1990); *Faymour Dev. Co., Inc. v. Bd. of Standards & Appeals of N.Y.C.*, 45 N.Y.2d 560, 410 N.Y.S.2d 798 (1978).
3. *Alscot Investing Corp.*, 64 N.Y.2d 921, 488 N.Y.S.2d 629; *Pokoik*, 40 N.Y.2d 769, 390 N.Y.S.2d 49.
4. *Alscot Investing Corp. v. Inc. Village of Rockville Centre*, supra, 64 N.Y.2d 921, 488 N.Y.S.2d 629; *Pokoik v. Silsdorf*, supra, 40 N.Y.2d 769, 390 N.Y.S.2d 49.
5. *See, e.g., Jamaica Recycling Corp. v. City of N.Y.*, 38 A.D.3d 398, 832 N.Y.S.2d 40 (1st Dep't 2007), *app. den'd*, 9 N.Y.3d 801, 840 N.Y.S.2d 566 (2007); *Hamptons LLC v. Rickenbach*, 98 A.D.3d 736, 950 N.Y.S.2d 182 (2d Dep't 2012); *Alfano v. ZBA of Vill. of Farmingdale*, 74 A.D.3d 961, 902 N.Y.S.2d 662 (2d Dep't 2010); *Ronsville v. Totman*, 303 A.D.2d 897, 757 N.Y.S.2d 134 (3d Dep't 2003); *Preble Aggregate v. Town of Preble*, 263 A.D.2d 849, 694 N.Y.S.2d 788 (3d Dep't 1999); *Cleary v. Bibbo*, 241 A.D.2d 887, 660 N.Y.S.2d 230 (3d Dep't 1997); *Meteor Enter., LLC v. Bylewski*, 38 A.D.3d 1356, 831 N.Y.S.2d 787 (4th Dep't 2007); *Envirotech of America, Inc. v. Dadey*, 234 A.D.2d 968, 651 N.Y.S.2d 778 (4th Dep't 1997).
6. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 37 A.D.3d 805, 806, 831 N.Y.S.2d 456, 457-58 (2d Dep't 2007).
7. A floating zoning district is created by an amendment to a town code, but is placed on a town's zoning map only through subsequent town board legislative acts placing the zoning on individual parcel(s), in accordance with a comprehensive plan. *Rodgers v. Vill. of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951); Patricia Salkin, 1 N.Y. Zoning Law & Prac. § 4:18. A floating zone does not have set boundaries but is applied on individual bases at varied times. Applying a floating zone to a particular parcel or "landing" it on a designated lot amends the zoning map. Such a designation is not spot zoning. *See also* Patricia Salkin, 1 N.Y. Zoning Law & Prac. § 4:18. (discussing floating and spot zoning).
8. Town of Brookhaven Final Comprehensive Land Use Plan, adopted May, 1996.
9. The trial court incorrectly held that the zoning amendment was commenced *after* the Appellant's predecessor had filed its site plan application.
10. Brookhaven Town Code § 85-1.
11. Brookhaven Town Code § 85-45 H, formerly § 85-45 G.
12. 6 NYCRR § 617.6(b)(3).
13. *Sans Agent Inc. v. Town of Brookhaven*, Short Form Order, Suffolk County Supreme Court, October 4, 2001, Index No. 01-14952 (Whelan, J.).
14. *Rocky Point*, 37 A.D.3d at 806, 831 N.Y.S.2d at 457-58.
15. *Id.*
16. *Id.*
17. *Rocky Point*, 93 A.D.3d at 654, 939 N.Y.S.2d at 865-66.
18. *Rocky Point*, 21 N.Y.3d at 734, 977 N.Y.S.2d at 720.
19. *Id.* at 737, 977 N.Y.S.2d at 722.
20. *Id.*
21. *Id.* at 738, 977 N.Y.S.2d at 723.
22. *Id.* at 736, 997 M/U/S/2d at 722.
23. *Rocky Point*, Decision After Trial, June 5, 2009, Suffolk County Supreme Court, Index No. 02-30047 (Sweeney, J.).
24. *303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 693, 416 N.Y.S.2d 219, 223 (1979) (*citing Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1986)).
25. *Id.*
26. 2 N.Y.3d 617, 631, 781 N.Y.S.2d 240, 248 (2004).
27. 56 A.D.2d 150, 152, 391 N.Y.S.2d 750, 753 (3d Dep't 1977) (citation omitted), *aff'd*, 43 N.Y.2d 662, 400 N.Y.S.2d 816 (1977).
28. *Rocky Point*, 21 N.Y.3d at 738, 977 N.Y.S.2d at 723 (citing 45 N.Y.2d 560, 566, 410 N.Y.S.2d 798, 803 (1978)).
29. *Id.* (citation omitted).
30. *See, e.g., Our Lady of Good Counsel v. Ball*, 45 A.D.2d 66, 68, 356 N.Y.S.2d 641, 643 (2d Dep't 1974), where the New York City Department of Consumer Affairs failed to move along an application for a bingo license despite "persistent and continuous" inquiries by the applicant.
31. *Tilles Investment Co. v. Town of Huntington*, 74 N.Y.2d 885, 888, 547 N.Y.S.2d 835, 836 (1989) (citation omitted); *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139 (1989); *Kurzius v. Inc. Village of Upper Brookville*, 51 N.Y.2d 338, 434 N.Y.S.2d 180 (1980).
32. *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp. 2d 179 (E.D.N.Y. 1998) (quoting *Elias v. Town of Brookhaven*, 783 F. Supp. 758, 761 (E.D.N.Y. 1992)).
33. Patricia Salkin, 1 N.Y. Zoning Law & Prac. § 1:12 (10th ed.).
34. *See, e.g., Sunrise Check Cashing and Payroll Serv., Inc. v. Town of Hempstead*, 20 N.Y.3d 481, 964 N.Y.S.2d 64 (2013), *reargument denied*, 21 N.Y.3d 978 (2013).
35. *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 369-70, 526 N.Y.S.2d 56, 61 (1988); *Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 178-79 (1988), *reargument denied*, 71 N.Y.2d 995 (1988), *cert. denied*, 488 U.S. 801 (1988); *Rudolf Steiner Fellowship Found. v. De Luccia*, 90 N.Y.2d 453, 460, 662 N.Y.S.2d 411, 414 (1997).

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Defense and Indemnification of Public Employees After *Lancaster*

By Jessica M. Baquet

Public employees may be exposed to liability in the performance of their duties. At common law, a public entity could not lawfully fund the defense of or indemnify its public employees in a lawsuit, even if the case arose out of the employee's official acts.[1] In the late 1970s and early 1980s, however, the state legislature enacted sections 17 and 18 of the Public Officers Law, which provide for the defense and indemnification of public employees at the state and local levels, respectively.

Both public entities and public employees have certain obligations under these statutes, which Peter Bee and James Clemons described in detail in their article "Indemnities and Immunities for Municipal Officials," published in the Winter 2014 issue of *Municipal Lawyer*.[2] In general, the public entity must fund the defense of a public employee in a lawsuit arising from his official acts and must indemnify him in the event of a settlement or adverse judgment so long as the public employee fully cooperates in his defense and fulfills the statute's procedural requirements.[3]

This article focuses on the obligation of public employees to fully cooperate in their defense. Until recently, several important questions regarding the cooperation requirement remained largely unanswered: What must a public employee do to fulfill his duty to cooperate? What are the public entity's obligations in the event the employee fails to cooperate? What are the consequences of a public entity's failure to withdraw an employee's defense after he refuses to cooperate? In *Lancaster v. Inc. Village of Freeport*,[4] the Court of Appeals shed light on these issues for the first time.

The *Lancaster* Decision

Lancaster concerned the Village of Freeport's ("Village") withdrawal of its defense of various public employees in two federal lawsuits brought against them and the Village by two private plaintiffs. These suits alleged, among other things, that the public employees had committed RICO violations and fraud. The plaintiffs demanded $8,500,000 in damages plus treble damages and attorney's fees.

The Village and the public employees were represented by separate counsel in the federal lawsuits. The Village, by its attorney, negotiated a settlement that provided for the discontinuance of the cases against it and the public employees. Although the Village was required to make a payment to the private plaintiffs as part of the settlement, the employees were not required to pay plaintiffs or to admit any wrongdoing. The plaintiffs required only that the public employees agree to refrain from criticizing the settlement.

The employees refused to agree to the foregoing terms, and, as a result, the settlement foundered with respect to the claims against them. Thereafter, the Village's Board of Trustees voted to withdraw the public employees' defense based on their failure to fulfill their duty to cooperate under Public Officers Law § 18 and Freeport Village Code § 130-6.[5]

The public employees then brought Article 78 proceedings against the Village seeking the reinstatement of their defense. The Supreme Court dismissed the proceedings, finding that the employees, had, in fact, failed to cooperate.[6] The Second Department and the Court of Appeals subsequently affirmed.[7] *Lancaster* is one of only a handful of decisions to consider whether a public employee breached the duty to cooperate under the Public Officers Law and marks the first time that the Court of Appeals has weighed in on the issue.

The *Lancaster* decision expounded upon the duty to cooperate in two important respects. First, the Court found that the failure of a public employee to accept a reasonable settlement offer constitutes a breach of the duty to cooperate.[8] Second, the Court held that a public entity's duty to defend its employees is akin to an insurer's obligation to defend its insured. As such, like an insurer, a public entity is only justified in withdrawing an employee's defense for non-cooperation where: (1) the entity acted diligently in seeking to bring about the public employee's cooperation; (2) the efforts employed by the entity were reasonably calculated to obtain the employee's cooperation; and (3) the attitude of the employee, after cooperation was sought, was one of willful and avowed obstruction.[9]

The *Lancaster* decision has significant implications for public employees and public entities alike: public employees must be aware of what they must do to fulfill their duty to cooperate, while public entities must understand the circumstances under which they are obligated to withdraw an employee's defense for non-cooperation and the potential consequences of a failure

to do so. In this regard cases construing an insured's breach of the duty to cooperate with his insurer will prove instructive.

Obligations of the Public Employee

In the insurance context, courts have noted that the duty to cooperate is premised upon the fact that an insurer cannot properly defend a lawsuit without the participation of its insured. Courts have thus held that the duty to cooperate requires an insured to provide truthful disclosure of information demanded by the insurer, to aid in securing witnesses, to forward papers related to the lawsuit to counsel, to testify at depositions and at trial and to otherwise provide all reasonable assistance necessary to enable counsel to defend the lawsuit.[10] Courts will likely find that public employees are subject to the same obligations.

Lancaster sets out another critically important element of the cooperation requirement: the duty to accept a reasonable offer of settlement. There, the Court of Appeals found that, in the face of the multi-million dollar exposure associated with continuing to litigate, the public employees' refusal to settle the lawsuits in exchange for nothing more than their agreement to refrain from criticizing the settlement was unreasonable. The Court did not, however, articulate a test to be applied in determining whether an employee's refusal to settle was unreasonable in other situations.

Insurance cases do not provide much additional insight on this point. In the most relevant case, *Cowan v. Ernest Cordelia, P.C.*, an insured refused to settle a lawsuit because the plaintiff would not agree to keep the settlement absolutely confidential.[11] The insured's purported justification for insisting on confidentiality was that, if the fact that the case settled became known, it might create the perception that he had done something wrong. He was particularly concerned about this because he was an attorney and had previously testified before the Character and Fitness Committee that he had not committed the acts that gave rise to the lawsuit. The Court found that the objections to the settlement were "phantom" and "illusory" insofar as there is no legal basis upon which a settlement that does not include an admission of wrongdoing could support a claim that the insured lied about his innocence in another proceeding. As such, the Court found that the insured failed to cooperate by "thwart[ing] the ultimate settlement of [the] lawsuit."[12]

The principle to be gleaned from *Lancaster* and *Cowan* is that the reasonableness of an employee's refusal to settle likely hinges on a balancing of: (1) the financial burden to be incurred by the public entity if litigation continues; against (2) the degree to which the employee will be injured or prejudiced by the settlement terms. While the financial exposure to the public entity may be more easily determined, the extent of injury to the employee is harder to quantify. The injury may not be monetary in nature, but might instead take the form of the relinquishment of a right or potential exposure to civil or criminal liability. If the employee can articulate a real and substantial harm that will inure to him under the settlement, it is unlikely that his refusal to settle will be considered unreasonable. The employees and insured in *Lancaster* and *Cowan* simply failed to meet that burden.

Obligations of the Public Entity

Faced with a public employee's failure to cooperate, a public entity is not simply free to withdraw the employee's defense. Instead, there are several standards that must be met, and steps the entity must take in order to ensure that the withdrawal is proper.

First, cases in both the insurance and public employment contexts make it clear that a public employee's lack of cooperation must be both material and substantial in order to warrant the withdrawal of his defense.[13] The burden of proving materiality is on the public entity and it has been described as a "heavy one."[14] Before *Lancaster*, the Third Department considered two cases concerning the withdrawal of a public employee's defense. In *Garcia v. Abrams*, the court found that the employee had not committed a material breach of the duty to cooperate when he testified inaccurately about a prior arrest at his deposition because: (1) he quickly corrected the inaccuracy; (2) the inaccurate information was likely inadmissible; and (3) even if the testimony were admitted at trial, the defense would have an opportunity to explain the reason for the misstatement.[15] In *N.Y.S. Inspection, Security and Law Enforcement Employees, District Council 82 v. Abrams*, the court held that an employee's failure to attend a deposition on a single occasion, where he otherwise completed all necessary paperwork and subsequently attended a rescheduled deposition, was not a material breach of the duty to cooperate.[16]

When, then, is a failure to cooperate material and substantial? With respect to the failure to attend depositions or to provide requested information, several courts have held, in the insurance context, that the insurer is required to demonstrate an "unreasonable and willful pattern" of such conduct.[17] In contrast, a single instance of the insured knowingly providing false information has been held sufficient to constitute non-cooperation.[18] With the foregoing in mind, public entities should be guided by the principle that, where an employee has prevented counsel from effectively defending the claims against him, he has committed a material breach of the duty to cooperate.

If the employee has committed a material and substantial breach, the employer must then fulfill its obligations under *Lancaster* before withdrawing the employee's defense. Specifically, the entity must act diligently in seeking to bring about the public employee's cooperation and it must employ efforts that are reasonably calculated to obtain the employee's cooperation. The employer is required to attempt to convince the employee to cooperate and must continue to do so until it is clear that "further reasonable attempts… will be futile."[19] The Court of Appeals has held, in the insurance context, that further attempts may clearly be futile where an insured openly disavows its duty to cooperate, while a "longer period of analysis may be warranted" where an insured "has punctuated periods of noncompliance with sporadic cooperation or promises to cooperate."[20] In sum, unless a public employee overtly declares that he will not cooperate, as the employees in *Lancaster* did, the public entity must make multiple attempts to procure cooperation over an extended period of time before it can legitimately withdraw the employee's defense.

Finally, the public entity must be able to demonstrate that the public employee's conduct was willful and avowed after the entity attempted to procure his cooperation. Simply put, the public entity must be able to show that the employee's continued failure to cooperate was deliberate rather than inadvertent.[21]

If all of the foregoing requirements are satisfied, the public entity must withdraw the employee's defense. The entity's failure to do so carries with it serious implications, as the unlawful expenditure of funds on an employee's defense may violate the Gift and Loan Clause of the New York Constitution. That clause provides that a public entity "shall [not] give or loan any money or property to or in aid of any individual or private corporation or association, or private undertaking…."[22] The magnitude of such a violation is severe; public officials can be held personally liable for such unlawful expenditures under General Municipal Law § 51.[23] Therefore, it is of critical importance that public entities keep abreast of their employees' cooperation, or lack thereof, in the defense of a lawsuit and that they document evidence of non-cooperation as well as their attempts to convince the employee to cooperate.

Conclusion

Lancaster has brought clarity to the obligations of public entities and public employees under the Public Officers Law. While there is room for further judicial clarification of the broad concepts of reasonableness of a settlement, materiality of an employee's breach, and futility of further attempts by the public entity to procure an employee's cooperation, public entities can now tailor their policies and procedures to ensure, in large part, that the requirements of Public Officers Law sections 17 or 18 are satisfied.

Endnotes

1. *See generally* James D. Cole, *Defense and Indemnification of Local Officials: Constitutional and Other Concerns*, 58 ALB. L. REV. 789 (1995).
2. Peter A. Bee & James A. Clemons, *Indemnities and Immunities for Municipal Officials*, 28 MUN. LAWYER 10 (2014).
3. N.Y. Pub. Officers Law §17(4) (2013) (requiring public employee to deliver initiatory papers to attorney general within five days of being served therewith and providing that delivery of those papers shall be deemed a request that state fund his defense); N.Y. Pub. Officers Law §18(5) (2013) (requiring public employee to deliver initiatory papers to chief legal officer of public entity within ten days of being served therewith along with written request that public entity fund his defense).
4. 22 N.Y.3d 30, 978 N.Y.S.2d 191 (2013).
5. This section of the Village Code adopts the provisions of Public Officers Law § 18.
6. *Lancaster v. Inc. Vill. of Freeport*, 2010 N.Y. Slip Op. 32341(U) (Sup. Ct., Nassau Co. 2010).
7. *Lancaster v. Inc. Vill. of Freeport*, 92 A.D.3d 885, 939 N.Y.S.2d 122 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 30, 978 N.Y.S.2d 191 (2013).
8. 22 N.Y.3d at 34.
9. *Id.* at 39.
10. *See generally* 70A NY Jur. *Insurance* § 2121.
11. *Cowan v. Ernest Cordelia, P.C.*, 2001 U.S. Dist. LEXIS 185, 98 Civ. 5548 (S.D.N.Y. 2001).
12. *Id.* at *15.
13. *Garcia v. Abrams*, 98 A.D.2d 871, 872, 471 N.Y.S.2d 161, 163 (3d Dep't 1983); *State v. Aetna Casualty & Surety Co.*, 43 A.D.2d 988, 988, 352 N.Y.S.2d 65, 65 (3d Dep't 1974).
14. *City of New York v. Cont'l Casualty Co.*, 27 A.D.3d 28, 31-32, 805 N.Y.S.2d 391, 393-94 (1st Dep't 2005).
15. 98 A.D.2d at 872, 471 N.Y.S.2d at 163.
16. 135 A.D.2d 304, 525 N.Y.S.2d 402 (3d Dep't 1988).
17. *See, e.g., N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 603, 840 N.Y.S.2d 358, 358 (2d Dep't 2007); *Anthony Sicari, Inc. v. Fireman's Ins. Co.*, 200 A.D.2d 542, 542, 606 N.Y.S.2d 695, 695 (1st Dep't 1994).
18. *See, e.g., United States Fidelity & Guaranty Co. v. Von Bargen*, 7 A.D.2d 872, 872, 182 N.Y.S.2d 121, 121 (2d Dep't 1959).
19. *Continental Cas. Co. v. Stradford*, 11 N.Y.3d 443, 450, 871 N.Y.S.2d 607, 611 (2008).
20. *Id.*
21. *Matter of Liberty Mut. Ins. Co. v. Roland-Staine*, 21 A.D.3d 771, 773, 802 N.Y.S.2d 6, 9 (1st Dep't 2005).
22. N.Y. CONST. art. VIII § 1; *see also* Cole, *supra* n. 1.
23. N.Y. Gen. Mun. Law § 51 (2014); *see also* Jessie Beller, *Assistant Counsel of New York City Conflicts of Interest Board, Use of Municipal Resources for Personal Purposes*, 23 MUN. LAWYER 17 (Spring 2009).

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All About Provisional Employees in the Competitive Class

By Harvey Randall

In New York State an individual may be appointed to a position in the competitive class in the State's civil service as a permanent employee,[1] a temporary employee,[2] a provisional employee,[3] a substitute employee[4] or as a term appointee for a predetermined period of time.[5]

This article will cover a number of issues and questions relevant to the appointment of an individual to a position in the competitive class as a provisional employee including how to effect a provisional appointment, removal of a provisional appointee from his or her position without notice and hearing, how a provisional employee may attain tenure in the position, and what impact a collective bargaining agreement may have on the continuation of a provisional employee in service.

A. Noncompetitive Provisional Appointments to Vacant Positions in the Competitive Class

An appointing authority[6] may wish to make an appointment to fill a vacant position in the competitive class[7] for which there is no appropriate eligible list available.[8] In such cases, the appointing authority recruits and nominates an individual for a non-competitive examination for appointment to the vacant position as a provisional employee. The appointing authority's nomination is submitted to the responsible civil service central personnel agency.[9] In cases involving the provisional appointment of an individual to a position with the State as the employer or with public authorities, public benefit corporations or other agencies for which the Civil Service Law is administered by the State Department of Civil Service, the nomination is submitted to the State Department of Civil Service.[10] With respect to provisional appointments by municipal employers, school districts and other political subdivisions of the State, the nomination is submitted to the responsible municipal civil service commission or personnel officer.[11]

If the individual is certified as qualified following the non-competitive examination,[12] she may be appointed provisionally to fill the vacancy. She may then be continued in the position until it becomes possible to make an appointment from an appropriate eligible list promulgated from a competitive examination for the title. In addition, a provisional employee must yield the position upon the certification of an individual whose name is on a special military list,[13] a preferred list[14] or some other roster or list as established by law, rule or regulation and who is interested and willing to accept the appointment.[15]

There are time limits controlling the duration of provisional appointments set out in law.[16] Although a provisional appointment is, as a matter of law, not to be for a period in excess of nine months, compliance with such a deadline has proven to be virtually impossible,[17] and often long-time provisional appointments have been the rule rather than the exception.[18]

1. Effect of Long-Term Provisional Service on Provisional Status

In response to claims by long-time provisional employees claiming they have attained tenure status by the passage of time, court rulings have consistently indicated that a provisional appointment is a "stop-gap" method for filling a vacancy[19] and the provisional appointee attains no right to be permanently appointed to the position by reason of having served in the position as a provisional appointee for an extended period of time.[20] Further, subject to a number of exceptions considered below, this is true even if the provisional appointee should subsequently become eligible for permanent appointment to the title from an appropriate eligible list.[21]

As to litigation based on the provisional incumbent claiming that she had attained permanent status in the position based on such longtime service, the decisions summarized below illustrate the various terms, conditions and circumstances under which a provisional employee may obtain, or be denied, permanent status in the position upon his or her passing the appropriate competitive examination.

In *Haynes v. Chautauqua County*[22] the Court of Appeals held that being reachable for permanent appointment from the eligible list does not serve to give a long-time provisional employee any right to be selected for permanent appointment to the position. Haynes, a long-time provisional appointee, was terminated from his position about a month following the certification of the eligible list promulgated for the position. He sued the appointing authority seeking reinstatement to the position as a permanent appointee. The Court held that passing the examination and being certified as eligible and reachable for permanent appointment[23] does not give a provisional employee any automatic right or priority to being appointed to the position as a permanent employee. The Court noted that § 65.3 of the Civil Service Law,[24] providing for the termination of a provisional employee within two months of the date of the promulgation of the eligible list, controlled notwith-

standing the fact that Haynes' name was the first on the eligible list certified to the appointing authority.

In contrast, in *LaSota v. Green*[25] the Court of Appeals, reversing a lower court ruling, held that LaSota, a long-time provisional employee, did have a right to a permanent appointment to the position. The Court explained that LaSota, a provisional employee for more than nine months and whose name was first on the eligible list, had obtained a permanent appointment by operation of law when he was retained in the position as a provisional appointee following the establishment of the eligible list. Accordingly, the LaSota Court held that the provisions of Civil Service Law § 65.4, rather than § 65.3, controlled in determining LaSota's right to be continued in the position.

The *LaSota* Court expanded upon an earlier decision, *Matter of Roulett*.[26] The *Roulett* court had held that where a provisional employee, eligible for permanent appointment, was retained in the absence of a mandatory eligible list beyond the relevant probationary period for the position, she attained permanent appointment in the position by operation of law. Thus, the key distinction between *Haynes* and *LaSota* was that LaSota's name was on a non-mandatory eligible list,[27] while in Haynes the list was mandatory as it consisted of the names of more than three candidates interested in and willing to accept appointment to the position.

Becker v. New York State Civil Service Commission[28] is a decision that demonstrates yet another variation regarding the rights, if any, of a long-time provisional employee when the individual, otherwise qualified for permanent appointment, is continued in the position as a provisional employee after the appropriate eligible list has been promulgated. Becker was appointed and served as a provisional appointee for six years when she took and passed the competitive examination for the title. She was reinstated to her lower grade permanent title after the eligible list had been promulgated. As she had been continued as a provisional employee for more than two months following the date on which the list was established, Becker claimed she had attained permanent status pursuant to § 65.4 as she was one of the top three eligibles whose names were on the list.

Rejecting Becker's argument, the Court explained that a permanent appointment by operation of law pursuant to § 65.4 results only when the provisional employee, who is otherwise an employee eligible for permanent appointment, is continued in the position after the eligible list is established and the list is not "mandatory" because there are fewer than three candidates interested in being appointed to the position. The Court explained that the provisions of § 65.4 of the Civil Service Law are to be strictly construed and apply only where there are fewer than three persons willing to accept the appointment left on the eligible list. Although Becker had been retained in the position as a provisional employee for more than the two-month period specified in § 65.3,[29] the appropriate eligible list certified for appointment to her position contained the names of three or more qualified individuals interested in being appointed, and thus, as in *Haynes*, her reliance on § 65.4 was misplaced.

In any event, it is black letter law that a provisional appointment cannot ripen into a permanent appointment merely by the passage of time. Further, a provisional employee cannot claim a contractual right to continued employment in the position[30] unless she becomes qualified for permanent appointment and is selected for such an appointment by the appointing authority or attains such status by operation of law.[31]

2. Effect of Collective Bargaining Agreements on Provisional Status

The courts have rejected efforts to frustrate the merit and fitness provisions set out in Article V, section 6 of the State Constitution through collective bargaining conducted pursuant to the Taylor Law.[32] Specifically, Article V, section 6 mandates that appointments and promotions in the civil service of the State and its political subdivisions "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive."[33]

An attempt to provide for converting a provisional appointment into a permanent appointment merely through the passage of time was considered in *Matter of City of Long Beach v. Civil Serv. Empls. Assn., Inc. [Long Beach Unit]*[34] under color of the terms set out in a collective bargaining agreement [CBA].

The relevant CBA included the following provision:

> Section 6-1.0—Definition of Tenure—Employees with one (1) year of service in the annual employment of the City, regardless of classification, will be deemed tenured employees. This period of tenure is to be computed retroactively and only employees enumerated in Section 2-1.0 of this Agreement shall be deemed non-tenured.
>
> Section 6-1.1—Rights of Tenured Employees—All tenured employees will be protected from separation from employment with the City for any reason other than (a) voluntary withdrawal; (b) dismissal for disciplinary reasons after a hearing pursuant to Section 75 of the Civil Service Law; (c) provisional employees in the competitive class will be protected by tenure with the

> exception that their employment may be terminated pursuant to Civil Service Law should it be necessary pursuant to Civil Service Law to appoint a qualified candidate from a Civil Service eligible list to their position. In that event, the displaced provisional employee will be transferred by the City to another position in the City for which he/she qualifies, should such a position be open. A position will be deemed open if it was vacated within six (6) months of a tenured provisional employee's displacement by a candidate from an eligible list certified by the Civil Service Commission.

In effect, these provisions in the CBA obviated the mandates of Article V, section 6 and the provisions of the Civil Service Law adopted to effect appointment and promotion in the public service based on merit and fitness. Rather, these contract clauses gave provisional and temporary employees subject to their provisions almost the same "permanent status" upon their satisfactory completion of their probationary period as the permanent status enjoyed by individuals appointed from an open-competitive or promotion eligible list.

The Court of Appeals, noting that it "repeatedly held…that a dispute is not arbitrable when the subject matter of the dispute violates a statute, decisional law or public policy," ruled that CSEA's grievance seeking to implement these provisions "is not arbitrable because granting the relief sought on behalf of the provisional employees under the so-called 'tenure' provisions of the CBA would violate the Civil Service Law and public policy." Further, noted the court, provisional appointments carry no expectation or right of tenure. Citing *Koso v. Greene*, the Court of Appeals said provisional employees, while appointed to positions in the competitive class, are "exempt from the civil service requirements for appointment; and similarly, so long as they hold such positions, they are entitled to none of the advantages secured by period of tenure under the [Civil Service Law]."[35]

Again quoting from *Koso*, the Court of Appeals reiterated that provisional appointments "'are mere stop-gaps, exceptions of necessity to the general rules with respect to the filling of such positions' and '[w]hile such appointments may on occasion be succeeded by a permanent appointment, this may only be by virtue of examination and eligibility under the civil service laws, and not by reason of any ripening of the temporary or provisional appointment into a permanent appointment.'"[36]

The decision also noted "CSEA relies on those portions of the CBA which provide that a provisional appointee is considered a tenured employee after one year of service. The Civil Service Law, however, clearly sets a time limitation on provisional appointments and that period is nine months." Accordingly, the Court viewed the City's agreement providing superior rights to provisional employees holding positions beyond that statutory time period as a nullity. Thus, the Court concluded that "the provisions under the CBA are unenforceable as a matter of law" as the terms of the CBA that afford tenure rights to provisional employees after one year of service are contrary to statute and decisional law and therefore any relief pursuant to those terms may not be granted by an arbitrator.

A collective bargaining agreement's effort to provide special rights to provisional employees in the bargaining unit was the critical element in another case, *City of Plattsburgh v. Local 788.* Here, the issue concerned determining the seniority rights of an employee in a layoff situation.[37] The relevant provisions in the collective bargaining agreement between Plattsburgh and the Union provided that, if there were to be demotions in connection with a layoff, the "date of hire" was to be used to determine an employee's seniority. However, the "date of hire" might not necessarily be the same date to be used to determine an individual's seniority purposes for layoff under State law, i.e., the individual's date of initial permanent appointment in public service.[38]

For example, assume that Employee A was provisionally appointed on January 1 and that Employee B was provisionally appointed on February 1 of the same year. Employee B, however, was permanently appointed on March 1 of that same year, while Employee A was permanently appointed a month later, on April 1. Under the terms of the collective bargaining agreement A would have greater seniority for layoff purposes than enjoyed by B. Sections 80 and 80-a of the Civil Service Law, however, provide that the date of an individual's most recent, uninterrupted "permanent appointment" determines his or her seniority for the purposes of layoff and so, under the law, B would have greater seniority than A.

In *Plattsburgh*, when the City laid off employee A rather than employee B, the Union grieved, contending that pursuant to the seniority provision in the collective bargaining agreement, B should have been laid off as A had greater seniority. The City, on the other hand, argued that Civil Service Law § 80 controlled and thus A, rather than B, had to be laid off first as B had greater seniority within the meaning of the statute. The Appellate Division ruled that Plattsburgh (employee B in the hypothetical) was entitled to an order barring submitting the Union's grievance to arbitration. The court held that § 80[39] of the Civil Service Law "reflects a legislative imperative" that the City was powerless to bargain away.[40] Accordingly, employee B was continued in the position.

3. Effect of Examination Failures on Provisional Status

In some instances the rules of a civil service commission may provide that a provisional employee must be terminated after failing two examinations for the position. In *Village of Bath v. Steuben County Civil Service Commission*, a trial court sustained the termination resulting from the Civil Service Commission invoking its "Two Examination Failure" rule and refusing to approve a provisional employee's continuation in the position.[41] The rule provided that no provisional employee who twice failed the examination for the position would be given another provisional appointment unless the test failed to produce any qualified eligible employees or the list was immediately exhausted.

In this case, the list consisted of four names, but one candidate refused appointment and a second withdrew his name from consideration. The Commission successfully argued that discontinuing further employment of the individual as a provisional appointment was permitted under its rule because: (1) the examination did not fail to produce any qualified candidates, and (2) the list was not exhausted. Noting that a local civil service commission or personnel officer has the discretion to adopt such a rule, the court suggested the employer, who "clearly was under no compulsion" to use the non-mandatory eligible list would effect the purposes of the Constitution's merit and fitness provision by appointing one of the two remaining eligibles on a provisional basis to the position or, in the alternative, by electing to make a permanent appointment from the "two-name list."

B. Contingent Permanent Appointments

Significantly, if a person whose name is on the eligible list is appointed to the vacancy provisionally from a nonmandatory eligible list, applying the decision in *Roulett*,[42] the individual selected would attain permanent status if continued in service as a provisional employee beyond the maximum probationary period otherwise required for the position by operation of law.[43] The *Roulett* decision, however, would not apply in an alleged "contingent permanent appointment"[44] situation.

When the permanent incumbent of a position is placed on a leave of absence for what is expected to be an extended period of time, the appointing authority often seeks to fill the position while the permanent incumbent is absent on such leave. Usually this results in a "temporary" appointment.[45] However, under State Civil Service Commission rules if there is an appropriate eligible list available, the department or agency may elect to fill the position on a "contingent permanent" basis by selecting a person otherwise reachable for appointment from the eligible list.[46] Such an appointment may prove to be a significant benefit to the "contingent permanent" appointee as an individual appointed on a contingent permanent basis who successfully completes the required probationary period is vested with all of the rights of a permanent employee except the right to be retained in the position in the event the permanent incumbent on leave from the position returns to the position.

In *Matter of Snyder*, the Appellate Division clarified that making an appointment on a contingent permanent basis is discretionary and that making a contingent permanent appointment requires an affirmative act on the part of the appointing authority to effect such an appointment.[47] Snyder had been "provisionally appointed" to a higher level position, position A, when the permanent incumbent of position A was placed on a leave of absence from position A upon his provisional appointment to a still higher level position, position B. About two years later, Snyder was reinstated to his permanent, lower grade, position. The permanent incumbent of position A, however, continued to serve as a provisional employee in position B.

Snyder sued, contending that he had attained tenure in position A as a "contingent permanent" employee when he was continued in the position for more than nine months under § 65.4 of the Civil Service Law.[48] He argued that he had attained such status by operation of law because he had been qualified to be appointed on a contingent permanent basis to position A. As a result, he said, he could not be "demoted" except as a result of a disciplinary action taken after notice and hearing so long as the permanent incumbent of position A remained on leave of absence from the position.

However, the State Civil Service Commission, in interpreting its own rule concerning contingent permanent appointments,[49] argued that making an appointment on a contingent permanent basis was discretionary and that the appointing authority did not have to make such an appointment merely because it was possible to do so. The Appellate Division agreed with the Commission, noting that the regulation uses the permissive word "may." The court said "[o]nce it is established that (Snyder's) status was solely as a provisional appointee[50] and, therefore governed entirely by Civil Service Law § 65, the conclusion becomes inescapable that it could not ripen into that of permanent appointment absent full, literal compliance with all of the conditions for converting a provisional appointment to a permanent one under Civil Service Law § 65.4." As § 65.4 applies only where an examination fails to produce a list adequate to fill all positions then held on a provisional basis or where such a list is exhausted immediately following its establishment, the majority concluded that Snyder could not have attained permanent (or contingent permanent) status as there was neither an examination nor an eligible list to support his claim.

C. Due Process Rights of Provisional Employees

Sometimes a permanent employee is promoted to a higher-level position in his or her field of promotion as a provisional employee. Should the appointing authority elect to discontinue the provisional appointment and reinstate the individual to his or her lower grade position, is the employee entitled to notice and hearing? This was the issue in *Singletarly v. NYC Dept. of Homeless Services*.[51]

In the *Singletarly* decision, the court set out the basic rules concerning the rights of a provisional employee to continued employment as a provisional employee. In a nutshell, the court held that provisional appointments cannot, "with one rare exception inapplicable here,[52] ripen into a permanent appointment" and provisional employees have no civil service status and acquire no vested rights to be continued in the position by virtue of their temporary or provisional service. The court dismissed Singletarly's petition, noting that his "appointment was a provisional appointment from [his] non-competitive class" position and he never took or passed a civil service examination[53] for any position or title, nor was he on or selected from an eligibility list. Singletarly, said the court, "has no entitlement to any position or to any particular title."[54]

In such situations the provisional employee, at best, has only the right to reinstatement to the position he or she holds as a tenured employee and from which he or she is on an approved leave of absence. In contrast, a permanent employee may resign from his or her position in the competitive class to accept a provisional appointment in another title. In so doing the individual forfeits his or her right to reinstatement to the former position as a matter of law and any such reinstatement is to be made solely at the discretion of the appointing authority.

As the court held in *Lee v. Albany-Schoharie-Schenectady-Saratoga Board of Cooperative Educational Services*,[55] should a permanent employee resign from his or her position in order to accept a provisional appointment in a different competitive class position, he or she retains no right to be reinstated to his or her former position. Lee was appointed to and then served in the new position as a provisional appointee for some twelve years. After a job audit[56] of a number of BOCES positions by the Albany County Civil Service Commission, BOCES was required to reclassify a number of its positions, including the position in which Lee was then serving. Lee subsequently took the competitive examination held for the position, but she did not attain a passing score. The position was ultimately filled by BOCES "from a list of eligible persons who had passed the examination" and Lee was terminated from the position.

Lee filed a CPLR Article 78 petition seeking reinstatement to the title she had held as a provisional appointee with back pay or, in the alternative, reinstatement as a permanent appointee in her BOCES title from which she had resigned some twelve years earlier. Lee contended that her termination was arbitrary and capricious because there was a failure to comply with the certification requirements of Civil Service Law § 22 and certain other civil service requirements in reclassifying her position.

The Appellate Division dismissed Lee's appeal, explaining that regardless of whether the reclassification of the position in question was properly accomplished, Lee was not entitled to the relief she sought as it was undisputed that as a provisional employee she was subject to termination by BOCES "at any time without charges preferred, a statement of reasons given or a hearing held."

D. Qualification for Provisional Appointment

As noted earlier, selecting an individual for provisional appointment to a vacancy does not require that the individual be eligible to qualify for the promotion examination or open-competitive examination for the title.

In *Turel v. Delancy*, the Court of Appeals said that the appointing authority is not required to select a person who is, or had previously been, on an eligible list for promotion to the position.[57] In *CSEA v. Bobenhausen*,[58] the Appellate Division extended such discretion to include selecting someone for appointment to the vacancy "who is not qualified to take the promotion examination or open competitive examination for the position." Citing *Koso v. Greene* and other decisions, the court explained that there is "nothing in subdivision 1 of § 65 of the Civil Service Law that requires that a provisional appointee be fully qualified for permanent appointment or that he [or she] must be eligible to take the civil service test for the position before being provisionally appointed to it." The court noted that Bobenhausen had been approved for the appointment by the State Department of Civil Service after a noncompetitive examination, i.e., after a review of his qualifications, and the Department's determination that he was qualified to serve provisionally complied with the statute, not withstanding his failure to meet the existing eligibility requirements in order to be admitted as a candidate in the competitive examination for permanent appointment to the position. A provisional appointment, said the Appellate Division yet again, is a stopgap measure occasioned by necessity "and the appointee is exempt from civil service requirements and protection."

However, under certain circumstances not within the ambit of *Roulett*, a provisional employee may attain permanent status with tenure "by operation of law."

For example, § 45 of the Civil Service Law addresses the status of employees of a private sector employer upon acquisition of the private entity by a governmental entity. Section 45 provides that the governmental entity may continue the employment of all officers or employees of the private entity it deems necessary who had been in the employ of the private institution or enterprise for at least one year prior to the effective date of such acquisition. The positions then held by such employees are placed in the noncompetitive class pending the jurisdictional classification of the positions and the "positional classification" of the title consistent with the Civil Service Law.[59]

The state or municipal civil service commission or personnel officer having jurisdiction determines which such positions are appropriate for competitive examinations.[60] The incumbents of such positions who were so employed at the time of the acquisition of the private entity, and who were so employed for at least one year prior to the acquisition, continue to hold their respective positions as classified without further examination and are deemed to be permanent employees in the competitive class in the title with tenure.

E. Certification of Payroll

Another element to consider with respect to a provisional appointment is the fact that the certification of the payroll by the civil service commission or department, or personnel officer having jurisdiction, is critical to lawfully paying an individual in the classified service. As the decision in *Eldridge v. Carmel Central School District Board of Education*[61] demonstrates, a civil service department and municipal commission possess the authority to withhold its certification "from an entire payroll or from any item or items therein."[62]

The Appellate Division said that the allegations in the Putnam County Personnel Officer's complaint were sufficient to establish that the School District "continued to pay and approve salary and compensation to the employee after the expiration of his provisional appointment and without proper certification of the payroll." The County Personnel Officer, who also serves as the Personnel Director for the Putnam County Personnel Department, sued the Carmel Central School District's Board of Education to recover some $233,245 that was allegedly unlawfully paid by the School District to a provisional employee in the classified service. The individual had been employed by the District without the payroll certification required by the Civil Service Law § 100.

The Personnel Officer contended that the School District "illegally paid or authorized payment of salary or compensation" for an period of time, which payments, it was alleged, were not properly certified as required by Civil Service Law §100(1)(a). The Appellate Division rejected the School District's argument that notice that a person has been "promoted, transferred, assigned, reinstated or otherwise employed" in violation of the law was a condition precedent to an action to recover sums illegally paid under Civil Service Law § 102(2). The Appellate Division also observed that "[c]ontrary to the [School District's] contention, an action commenced pursuant to Civil Service Law § 102(2) is an action 'to vindicate a public interest' to which the notice of claim requirement in Education Law § 3813(1) does not apply."

F. The Whistleblower Exception

An exception to the rule that a provisional employee may be terminated without notice and hearing exists where the provisional employee has been terminated for allegedly "whistle blowing." In *Sisson v. Lech*,the court held that a provisional appointee is covered by the State's "Whistleblower Law."[63] The Appellate Division concluded that Sisson, although a provisional appointee, was covered by Civil Service Law § 75-b and thus he had a statutory right to challenge his dismissal that he alleged resulted from "whistle blowing."

Civil Service Law § 75-b, typically referred to as the "Whistleblower Law," defines the term "public employee" as any person holding a position by appointment or employment in the service of a public employer except judges and members of the legislature. It also provides that where the employee is not entitled to due process pursuant to Section 75 or a similar provision of law, or a disciplinary procedure negotiated pursuant to the Taylor Law,[64] the individual may sue under the same terms and conditions as set out in Article 20-C of the Labor Law. Thus, Section 75-b covers all public employees in the classified service, not just those "tenured."

According to the Appellate Division, Sisson presented evidence to the lower court that his termination was related to the fact that "he reported to the Community Service Board that his superior acted in an improper manner with respect to him and two other employees." Viewing this evidence in the light most favorable to Sisson, the court concluded that there was a "rational basis whereby [a] jury might find for [Sisson] as against [Sisson's superior]" and thus neither Sisson's superior nor the department was entitled to summary judgment dismissing Sisson's petition.

Finally, notwithstanding the fact that the courts have consistently ruled that a provisional appointment is a stopgap measure occasioned by necessity and the appointee is exempt from civil service requirements and protections, an appointing authority may not remove a provisional employee from his or her position for an unconstitutional or unlawful reason.[65]

Endnotes

1. N. Y. Civil Service Law § 61.1.
2. *See generally* Civ. Serv. Law § 64. A temporary appointment, which must be distinguished from a provisional appointment made pursuant to § 65.1, may be made for a period not exceeding three months when the need for such service is important and urgent even in the face of an appropriate eligible list. A temporary appointment also may be made for a period exceeding three months under special circumstances set out in law. In contrast, the Civil Service Law permits provisional appointments to positions in the competitive class only when there is no eligible list available for filling a vacancy in the competitive class, and then only for a maximum period of nine months. Further, the statute requires that once a provisional employee has been in a position for one month, a civil service examination for the position must be scheduled and the provisional appointment to the position must end within two months of the date on which an appropriate eligible list is established.
3. Civ. Serv. Law § 65.1.
4. N.Y. Military Law § 243.3.
5. *See* Civ. Serv. Law § 15.1(b). Although term appointments are rare in the Classified Service, such appointments are relatively common in the Unclassified Service, especially in higher education.
6. Civ. Serv. Law § 2.9.
7. Civ. Serv. Law § 44.
8. The term "appropriate eligible list" includes a special military list, a preferred list, a list resulting from a competitive examination, a displacement list, a transfer list and similar rosters of employees created for a particular purpose.
9. Civ. Serv. Law § 23.
10. Civ. Serv. Law § 65.1.
11. *Id.*
12. The non-competitive examination may consist of a review and evaluation of the training, experience and other qualifications of the nominee, without written, oral or other performance tests.
13. *See generally* Military Law § 243.
14. *See* Civ. Serv. Law § 80.
15. In the event an appropriate special military list, preferred list or a similar "mandatory" eligible list is promulgated while the position is being filled by a provisional appointee, if an individual on such a list is willing to accept appointment to the position, he or she must be appointed to the position or the position must revert to a "vacancy" and the provisional appointee must be terminated from the position. In *Kerr v. Weisenberg*, 65 A.D.2d 815, 410 N.Y.S.2d 351 (2d Dep't 1978), *aff'd*, 49 N.Y.2d 870, 427 NY.S.2d 935 (1980), the court held that rights of an individual on a preferred eligible list are superior to those of a provisional employee. Although the provisional appointee must be terminated in the face of such list or lists, the appointing authority is not required to make an appointment from any such list and the appointing authority may elect to keep the position vacant instead.
16. Civ. Serv. Law § 64.2.
17. Section 15.1 of the Civil Service Law (Laws of 1909, Chapter 15) provided that the duration of a provisional appointment was not to exceed six months.
18. Legislation has been adopted seeking to establish a plan to control "excess provisional appointments in the City of New York." See Civ. Serv. Law § 65.59(c). This provision was repealed effective December 31, 2014. *See* http://www.cs.ny.gov/commission/DCAS/index.cfm for the timeline associated with implementing this provision of law.
19. *Gaiser v. Thom*, 30 Misc. 2d 619, 625, 211 N.Y.S.2d 337, 342 (Sup. Ct. Suffolk Co. 1961), *aff'd*, 15 A.D.2d 793, 225 N.Y.S.2d 494 (2d Dep't).
20. *Russell v. Hodges*, 470 F.2d 212, 216 (2d Cir. 1972).
21. Indeed, a provisional appointee may be terminated "at any time without charges preferred, a statement of reasons given or a hearing held" so long as such termination is not for an unlawful reason. *Preddice v. Callanan*, 69 N.Y.2d 812, 814, 513 N.Y.S.2d 958, 959 (1987).
22. *Haynes v. Chautauqua Cnty.*, 55 N.Y.2d 814, 816, 447 N.Y.S.2d 430, 431 (1981).
23. Civ. Serv. Law § 61.1
24. Civ. Serv. Law § 65.3, subject to certain considerations not here relevant, provides that "[a] provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions…."
25. *LaSota v. Green*, 53 N.Y.2d 631, 438 N.Y.S.2d 780 (1981).
26. *Roulett v. Town of Hempstead*, 40 A.D.2d 611, 335 N.Y.S.2d 1008 (2d Dep't 1972).
27. The concept of a mandatory eligible list consisting of three of more names was the result of the holding in *People v. Mosher*, 163 N.Y. 32 (1900), wherein the court held that limiting the appointing officer's authority to selecting the highest candidate on the eligible list transferred the real power of appointment from the appointing authority to the civil service commission and thus was unconstitutional, while the so-called "rule of three," whereby the appointing authority could chose one of the three candidates rating highest, was valid. *People v. Gaffney*, 142 A.D. 122, 126 N.Y.S. 1027 (3d Dep't 1911), *aff'd*, 201 N.Y. 535 (1911). Section 61.1 of the Civil Service Law of 1958, which was derived from § 14 of the Civil Service Law of 1909, statutorily reflects the *Mosher* and *Gaffney* decisions.
28. *Becker v. New York State Civil Serv. Comm'n*, 61 N.Y.2d 252, 473 N.Y.S.2d 374 (1984).
29. *See* Civ. Serv. Law § 65.2.
30. *Russel v. Hodges*, 470 F.2d 212, 216 (2d Cir. 1972); *Rohl v. Jeacock*, 259 A.D. 208, 208, 19 N.Y.S.2d 441, 441 (4th Dep't 1940), *aff'd*, 284 N.Y. 660.
31. Civ. Serv. Law § 65.4.
32. Civ. Serv. Law Art. 14.
33. The concept of selection based on merit and fitness is also applied in situations where it has been determined that a competitive examination is not "practicable." Section 42.1 of the Civil Service Law mandates that appointment to a classified civil service position other than to positions in the exempt and labor classes shall be made only "after such non-competitive examination as is prescribed by the State Civil Service Department or municipal commission having jurisdiction."
34. 8 N.Y.3d 465, 835 N.Y.S.2d 538 (2007).
35. *Koso v. Greene*, 260 N.Y. 491, 495 (1933).
36. *Id.* at 494.
37. *City of Plattsburgh v. Local 788*, 108 A.D.2d 1045, 1045, 486 N.Y.S.2d 618, 618 (3d Dep't 1985).
38. Civ. Serv. Law §§ 80-80a.
39. And, presumably, § 80a.
40. Similarly, in *Szumigala v. Hicksville Union Free Sch. Dist.*, 148 A.D.2d 621, 621, 539 N.Y.S.2d 83, 83 (2d Dep't 1989), the Appellate Division, citing *Cheektowaga v. Nyquist*, 38 N.Y.2d 137 (1975), held that a seniority clause in a Taylor Law agreement violated § 2510 of the Education Law when it permitted seniority in different tenure areas to be combined for the purposes of determining seniority with the District for the purposes of layoff.

41. *Village of Bath v. Steuben Cnty. Civil Serv. Comm'n*, 113 Misc. 2d 570, 570, 449 N.Y.S.2d 868, 868 (Sup. Ct. Steuben Co. 1982).

42. *Roulett v. Town of Hempstead*, 40 A.D.2d 611, 335 N.Y.S.2d 1008 (2d Dep't 1972).

43. Unlike individuals permanently appointed to a position in the competitive class, provisional employees typically are not required to satisfactorily complete a probationary period in order to be continued in the position.

44. Civ. Serv. Law § 64.4

45. *See generally* Civ. Serv. Law § 64.

46. Similar rules have been promulgated by a number of municipal civil service commissions and personnel officers as well.

47. *Snyder*, 132 A.D.2d at 907, 518 N.Y.S.2d at 464.

48. The Department of Civil Service conceded that it did not expect to ever hold a competitive examination for position A. Reading Civil Service Law §§ 52.6 and 65.4 together, Snyder contended that he was now tenured in position A on a contingent permanent basis.

49. *See* N.Y. Comp. Codes R. & Reg. tit. 4, § 4.11(a).

50. Actually it could be argued that Snyder served as a "temporary employee" rather than a provisional appointee, as a provisional appointment may be made only in the event the position is vacant. See Civ. Serv. Law § 65.1. In Synder's case the position in question was encumbered by a permanent employee on leave from the title to serve in a higher grade position as a provisional employee. N.Y.C.R.R. § 4.10 provides, in pertinent part, that "[w]hen a permanent competitive class employee is given a temporary provisional or trainee appointment or promotion to another competitive class position in the same department or…he [or she] shall be deemed to be on leave of absence from his [or her] permanent position for the period of his [or her] service under such temporary, provisional or trainee appointment or promotion."

51. *Singletarly v. N.Y.C. Dept. of Homeless Services*, Supreme Court IA Part 27, Justice Gammerman [Not selected for publication in the Official Reports]. The text of the opinion is available at Harvey Randall, *Continued Employment as Provisional:* Singletarly v. NYC Dept. of Homeless Services, *Supreme Court IA PART 27, Justice Gammerman, Sept. 1998*, 1998 No. 10 Pub. Employment L. Notes 211 (1998).

52. *See Roulett v. Town of Hempstead*, 40 A.D.2d 611, 335 N.Y.S.2d 1008 (2d Dep't 1972).

53. Section 52 of the Civil Service Law authorizes the State Department of Civil Service to allow noncompetitive and labor class employees in the service of the State to compete in promotion examinations when such examinations are held in conjunction with open competitive examinations for the same title.

54. This, however, may not be entirely accurate with respect to Singletarly insofar as termination from his noncompetitive class position is concerned if he (1) is a veteran who served in time of war or is an exempt volunteer firefighter, or (2) satisfies the requirements set out in § 75.1(c) of the Civil Service Law. Further, a collective bargaining agreement negotiated pursuant to the Taylor Law may give persons not otherwise protected by § 75 certain pre-termination due process rights. Also, in *Sisson v. Lech*, 266 A.D.2d 858, 607 N.Y.S.2d 805 (4th Dep't 1999), the Appellate Division held that a provisional employee is protected by the Whistleblower Law, Civil Service Law § 75-b.

55. *Lee v. Albany-Schoharie-Schenectady-Saratoga Bd. of Coop. Educ. Servs.*, 69 A.D.3d 1289, 893 N.Y.S.2d 383 (3d Dep't 2010).

56. A job audit is an examination of the duties being performed by the incumbent of a position to determine if it is properly classified. Job audits are typically undertaken by a civil service commission or personnel officer.

57. 287 N.Y. 15 (1941).

58. 69 A.D.2d 983, 416 N.Y.S.2d 113 (4th Dep't 1979).

59. The term "jurisdictional classification" refers to the assignment of positions in the classified service to the competitive, non-competitive, exempt or labor classes, Civ. Serv. Law § 2.10, while the term "position classification" refers to grouping together, under common and descriptive titles, positions that are substantially similar in the essential character and scope of their duties and responsibilities and in the qualification requirements for appointment, Civ. Serv. Law § 2.11.

60. Civ. Serv. Law § 44 provides that all positions in the classified service are in the competitive class unless placed in a different jurisdictional class.

61. *Eldridge v. Carmel Cent. Sch. Dist. Bd. of Educ.*, 82 A.D.3d 1147, 920 N.Y.S.2d 155 (2d Dep't 2011).

62. *See* Civ. Serv. Law § 100[1][a].

63. 266 A.D.2d 858, 858, 697 N.Y.S.2d 405, 405 (4th Dep't 1999).

64. Civ. Serv. Law Art. 14.

65. *Bienz v. Kelly*, 73 A.D. 3d 489, 490 (1st Dep't 2010).

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Talking to the Press: Ethical Considerations for Municipal Attorneys

By Steven G. Leventhal

> "Well, when you come down to it, I don't see that a reporter could do much to a president, do you?"[1]
>
> **Dwight D. Eisenhower**
>
> "I hereby resign the office of the President of the United States."[2]
>
> **Richard M. Nixon**

Unlike in the halcyon days of the Eisenhower Administration, today there may be no political, governmental or professional activity that requires a more cautious exercise of judgment than the perilous press interview. This is particularly true for the municipal attorney.

In a broad sense, investigative journalism and adversarial justice are both methods of seeking the truth. However, the inquisitorial methods and opinion shaping reportage of the investigative journalist often work at cross-purposes to the outcome shaping advice and pointed advocacy of the role-specific lawyer.

Municipal lawyers are frequently thrust into the vortex of public debate, where press inquiries on sensitive matters are common. In responding to press inquiries, a municipal lawyer must consider a variety of legal and professional obligations that will influence what a lawyer may and, in some cases, may not reveal. This article will examine some of the issues that a municipal attorney should consider in responding to press inquiries—including protected forms of expression, compulsory disclosure, permissive privacy and mandatory confidentiality—and will provide practical advice for dealing with press inquiries.

Freedom of Speech and the Municipal Employee

Because the discharge or discipline of a municipal employee is government action, it may implicate the protection afforded to certain types of speech under the United States and New York State Constitutions.

Generally, New York does not recognize a cause of action for wrongful discharge of an "at will" employee.[3] Absent a constitutional, statutory or contractual requirement to the contrary, an employer may, at any time, terminate an "at will" employee. In New York, the private sector "at will" doctrine is applied with vigor. It trumps the ethical obligation of a physician to maintain the confidentiality of patient information.[4] In a narrow exception, the private sector "at will" doctrine does not trump the ethical obligation of an attorney to report the professional misconduct of another attorney.[5]

In earlier First Amendment jurisprudence, municipal employees were afforded limited protection from discharge. In a 1952 opinion, the United States Supreme Court stated: "It is clear that such persons [municipal employees] have the right under our law to assemble, speak and think as they will… It is equally clear that they have no right to work for the State in the school system on their own terms."[6]

More recently, modern cases have held that a public employee's statements on a matter of "public concern" cannot be the basis for discharge unless the statements were knowingly or recklessly false, or were likely to substantially interfere with the continued performance of the employee's official duties.[7] Generally, courts will protect public employees from discharge or discipline for their political beliefs.[8] However, the First Amendment does not protect public employees for statements made pursuant to their official duties.[9]

In 2011, the United States Supreme Court held that a state legislator "whose longtime friend and campaign manager had a financial interest in an application for approval of a hotel and casino project pending before the state legislature" had no First Amendment right to vote on the legislation where the vote was in violation of a local code of ethics.[10] Unlike a voter's exercise of his or her franchise on Election Day,

> [A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it… [T]he legislator casts his vote as

> trustee for his constituents, not as a prerogative of personal power. In this respect, voting by a legislator is different from voting by a citizen. While a voter's franchise is a personal right, the procedures for voting in legislative assemblies…pertains to legislators not as individuals but as political representatives.[11]

Whistleblower Protection in New York

New York law prohibits a public sector employer from disciplining or taking retaliatory action against an employee who discloses certain information to a government body. Specifically, New York Civil Service Law section 75-b(2)(a) provides:

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information (i) regarding a violation of a law, rule or regulation, which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. An "improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his or her employment, and which is in violation of any federal, state or local law, rule or regulation.[12]

Prior to making a protected disclosure, an employee must make a good faith effort to provide the appointing authority with notice and reasonable time to take appropriate action, unless there is imminent and serious danger to public health or safety.[13] New York whistleblower protections do not trump the terms of a collective bargaining agreement. Nor do they prohibit any personnel action which otherwise would have been taken regardless of the disclosure of information.[14]

New York whistleblower protections apply only to covered disclosures made to a governmental body. Such protections do not apply to disclosures made to the press.[15]

The Undefined Term: Confidential Information

New York General Municipal Law section 805-a provides, in pertinent part, that no municipal officer or employee shall disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests. However, the term "confidential information" is neither defined in the General Municipal Law nor in a similar provision of the Public Officer's Law applicable to state employees.[16] Moreover, there appears to be no consensus as to the meaning of the term "confidential information," as used in Article 18, which regulates conflicts of interest of municipal officers and employees.

An area of distinct difference between the culture 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 in the post-Watergate era, we have come to view openness and transparency in government as a fundamental public policy that is essential to government accountability and public confidence. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law,[17] which makes most government records available for public inspection and copying, as well as the Open Meetings Law,[18] which makes most government meetings open to the public.

May a Local Code of Ethics Prohibit Disclosure of Matters Properly Discussed in Executive Session? The Attorney General and the Committee on Open Government Disagree

In 2000, the Attorney General was asked whether a municipality has the statutory authority under General Municipal Law section 806[19] to adopt a code of ethics that prohibits 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.[20] The Attorney General noted that "[a]ny such restriction on speech would, of course, be subject to further state and federal constitutional requirements."[21]

The Attorney General reasoned that:

> The purpose of an executive session is to permit members of public bodies to discuss sensitive matters in private.

> A review of the subjects that may be discussed in executive session clearly reveals that these are matters which, if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety…. Disclosure of matters discussed in executive session would defeat the apparent legislative intent of authorizing local legislative bodies to discuss these limited matters in private. Disclosure would be contrary to the public welfare. A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and would promote the public interest.[22]

The Attorney General cited a 1997 decision of the Appellate Division Third Department, 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 disclosure under the Freedom of Information Law.[23] The Attorney General concluded that the General Municipal Law section 806(1)(a) authorization to adopt municipal codes of ethics that prohibit disclosure of information is consistent with existing law and reinforced the fact that records of discussions properly taking place in executive session may be withheld from public disclosure.[24]

In a series of staff advisory opinions, 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 General Municipal Law section 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."[25]

Citing a 1986 decision by the New York Court of Appeals,[26] 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).[27] 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 found that the only situations in which an agency must withhold records involve instances where 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.'"[28]

Under this view, each request for disclosure must be considered by a municipal information officer on a case-by-case basis, with each discretionary denial of access subject to Article 78 review, and with the burden upon the municipality to establish that its discretion has not been abused.[29] As the following discussion will indicate, experience suggests that courts called upon to address this issue are likely to adopt and apply the Executive Director's view, based as it is on Court of Appeals authority, and consistent as it is with the statutory scheme of limited, discretionary denials subject to case-by-case judicial review.

May a Local Code of Ethics Prohibit Disclosure of Ethics Investigations Conducted by a Local Board of Ethics?

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, spoliation of evidence, and it fosters freedom of deliberation among ethics board members 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.

In 2011, the Board of Ethics of the City of White Plains dismissed as moot a *sua sponte* complaint alleging the then-Mayor's non-compliance with certain provisions of Article 18 of the General Municipal Law and the City Code of Ethics.[30]

An investigation by the Board of Ethics was initiated while the Mayor was under prosecution by the

Westchester District Attorney's Office in connection with a charge of domestic violence.[31] Pursuant to an order of protection, the Mayor vacated the marital abode.[32] Evidence obtained by the Board of Ethics indicated that he rented an apartment from a developer doing business with the City at a below-market rate.[33] The Mayor was convicted of the domestic violence charge while the ethics investigation was pending. However, the conviction was later reversed.[34]

After a preliminary investigation, the Board of Ethics served the Mayor with formal charges.[35] The Mayor resigned his office before a hearing was conducted.[36] After the complaint was dismissed, the *Journal News* submitted a FOIL request for the entire record of proceedings before the Board of Ethics.[37] The FOIL request was granted in part and denied in part.[38] 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.[39]

The Westchester Supreme Court granted the petition in part and denied it in part.[40] The court upheld the denial of access to the Mayor's personal diary, bills and canceled checks because their disclosure would have resulted in an "unwarranted invasion of personal privacy."[41] The court also upheld the denial of access to transcripts of sworn testimony taken before the Board of Ethics as protected by the "deliberative process" privilege.[42] However, the court directed that the statement of formal charges be disclosed because, if not for the dismissal, the City Charter contemplated that the statement of formal charges was to have been delivered to the Common Council for further proceedings.[43]

The Ethics Issues Raised by the Investigation of the Suffolk County Ethics Commission (I): Responding to a Subpoena

Amid allegations that the Suffolk County Ethics Commission was subject to "influence" by the then-County Executive, a special Committee of the County Legislature served a subpoena seeking disclosure of certain records of the Commission.[44] 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.[45] The Suffolk County Supreme Court granted the motion on procedural grounds but otherwise rejected the Commission's argument that the records were confidential and thus immune from disclosure pursuant to the subpoena.[46]

The Suffolk County Supreme Court granted the Commission's motion to quash the subpoena because 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.[47]

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."[48] Because the County Code of Ethics 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.[49]

The court 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.[50] 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 of Ethics or other Local Law.[51]

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.[52]

Further, the court concluded that any claims of privilege in connection with complaints filed with the Commission "[a]ppear [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."[53] 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.[54]

However, the court held that 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 are exempt from disclosure pursuant to the Freedom of Information Law.[56]

The Ethics Issues Raised by the Investigation of the Suffolk County Ethics Commission (II): To What Extent May a Government Attorney Be Compelled to Testify Before a Grand Jury About Conversations with a Client?

The Suffolk County District Attorney's Office convened a grand jury to take over the investigation of the special legislative committee.[57] A subpoena was served on the Commission for its records, and on the Commission's counsel for testimony before the grand jury.[58]

The extent to which a government attorney may be compelled to testify before a grand jury about a conversation with a client has been the subject of several significant decisions by the United States 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.[59] The White House asserted that the testimony was protected by the attorney-client privilege, and moved to quash the subpoena.[60] 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.... [T]he proper allegiance of the government attorney is contemplated by the public's interest in uncovering illegality among its elected and appointed officials.[61]

The Second Circuit reached a different conclusion in a case arising out of a subpoena issued to the former chief legal counsel to the office of former Connecticut Governor John Rowland in an investigation leading to the Governor's resignation and subsequent conviction on charges of public corruption.[62] 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.[63]

Often, conversations between government lawyers and their clients move seamlessly between legal advice and policy formulation. The question then arises: 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 a 2007 challenge to the constitutionality of a policy requiring invasive strip searches at a local correctional facility, the Second Circuit held that email messages between the County Attorney and the Sheriff were protected by the attorney-client privilege where the messages "reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes."[64]

The Ethics Issues Raised by the Investigation of the Suffolk County Ethics Commission (III): Who Is the Client of a Municipal Attorney?

As the 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.[65]

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.[66]

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.[67]

This purported waiver by the Comptroller of the attorney-client privilege raised a familiar and often thorny question: 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.[68]

The Rules of Conduct require an attorney to distinguish between the interest of a represented organization, and those of the individuals comprising the organization.[69] Rule 1.13 provides, in pertinent part:

> 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.[70]

But what if the interests of one government agency (here, the County Ethics Commission) appear to conflict with the interests of another agency or official (here, the County Comptroller)? Comment 9 to Rule 1.13 provides, in pertinent part:

> 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.[71]

Here, special counsel was engaged solely to represent the Ethics Commission. On these facts, the Ethics Commission was the "client," and therefore, 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.

The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by the Rules of Professional Conduct or to comply with other law or court order.[72]

Rule 1.6 (Confidentiality of Information) is applicable to all attorneys in the public and private sectors. For purposes of this Rule, confidential information consists of "information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege,…likely to be embarrassing or detrimental to the client if disclosed,…or information that the client has requested be kept confidential…."[73]

While there appears to be no consensus as to the meaning of the term "confidential information" as used by Article 18 in regulating the conduct of municipal officers and employees, government information is presumptively subject to public disclosure.[74] The opposite presumption may apply to confidential government information obtained by a government lawyer.

In promulgating the Rules of Professional Conduct,[75] the Appellate Divisions adopted a definition of "confidential government information" for the purpose of regulating the professional conduct of current and former government attorneys.[76] Unlike the meaning given to the term "confidential information" by the Executive Director 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.[77]

Rule 1.11 is applicable to current and former government attorneys. For purposes of this Rule, "confidential government information" consists of "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."[78] It should be noted that the obligation of confidentiality applicable to current and former government attorneys is broader than the corresponding obligation owed by private sector attorneys.[79]

Trial Publicity

The Rules of Professional Conduct also regulate certain speech by trial attorneys.[80] A lawyer who is participating or has participated in a criminal or civil matter may not make an extrajudicial statement that the lawyer knows or reasonably should know will be publicly disseminated and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[81] The prohibition applies to all lawyers associated in a firm or government agency with an attorney subject to the Rule.[82] A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.[83]

Under Rule 3.6, certain statements are presumptively prejudicial (such as information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial),[84] and certain other statements are presumptively permissible (such as claims and defenses, and information contained in a public record).[85]

Special rules of confidentiality may apply in juvenile, domestic relations and mental disability proceedings.[86]

Practical Advice for Dealing With Press Inquiries

Lawyers must exercise care in speaking with reporters. Following are some tips you may find helpful:

- Return the call (score courtesy points).
- Refer questions to the proper spokesperson, if any.
- Refrain from disclosing confidential or privileged information.
- Always be truthful. Falsehoods destroy credibility and undermine public confidence.
- Remember that you will be selectively quoted; the context and "spin" will be controlled by the press.
- Consider speaking "on background" where appropriate.

Speaking on background will give you time to collect your thoughts, and an opportunity to persuade the reporter. It is often helpful to begin the conversation by speaking to the reporter on background and then conclude by giving the reporter a statement for attribution.

Attorneys who speak to the press should understand the distinction between statements made "on background" and those made "off the record." The NYU Journalism Handbook for Students defines these commonly used, but oftentimes misunderstood terms as follows:

> "On background" is a kind of limited license to print what the source gives you without using the source's name. But most veteran reporters will not use "on background" information until they can verify it with other sources. People try to go "on background" when their information is very sensitive, which is to say, the information is likely to cause a stir. "On background" means the source's name does not appear in the story. In effect it confers anonymity on your source, but allows you to work with the information the source has provided. Again, it's best to consult your professor in these situations.
>
> "Off the record" restricts the reporter from using the information the source is about to deliver. The information is offered to explain or further a reporter's understanding of a particular issue or event. (Various presidents have invited reporters to have dinner with the understanding that no information from this meeting can ever be published.) But if the reporter can confirm the information with another source who doesn't insist on speaking off the record (whether that means he agreed to talking on the record, on background, or not for attribution) he can publish it.
>
> The problem with the phrase "off the record" is that many people, reporters and the general public alike, misunderstand its precise meaning. These days many interviewees think "off the record" is largely synonymous with "on background" or "not for attribution." There is so much murkiness about what "off the record" means that it is essential that the reporter and source agree on a definition before beginning an "off the record" portion of an interview. In the Department of Journalism, "off the record" means the information should not be used in the story unless the reporter can confirm it through another source. In general, it is best to avoid off the record conversations.[87]

Municipal law is often practiced under the glare of publicity. The municipal attorney must provide outcome-shaping advice and pointed advocacy on behalf of a client, while upholding high standards of ethics and professionalism. He or she must exercise careful judgment in speaking to the press. A municipal attorney may not adopt P.T. Barnum's famous philosophy: "I don't care what you say about me, just spell my name right."[90]

Endnotes

1. Quote of Dwight D. Eisenhower, BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/d/dwightdei112064.html.
2. Richard Nixon, *Letter Resigning the Office of President of the United States*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=4326.
3. Murphy v. Am. Home Prod. Corp., 448 N.E.2d 86 (N.Y. 1983).
4. *See* Horn v. New York Times, 790 N.E.2d 753 (N.Y. 2003) (holding that the exception to the at-will employment doctrine was not applicable to a physician whose employment was terminated because she refused to provide unauthorized nonmedical personnel with confidential medical information regarding patients).
5. Wieder v. Skala, 80 N.Y.2d 628 (1992).
6. Adler v. Bd. of Educ., 342 U.S. 485 (1952).
7. *See e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
8. *See* Branti v. Finkel, 445 U.S. 507 (1980); *see also* Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).
9. Garcetti v. Ceballos, 547 U.S. 410 (2006).
10. Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).
11. *Id.* at 2350 (internal quotations omitted).
12. N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney 2014).
13. *See id*. *See also* N.Y. LAB. LAW § 740 (McKinney 2006).
14. *Id.*
15. *Id.*
16. *See* N.Y. PUB. OFF. LAW § 74 (McKinney 2010).
17. *See* N.Y. PUB. OFF. Law §§ 84-90 (McKinney 2014).
18. *See* N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 2014).
19. *See* N.Y. GEN. MUN. L § 806 (McKinney 2006).
20. 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
21. *Id.*
22. *Id. See also* N.Y. PUB. OFF. LAW § 105 (McKinney 2014).
23. Wm. J. Kline & Sons v. County of Hamilton, 663 N.Y.S.2d 339 (N.Y. App. Div. 3d Dep't. 1997).
24. *See supra* note 20.

25. N.Y. Dep't. of State Comm. Open Govt., FOIL-AO-16799 (Sept. 20, 2007), *available at* http://docs.dos.ny.gov/coog/ftext/f16799.htm.
26. Capital Newspapers v. Burns, 496 N.E.2d 665 (N.Y. 1986).
27. *Id.*
28. *Id.*
29. Washington Post Co. v. New York State Ins. Dep't., 463 N.E.2d 604 (N.Y. 1984).
30. Journal News v. City of White Plains, No. 7781-11, 2012 WL 8262794, at *2-3 (N.Y. Sup. Ct. Mar. 20, 2012).
31. People v. Bradley, 952 N.Y.S.2d 260 (N.Y. App. Div. 2d Dep't 2012).
32. Nate Schweber, *For Mayor of White Plains, a Trial and an Unclear Future*, N.Y. Times (Nov. 11, 2010), http://www.nytimes.com/2010/11/12/nyregion/12bradley.html?_r=0.
33. *Journal News*, 2012 WL 8262794, at *1.
34. *Bradley*, 952 N.Y.S.2d at 262.
35. *Journal News*, 2012 WL 8262794, at *1.
36. *Id.*
37. *Id.*
38. *Id.* at *2.
39. *Id.* at *1.
40. *Journal News*, 2012 WL 8262794, at *2.
41. *Id.* at *5.
42. *Id.* at *8.
43. *Id.* at *9.
44. Suffolk Cnty Ethics Comm'n v. Lindsay, No. 38802-2010, 2011 WL 198449, at *1 (N.Y. Sup. Ct. Jan. 14, 2011).
45. *Id.* at *2.
46. *Id.*
47. *Id.* at *7.
48. *Id.* at *6.
49. *Id.* Here, the Court seems to have implicitly found that a record may be confidential under Local Law. *See* discussion, *supra*, of the contrary opinion of the Committee on Open Government.
50. *Suffolk Cnty Ethics Comm'n*, 2011 WL 198449, at *6.
51. *Id.* Here again, the Court seems implicitly to have found that a record may be confidential under Local Law.
52. *Id.*
53. *Id.* at *7.
54. *Id.* at *6.
55. N.Y.C.P.L.R. § 4503(a)(1) (McKinney 2002).
56. *See* N.Y. Pub. Off. Law § 87(2)(a) (McKinney 2013).
57. *Id.*
58. *Suffolk Cnty Ethics Comm'n*, 2011 WL 198449, at *2.
59. *In re* Bruce R. Lindsay, 158 F.3d 1263 (D.C. Cir. 1998).
60. *Id.*
61. *Id.*
62. Grand Jury Investigation v. John Doe (*In re* Grand Jury Investigation), 399 F.3d 527 (2d Cir. 2005).
63. *Id.* at 534.
64. Pritchard v. County of Erie (*In re* County of Erie), 546 F.3d 222 (2d Cir. 2007).
65. *Suffolk Cnty Ethics Comm'n*, 2011 WL 198449, at *1.
66. 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.
67. 2010 Suffolk Cnty. Comptroller. Rep. 15.
68. Patricia E. 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).
69. N.Y. Rules of Prof'l Conduct R. 1.13 (McKinney 2009).
70. *Id.*
71. *Id.* at cmt. 9.
72. N.Y. Rules of Prof'l Conduct R. 1.6 cmt. 3 (McKinney 2009).
73. *See* N.Y. Rules of Prof'l Conduct R. 1.6 (McKinney 2009).
74. *Id.*
75. *See* N.Y. Comp. Codes. R. & Regs. tit. 22, § 1200 (2013).
76. *See* N.Y. Rules of Prof'l Conduct R. 1.11 (McKinney 2009).
77. *Id.*
78. *Id.*
79. *See* N.Y. Rules of Prof'l Conduct R. 1.6 (McKinney 2009).
80. N.Y. Rules of Prof'l Conduct R. 3.6 (McKinney 2009).
81. *Id.* at R. 3.6(a).
82. *Id.* at R. 3.6(e).
83. *Id.* at R. 3.6(d).
84. *Id.* at R. 3.6(b).
85. N.Y. Rules of Prof'l Conduct R. 3.6(c) (McKinney 2009).
86. *Id.* at R. 3.6 cmt. 2.
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Book Review: Learning from Detroit

By Michael Lewyn

In *Detroit: Three Pathways to Revitalization*, George Washington University law professor Lewis Solomon focuses on three possible saviors for that city: public education, private investment, and community agriculture. Although his analysis is sometimes incomplete, he does address some topics of relevance to depressed upstate cities such as Buffalo and Rochester.

What's Wrong with Detroit

Solomon begins, quite sensibly, by focusing on what's wrong with Detroit. Detroit's population peaked at 1.8 million in the 1950s.[1] As highways opened up suburbia to development, most of Detroit's middle and upper classes left the city in the second half of the twentieth century. By 2010, the city had just over 713,000 residents,[2] about a sixty percent decrease from the city's peak population. In the 2000s alone, Detroit lost an additional 237,500 people, about a quarter of its 2000 population.[3] One-third of the city's remaining residents earn incomes placing them below the federal poverty level,[4] and almost half of the city's adults either are officially unemployed or are not in the labor force.[5] As the national economy contracted in 2008-09, Detroit's already low home values decreased further: in July 2009, the median residential home sale price was $7,100.[6] As a result, homeowners have had little incentive to rehabilitate houses in disrepair, and developers have had no incentive to build new homes on vacant land.[7] Twenty-three percent of the city's homes are vacant.[8] As a result of these problems, the city is virtually insolvent. Indeed, Solomon understated the city's fiscal difficulties: he pointed out that the city is drowning in debt, but wrote that "the March 2013 appointment of an emergency manager will put Detroit on the path to financial solvency."[9] In fact, Detroit filed for bankruptcy on July 18, 2013.[10] Its bankruptcy petition is currently in court, so the city's long-term fiscal future is anything but certain.

Solving Detroit's Problems

Even if Detroit resolves its fiscal problems, it will still be a desperately poor city. Solomon focuses on three possible pathways to revitalization: education, outside investment, and urban agriculture.

Solomon points out that Detroit's schools rank "at the bottom of student achievement among America's big cities."[11] Test scores are below those of other central cities, and student enrollment has decreased by more than half since 2000.[12] But Solomon admits that Detroit's poverty adversely affects school performance, noting that "students from poverty-stricken families… find it more difficult to concentrate, to sit still, to follow directions, and to rebound from disappointments."[13] It follows that the Detroit students' poor performance may be a result of their poverty rather than the school district's inadequacy.

Test score data suggests as much. The National Center for Education Statistics, a federal agency,[14] has created the Trial Urban District Assessment (TUDA), which compares the test scores of twenty-one urban school districts.[15] In 2013, the average reading test score for Detroit's black eighth-graders was 239—below average for the urban school districts surveyed,[16] but above four urban school districts in more prosperous cities (Fresno, Milwaukee, Cleveland, and Washington).[17] When schools are ranked by social class rather than race, Detroit does slightly worse. Of the eighth-graders whose families are poor enough to be eligible for government-subsidized school lunches, Detroit students' reading score (238) is below the big-city average, but above that of Washington and tied with Milwaukee.[18] Although Detroit's children are poorer than those of other urban school districts,[19] their test performance is not the worst.

Thus, it appears that when race and class are controlled for, Detroit's schools may not be as bad as Solomon suggests. If Detroit schools' poor performance is a function of poverty rather than educational incompetence, the city's decline is a cause, rather than a result, of the city's education problem. Therefore, the notion that improved schools will reduce the city's poverty may confuse cause and effect. Instead, it seems more likely that revitalization, if it happens, will eventually improve student performance in school and cause test scores to rise.

What does this likelihood mean for policymakers in impoverished upstate cities such as Buffalo and Rochester? It seems to me that if these cities become more desirable in other respects, improvement in at least a few schools will eventually follow. As cities revitalize and middle-class people return, some of those people will stay in the city even after having children, and some of those parents will be willing to take a risk on urban public schools. If enough parents do so, test scores will begin to rise, causing school reputations to improve, resulting in more parents choosing urban schools for their children. For example, in the north side of Chicago, gentrification has caused some neighborhood schools to have above-average test scores.[20]

Of course, urban school reform can mean two very different things. "Reform" can mean either making the schools attractive to the middle class, so that parents will not leave the city when their children reach school

age, as has occurred in some parts of Chicago, or improving the education of the poor, so that they have more job skills.

Solomon seems more interested in the latter view of reform but does not explain in much detail what Detroit schools should do differently to reach this goal. For example, he writes, "it is time to rehabilitate vocational (career and technical) education in Detroit high schools to prepare graduates for the new labor markets."[21] However, Solomon does not explain how Detroit's existing vocational schools[22] fall short of this goal, nor does he show how another school system has adopted any policies that Detroit schools could profitably borrow.[23]

Solomon then goes on to discuss economics, listing a wide variety of businesses that have invested in downtown Detroit.[24] However, a list is not a reform. More substantively, Solomon claims that Detroit must "overcome its reputation as a difficult city in which to start and do business"[25] without supplying evidence that such a reputation exists. In addition, Solomon suggests that the city should simplify business licensing through "a one-stop public sector website covering all the tax and business license issues…and the consolidation of all subsequent reporting requirements."[26] Although one-stop permitting certainly seems noncontroversial to me, Solomon's argument would be more persuasive if he explained whether other cities have tried it and whether any arguments other than political inertia prevent this idea from being put into practice.

In addition to endorsing more pro-business policies, Solomon suggests that Detroit turn one of its major liabilities into an asset. Detroit now has an enormous amount of vacant land: forty of the city's 139 square miles are vacant.[27] This problem also exists in upstate New York: Buffalo, for example, has 16,000 vacant lots—more than ten percent of its housing supply.[28]

Unless Detroit's population starts to increase again, it seems unlikely that anyone will want to build on these parcels. Solomon suggests a few options, such as allowing the vacant land to revert to nature, or creating parks and farms.[29] Solomon asserts that the latter use might be the most useful for three reasons. First, urban agriculture could increase Detroiters' supply of healthy food, such as fresh fruits and vegetables.[30] Second, agriculture could be a source of jobs to Detroit's many unskilled residents.[31] Third, if Detroiters consume more local-grown food, they could reduce the amount of energy used in transporting food products.[32]

Solomon points out two possible obstacles to urban agriculture in Detroit. First, individuals can lease city-owned land for an urban farm, but only for a year at a time, thus discouraging long-term investment in agriculture.[33] Second, the city's zoning code does not explicitly authorize agricultural uses, thus creating additional uncertainty.[34] Obviously, Detroit should create more specific rules governing urban agriculture.

In these respects, Detroit can learn from Buffalo. Urban agriculture has existed in Buffalo since 2003, when the Massachusetts Avenue Project turned one of the city's vacant lots into a vegetable garden.[35] The city's new zoning code includes farms as a permissible use in the city's "light industry" zone.[36] In addition, the code will address smaller-scale food-related practices, such as gardens and beehives in individuals' yards.[37] Because Buffalo's code is quite new, it is not yet clear to what extent farming will increase after the code is enacted.[38] In addition, Buffalo does sell city-owned land, and recently has streamlined the process for such purchases.[39]

III. Conclusion

Solomon's book is far from a complete guide to Detroit's problems and the possible solutions to these problems. Nevertheless, his book is useful for someone who might want an introduction to the state of Detroit, and to what people in Detroit are doing in an effort to revitalize the city's economy.

Endnotes

1. LEWIS D. SOLOMON, DETROIT: THREE PATHWAYS TO REVITALIZATION 3 (2013).
2. *Id.* at 4.
3. *Id.*
4. *Id.* at 8.
5. *Id.* at 7.
6. SOLOMON, *supra* note 1, at 7.
7. *Id.*
8. *Id.* at 5.
9. *Id.* at 23.
10. *See* Alana Semuels, *Digging into Detroit's bankruptcy filing*, L.A. Times (Oct. 26, 2013), http://articles.latimes.com/2013/oct/26/nation/la-na-detroit-bankruptcy-20131027. For day-to-day coverage of the bankruptcy proceedings, *see Bankrupt Detroit: Continuing Coverage*, The Detroit News, http://www.detroitnews.com/article/99999999/METRO01/130718001&template=theme&theme=DETROIT-BANKRUPTCY (last updated Mar. 14, 2014, 1:00 AM).
11. SOLOMON, *supra* note 1, at 66.
12. *Id.* at 67.
13. *Id.* at 75.
14. *See About Us*, Nat'l Ctr for Educ. Statistics, https://nces.ed.gov/about/ (last visited Mar. 14, 2014) [hereinafter NCES].
15. *See Mathematics & Reading 2013: What is TUDA?*, The Nation's Report Card, http://nationsreportcard.gov/reading_math_tuda_2013/#/what-is-tuda (last visited Mar. 14, 2014).
16. *See* NCES, 2013 Reading TUDA Assessment Report Card: Summary Data Tables with Additional Detail for Average Scores, Achievement Levels, and Percentiles for Districts and Jurisdictions 11 (2013), *available at* http://nationsreportcard.gov/reading_math_tuda_2013/files/Results_Appendix_2013_Reading_TUDA.pdf (providing that the average reading score for black eighth graders in urban school districts was 246).
17. *Id.*
18. *Id.* at 19. On the other hand, I note that Detroit students' mathematics scores are worse than those of other cities, even controlling for school lunch eligibility and race. See NCES, *supra* note 16, at 20. Given Detroit's generally high level of poverty, this may reflect the fact that Detroit's black and school-lunch-eligible students are poorer than those of other cities. *See* J.B. Wogan, *Poverty Rates Remain Stubbornly High in Big Cities*, Governing

The States & Localities (Sept. 24, 2013), http://www.governing.com/blogs/view/gov-poverty-rates-remain-stubbornly-high-big-cities.html (providing that 59.4 percent of Detroit residents under 18 live below poverty line, as opposed to 52.6% of Cleveland children, 42.6% of Milwaukee children, 43.4% of Fresno children, and 26.5% of Washington children).

19. *See* Wogan, *supra* note 18.
20. *See* Daniel Hertz, *Chicago: Gentrification Comes to the Neighborhood School*, Urbanophile: Passionate about Cities (Nov. 26, 2013), http://www.urbanophile.com/2013/11/26/chicago-gentrification-comes-to-the-neighborhood-school-by-daniel-hertz/.
21. SOLOMON, *supra* note 1, at 75.
22. *Compare* Chastity Pratt Dawsey, *EAA announces new program to give Detroit students job training*, Detroit Free Press (Aug, 2, 2013 6:04 PM), http://www.freep.com/article/20130801/NEWS01/308010113/EAA-announces-new-program-to-help-Detroit-kids-get-training-for-jobs (describing one existing program), *with* Chastity Pratt Dawsey, *Programs in jeopardy at 5 Detroit Public Schools vocational centers*, Detroit Free Press (Feb. 11, 2013), http://www.freep.com/article/20130211/NEWS01/302110088/Programs-in-jeopardy-at-5-Detroit-Public-Schools-vocational-centers ("The Detroit Public Schools' five vocational centers offer an array of career preparation and job placements that go beyond the auto shop and cosmetology programs of trade schools a generation ago.").
23. Solomon does mention something called the Harlem Children's Zone (which combines education with social services) and Turnaround for Children (in which a three-person team works with teachers to train school personnel to deal with mental health issues and minimize classroom disruption). *See* Solomon, *supra* note 1, at 75. However, he does not explain where these policies have been implemented or whether they have worked. *Id.*
24. *See* SOLOMON, *supra* note 1, at 83-116.
25. *Id.* at 116.
26. *Id.*
27. *Id.* at 126.
28. *See What We Do*, Groundwork Buffalo, http://www.groundworkbuffalo.org/whatwedo/whatwedo.html (last visited Mar. 14, 2014) (providing the number of vacant lots); *see also Buffalo (NY) Houses and Residents*, City-Data.com, http://www.city-data.com/housing/houses-Buffalo-New-York.html (last visited Apr. 26, 2014) (providing that the city has 122,720 occupied housing units).
29. *See* SOLOMON, *supra* note 1, at 127.
30. *Id.* at 129.
31. *Id.* at 130.
32. *Id.* at 131.
33. *Id.* at 133.
34. *See* SOLOMON, *supra* note 1, at 134.
35. *See* Maki Becker, *Reaping Urban Rewards; The popularity and plausibility of farming in Buffalo continue to grow as more residents show interest and City Hall considers easing restrictions on it*, Buffalo News (Apr. 16, 2012, 12:01 AM), http://www.buffalonews.com/article/20120416/CITYANDREGION/304169912.
36. *See* City of Buffalo: Office of Strategic Planning, Buffalo Green Code: A Preview of Buffalo's New Zoning 19 (2012), http://www.buffalogreencode.com/documents/A_Preview_of_Buffalo%27s_New_Zoning.pdf (listing farms as permitted use in "D-IL" zone). *See id.* at 14 (describing D-IL zone).
37. *See* Becker, *supra* note 35; *see also* City of Buffalo: Office of Strategic Planning, Buffalo Greencode: A New Zoning Direction for Buffalo 16-17 (2012), *available at* http://www.buffalogreencode.com/documents/New_Directions_Tech_Report.pdf (describing regulations in more detail).
38. For a more general, nationwide discussion of urban agriculture and zoning, *see* Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, 27 Am. Plan. Ass'n 2 (2010), *available at* http://www.planning.org/zoningpractice/2010/pdf/mar.pdf.
39. *See* Queenseyes, Post to *City Hall is Making it Easier to Buy City-Owned Properties*, Buffalo Rising (Apr. 4, 2013), http://buffalorising.com/2013/04/city-hall-is-making-it-easier-to-buy-city-owned-properties/.

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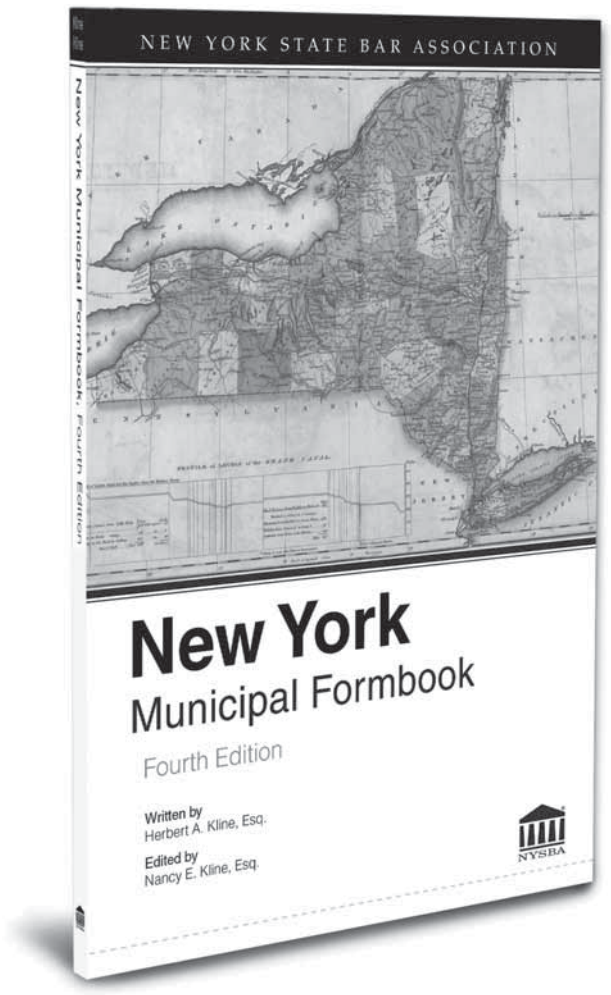

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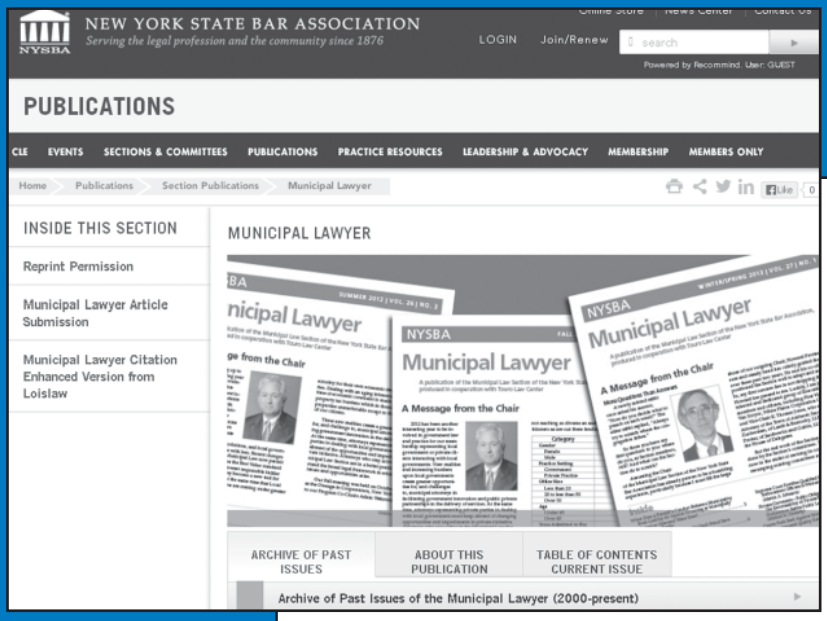

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