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Municipal Lawyer

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Message from the Chair

Unfunded state mandates remain one of the greatest threats to the financial security of municipalities across the state. Yet, the state legislature and the governor continue to turn a blind eye and a deaf ear to municipal pleas for relief. The cap on property tax increases (itself an unfunded mandate) has only exacerbated this problem. Indeed, in 2011 the Section issued comments for consideration by the Governor's Mandate Relief Redesign Team, detailing some of the significant problems raised by unfunded state mandates.

To be sure, Albany often pays lip service to assisting municipalities out of this fiscal hole into which the state has thrown them. In fact, in the current legislative session no fewer than a dozen mandate relief bills have been introduced,[1] including an "unfunded mandate reform act" (A3106/S4094) and a three-year moratorium on unfunded mandates from the legislature (A6343). But no significant mandate relief bill has been enacted, and most of the bills merely nibble around the edges of mandate relief or simply propose more study. In 2009, Senator Valesky did propose a relatively broad constitutional prohibition on unfunded mandates (S1640 (2009)). But that bill, which died in committee, would appear too complicated, too cumbersome, too narrow, and loaded with too many exceptions to serve as a model.

So, then, here is my personal, immodest proposal: by state constitutional amendment, prohibit *all* unfunded state mandates—past, present, and future. If the state wants it, then the state must pay for it. Period. Full stop.

Inside

Something along these lines might do nicely:

STATE OF NEW YORK

_____

2015-2016 Regular Sessions
IN [SENATE/ASSEMBLY]

_____, 2015

Introduced by

_____

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing amendments to article 9 of the constitution, in relation to prohibiting unfunded mandates

Section 1. Resolved (if the [Assembly/Senate] concur), That article 9 of the constitution be amended by adding a new section 4 to read as follows:

§ 4. **Prohibition on unfunded mandates. 1. a. The expenses of any existing or future action or program required by the state of any municipality shall be fully borne by the state.**

b. For purposes of this section, the term "municipality" shall mean a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency and any local authority as defined in section 2 of the public authorities law and shall include a city having a population of one million or more and any county, school district, or other public agency or facility therein.

2. The provisions of subdivision 1 shall not apply to the following actions or programs:

a. those necessary to comply with federal law but only to the extent they are necessary to comply with federal law;

b. those for which no affected municipality as a result of such state mandated action or program shall incur an annual aggregate net increase in direct expenditures in excess of one thousand dollars;

c. those that have been requested by the affected municipality through a home rule message or other resolution.

§ 2. Resolved (if the [Assembly/Senate] concur), That the foregoing amendment be referred to the first regular legislative session convening after the next succeeding general election of members of the assembly, and, in conformity with section 1 of article 19 of the constitution, be published for 3 months previous to the time of such election.

* * *

The first paragraph (§ 4(1)(a)) is based on N.Y. Const. art. vii, § 14 ("The expense of any grade crossing elimination…shall be borne by the state" and railroad and affected municipalities). If one believes that "action or program" is too broad, then the prohibition could be limited to any statute, executive order, or regulation or rule of a state agency. Thus, for example, Senator Valesky's proposed constitutional amendment would have prohibited unfunded mandates imposed by "a statute enacted by the legislature, an executive order issued by the governor, and a rule or regulation promulgated by a state agency, department, board, bureau, officer, authority or commission."[2]

The definition of "municipality" in the second paragraph (§ 4(1)(b)) is based on Gen. Mun. Law § 800(4) because of its breadth and adds local authorities within the meaning of Pub. Auth. Law § 2(2), which includes municipal-affiliated public authorities, public benefit corporations, not-for-profit entities, and their affiliates. If one does not wish to extend the prohibition on unfunded mandates to all municipalities, then the bill could be limited to specified types of municipalities but should include, at the very least, political subdivisions (counties, cities, towns, and villages) and school

districts. Senator Valesky's bill would have extended the prohibition only to counties, cities, towns, villages, school districts, and special districts and their agencies.

The exceptions set forth in subdivision 2 are taken from Senator Valesky's bill, with omissions and modifications. Specifically, this bill, unlike Senator Valesky's, would not except mandates:

- reapportioning responsibilities between or among municipalities (if the state mandates the reapportionment, the state should pay for any added cost);
- arising from an executive order of the governor exercising his or her emergency powers (the state should eventually pay);
- applicable to both government and non-government entities in the same or a substantially similar manner (stiffing the private sector provides no rationale for stiffing municipalities);
- in full force and effect prior to the effective date of the constitutional amendment, including any provision of law that extends or reauthorizes the mandate (the amendment should apply to existing state laws and programs).

An order or judgment by a state court may or may not be an "action" of the state, depending on whether the order or judgment enforces a state mandate or a municipal mandate.

In addition, unlike Senator Valesky's bill, this proposal makes clear that the federal mandate exception extends only to funds required to meet the federal mandate (§ 4(2)(a)), reduces the $10,000 threshold to $1,000 (§ 4(2)(b)), and omits "or which have been accepted by the affected [municipality]" because of the coercion inherent in "accept"(accept or get your state aid cut) (§ 4(2)(c)).

And there you have it. Simple, clean, and neat. Enough is enough. It's time for the state to pay its own way.

Tell us what *you* think by comment to the *Municipal Lawyer*, online, via the Section's listserv, or by email to our Section liaison, Beth Gould (bgould@nysba.org), or to me (davies@coib.nyc.gov).

Mark Davies

Endnotes

1. *See, e.g.*, A3106/S4094 (2013), A4861A/S1294A (2013), A4972 (2013), A5573 (2013), A6019 (2013), A6343 (2013), A6546 (2013), A7060 (2013), A7082 (2013), A8104 (2013), S1577A(2013), S5557A (2013).
2. Proposed N.Y. Const. art. 9, § 4(a), (d), in S1640 (2009).

From the Editors

Summertime and the livin' is easy, or so it is said. That means summer is a great time to pick up your pen (or tablet), or sit down at your computer, and write an article for publication in the *Municipal Lawyer*. As you know, municipal law covers a wide range of subjects of critical importance to the lives of New Yorkers. And, the *Municipal Lawyer* publishes a wide range of works, including short case, statute and regulation updates; summaries of the law; full-length, heavily footnoted articles; and, book reviews, just to name a few. Indeed, the Summer issue is a great example of the different types of articles and authors that come within the *Municipal Lawyer's* purview—which is to inform, educate and spark dialogue about topics both old and new related to the practice of municipal law.

Is there a Supreme Court decision that you believe is significant in the area of municipal law? Then do what attorney Lisa Cobb did and write it up. Cobb provides an update on the issue of prayer before municipal council meetings, which the Supreme Court recently addressed in *Town of Greece v. Galloway*. In addition to summarizing the Court's decision, Cobb also notes developments in the law after the case was decided.

Have you read an article in the *Municipal Lawyer* that you want to respond to? Follow attorney Linda Margolin's lead and draft a response. Margolin's article on the recent New York Court of Appeals *Rocky Point* decision responds to an article in the Spring 2014 issue of the *Munipcal Lawyer*, which was written by counsel for the Town. In this issue, Margolin, who represented the applicant in the *Rocky Point* case, examines the significance of the decision's treatment of the special facts exception from a land use applicant's perspective, concluding that the opinion provides "elusive justice" for applicants.

Do you have deep expertise in a complex area of municipal law? If so, consider writing a primer on that topic. In this issue, attorney Mark Glaser provides a detailed treatment of the New York State Lobbying Act. Glaser's piece will help municipal lawyers navigate New York's complicated lobbying rules, which Glaser explains cover activities "far beyond the realm of legislation," including, among other things, certain interactions with local governments.

Do you have an abiding interest in ethics? Attorneys Mark Davies and Steven Leventhal do, which is why they wrote a comprehensive article on New York State's standards of ethical conduct for municipal officials. Their article sets out the relevant ethics rules and includes hypotheticals that help explain those rules. We are always interested in publishing articles on the ethics and professional responsibility issues that arise in connection with the practice of municipal law.

Have you read an interesting book or consulted a valuable treatise that is relevant to municipal lawyers? Then check with us about writing a review because the *Municipal Lawyer* occasionally publishes book reviews. In this issue, we have Touro Law Center Dean Patricia Salkin's review of the third edition *of Commercial Litigation in New York State Courts*, which she commends and says warrants "prime desk space on the busy working lawyer's desk."

Are you a junior lawyer or law student, or do you supervise one whom you can mentor through the publication process? It's never too early in a young municipal law career to publish. Take inspiration from Touro Law Center student Brian Walsh's piece on the government's power of eminent domain and the judicial expansion of the public use doctrine.

Finally, is there an area of municipal law that consistently captures your attention? Consider following attorney Maureen Liccione's and Touro Law Center Professor Sarah Adams-Schoen's lead by writing a regular case or legislative update. Beginning with this Summer issue, Liccione and Adams-Schoen will be writing a regular column highlighting a recent land use decision or change in land use law. In this issue, the Land Use Law Update summarizes the New York Court of Appeals' highly anticipated decisions in the *Dryden* and *Middlefield* cases, which held that New York municipalities have the authority to prohibit gas extraction by hydraulic fracturing (otherwise known as fracking).

Sarah Adams-Schoen and Rodger Citron

United States Supreme Court Upholds Tradition and Continues Controversy in *Town of Greece v. Galloway*

By Lisa M. Cobb

Opening a legislative session with a prayer or invocation is nothing new in the United States. The members of the First Congress voted to appoint and pay official chaplains.[1] Notably, they did this in the same week that they also voted to approve the draft of the First Amendment containing the now-familiar Establishment Clause: "Congress shall make no law respecting an establishment of religion.…"[2] As Chief Justice Burger wrote in *Marsh v. Chambers*, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of [the First] Amendment.…"[3]

Despite the historical acceptance of this practice, however, the controversy concerning prayers at public gatherings has a history as lengthy as the practice itself. Opposition was expressed by historical figures such as John Jay and John Rutledge, who opposed the motion to begin the first session of the Continental Congress with a prayer.[4] In addition, objections to prayer were raised "apparently successfully" in Pennsylvania during the debate concerning ratification of the Constitution.[5]

The controversy continued in 2014, with the Supreme Court's decision in *Town of Greece v. Galloway*.[6] Demonstrating the continuing lack of consensus on Establishment Clause issues, the Court's decision contains five separate opinions.

Background

An excellent summary of the historic precedent of legislative prayer, as well as the trial and appellate decisions in *Galloway,* may be found in an article written by Professor Thomas A. Schweitzer entitled, "Is Prayer Constitutional at Municipal Council Meetings?" published in a prior edition of this newsletter.[7] Accordingly, the underlying facts and procedural posture of the cases will only be briefly summarized here.

Since 1999, the Town Board of the Town of Greece had opened their meetings with an invocation.[8] The Town did not seek to regulate the content of the prayers or any other aspect of the prayer practice.[9] It asserted that it had never refused anyone's request to offer a prayer, never reviewed the contents of any prayer prior to its utterance, and would never censor an invocation.[10] However, because the residents of the Town were predominantly Christian, the invocation was usually a Christian prayer.[11] Indeed, the Town's list of clergy members willing to volunteer to deliver the invocation included only clergy from Christian organizations until 2008.[12]

"Opening a legislative session with a prayer or invocation is nothing new in the United States.… Despite the historical acceptance of this practice…, the controversy concerning prayers at public gatherings has a history as lengthy as the practice itself.…"

The Trial Court's Decision

Plaintiffs in the trial court were two residents of the Town of Greece, New York, who objected to the overtly Christian nature of the prayers. One of the plaintiffs who objected to the practice was Jewish; the other was an atheist.[13] Critical to each of the courts' decisions in these matters, plaintiffs did not seek to end the practice of opening Town Board meetings with a prayer. Rather, they sought a declaration that would require the Town Board to ensure that the invocation was "nonsectarian" by deleting references to any specific creed.[14]

In a lengthy decision deciding the parties' cross motions for summary judgment, the trial court upheld the Town's right to open its meetings with an invocation given by the "chaplain of the month," finding (1) that the plaintiffs failed to provide any credible evidence that the Town employees intentionally excluded members of particular faiths, and (2) that the law did not prohibit denominational or sectarian prayers.[15] Among other concerns, the court was troubled by the difficulties in distinguishing between prayers that the plaintiffs contended were sectarian and those they claimed were not, referring to "the illusory nature of so-called nonsectarian prayer."[16] It found the mechanism proposed by the plaintiffs to allow the Board to determine what prayers would be acceptable to be "vague and unworkable."[17]

The Second Circuit's Decision

The plaintiffs appealed only on the latter ground, asserting that only nonsectarian prayer was permitted at legislative sessions.[18] The Second Circuit Court of Appeals agreed, reversing the trial court's decision. The court began its analysis with a review of the Supreme Court's decision in *Marsh v. Chambers*, in which the Court concluded that legislative prayer was permissible under the Establishment Clause.[19] Recognizing that a town may open its public meetings with a prayer or invocation without running afoul of the Establishment Clause, the Second Circuit applied a "reasonable observer" test to determine whether the Town's practice ran afoul of the Constitution.[20] The court found that the Town's prayer policy and practice, under the totality of the circumstances presented, impermissibly favored Christianity even though the Town attempted and intended to maintain a diverse prayer program.[21]

In reaching its decision, the court noted that it was "relevant, and worthy of weight" that most of the prayer-givers appeared to speak on behalf of the Town and its residents rather than only on behalf of themselves. This was evidenced by requested audience participation and by speaking in the first person plural, *e.g.*, let "us" pray.[22] The Court stated: "[T]he rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion."[23]

However, as one of its final points, the court emphasized that:

> [A] practice such as the one to which the town here apparently aspired—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—is fully compatible with the First Amendment.[24]

The United States Supreme Court's Analysis

The oral argument before the United States Supreme Court was held on November 6, 2013. Thomas Hungar, Esq., counsel for the Town, spoke just one sentence before Justice Kagan posed her first hypothetical.[25] She inquired whether it would be permissible for the Court session to be opened by a minister who asked those present to stand or bow their heads during an overtly Christian prayer, leading to an animated discussion concerning whether and to what degree the type of meeting or session at issue determined whether the prayer or invocation was permitted. Oral argument indicated that the justices held a number of different views on the issue before the Court.

These divergent opinions of the Justices are reflected in the Court's decision. Justice Kennedy wrote the Court's opinion, which was joined by Justices Roberts, Alito, Scalia and Thomas. Justice Kennedy began by tracing the historical acceptance of prayer at legislative meetings and reaffirming the principles articulated in *Marsh*.[26] "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[27] Moreover, Justice Kennedy held, the formation of a test "that would sweep away what has so long been settled" would create controversy and "begin anew" divisions along religious lines that the Establishment Clause seeks to prevent.[28]

Justice Kennedy then determined that the prayer practice in the Town of Greece comported with *Marsh* and that sectarian prayer was permissible.[29] He contended that requiring the Town to ensure that the invocation be non-denominational would impermissibly condone the Town's censorship of the prayer's content and involve the government in religious matters to a far greater degree than the Town's existing practice of allowing all to speak without any municipal oversight of the content. Instead of requiring non-sectarian invocations, he asserted that the growing religious diversity in this country should be accomplished "not by proscribing sectarian content but by welcoming ministers of many creeds."[30]

In a section of the decision joined only by Justices Roberts and Alito, and therefore not part of the Court's opinion, Justice Kennedy concluded that the record did not contain any evidence that prayer at a local body, as distinct from a state or federal body, was coercive—despite the fact that the audience might be seeking approval from the board members for various projects.[31]

Justices Thomas and Alito filed concurring opinions. In a two-part opinion, Justice Thomas first reiterated his view that the Establishment Clause is "best understood as a federalism provision" meant to protect the states from overreaching by the federal government and not to be used against them to prohibit any action.

In the second part of his opinion, he asserted that, even if the Establishment Clause were properly to be used against the states, the municipal prayer at issue bore no resemblance to the coercive state establishments that existed when the country was founded.[32] He concluded that, to the extent that coercion is relevant to the analysis, it must be legal coercion—like the mandatory attendance requirements of and tax levies by former state churches—and not the "subtle coercive pressures" asserted by the plaintiffs. Justice Scalia joined only in the second part of Justice Thomas' concurrence. Justice Alito, in response to Justice Kagan's dissenting opinion, found part of her objection to the Town's prayer practice to be "really quite niggling," and raised concerns about the broad-sweeping rhetoric he believed to be expressed therein.[33]

While agreeing with the Court's decision in *Marsh*, Justice Kagan faulted the Town for not being sufficiently inclusive in its choice of prayer-givers, forcing those with different views to either go along or stand apart, thereby causing a civic function to "bring[] religious differences to the fore.…"[34] Similar to the Second Circuit's decision, Justice Kagan also contrasted congressional legislative sessions with local municipal board meetings, finding the local settings potentially more coercive. Of relevance to the readers of this article, Justice Kagan concluded that a town hall is a hybrid of a legislative session, at which the attendees are an audience only, and a more interactive forum, in which "ordinary citizens engage with and petition their government, often on highly individualized matters."[35] For this reason, in Justice Kagan's view, town board members need to "exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen."[36]

Justice Breyer, in a brief dissenting opinion, reiterated the fact-sensitive nature of the case and concluded that the Town had not done enough to ensure that minority faiths were represented.[37] He believed that, given the ease with which the Town could have publicized its open-invocation policy (via its website, announcements at meetings and mailings to houses of worship), the Town's "fail[ure] to make reasonable efforts to include prayer givers of minority faiths" violated the Establishment Clause.[38] He also joined in the principal dissenting opinion of Justice Kagan.

All of the Justices agreed on the following three things: that prayers at legislative sessions generally are permissible, that the issue was whether the Town's actions comported with the Court's teachings in *Marsh*, and that the inquiry necessarily was fact-specific. Beyond that, like religious beliefs, the views diverged.

The Post *Town of Greece* World

The Supreme Court's decision brought at least some additional clarity to the issue of legislative prayer. In the days following, the United Stated District Court for the District of Maryland was forced to vacate an injunction it had previously granted precluding a County Board of Commissioners from opening its meetings with prayers that contained sectarian references.[39]

Less than six weeks after the Court's pronouncement in *Galloway*, on June 16, 2014, the case was discussed by two of the Supreme Court's justices. Justice Scalia, joined by Justice Thomas, dissented from the denial of a writ of certiorari for a Seventh Circuit decision which found it improper for a suburban Milwaukee school district to hold high-school graduations in a church. He faulted the Seventh Circuit for using the First Amendment to allow "[t]he aversion to religious displays to be enforced directly through the First Amendment, at least in public facilities and with respect to public ceremonies—this despite the fact that the First Amendment explicitly favors religion and is, so to speak, agnostic about music."[40] Justice Scalia stated that the Supreme Court had "recently confronted and curtailed this errant line of precedent"[41] in *Galloway*, and that the Seventh Circuit's decision should be vacated and the case remanded for reconsideration in light of the holding in *Town of Greece*, on three separate grounds. He asserted that *Galloway* abandoned the "antiquated endorsement test," which formed the basis of the Seventh Circuit's decision. He also quoted *Galloway*: "[o]ffense does not equate to coercion" and reiterated that the *Galloway* decision left no doubt that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[42]

Due to the fact-specific nature of the holding in *Galloway*, the decision offers municipalities and practitioners little additional guidance. Not unexpectedly, the Court declined to establish a bright-line test. In addition, by holding that the record did not support a conclusion that the prayers at these local meetings were impermissibly coercive, Justice Kennedy opened the door to permit a showing in a future case that differences between sessions held by federal, state and local legislative bodies, or other gatherings, warrant different treatment under the Establishment Clause—a determination that appears likely to be supported by Justices Kagan and Breyer. For now, the Court's decision permits the continuance of the practice of opening legislative sessions with an invocation, a "tolerable acknowledgment of a belief widely held."[43] Until further pronouncements on the subject are made, "God save the United States and this Honorable Court."[44]

Endnotes

1. Marsh v. Chambers, 463 U.S. 783, 788 (1983).
2. *Id*. *See also* U.S. CONST., amend. 1.
3. *Marsh*, at 788.
4. *Id*. at 791.
5. *Id.* at 791 n.12.
6. 134 S. Ct. 1811, 1818 (2014).
7. Thomas A. Schweitzer, *Is Prayer Constitutional at Municipal Council Meetings?*, 27 MUN. LAW. 26 (2013).
8. Galloway v. Town of Greece, 732 F. Supp. 2d 195, 197 (W.D.N.Y. 2010), *rev'd*, 681 F.3d 20 (2d Cir. 2012).
9. *Id.*
10. *Id.*
11. *Id.* at 197-98.
12. *Id.* at 202-03.
13. *Galloway*, 732 F. Supp. 2d. at 196.
14. *Id. See also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1817 (2014) (requesting an injunction that would require the town to limit its prayer practice to generic prayers).
15. *Galloway*, 732 F. Supp. 2d at 219, 243.
16. *Id.* at 243.
17. *Id.*
18. Galloway v. Town of Greece, 681 F.3d 20, 27 (2d Cir. 2012).
19. 463 U.S. 783 (1983).
20. *Galloway*, 681 F.3d at 29.
21. *Id*. at 33.
22. *Id*. at 32.
23. *Id*.
24. *Id*. at 34.
25. Transcript of Oral Argument at 3, Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (No. 12-696), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-696_6j37.pdf.
26. Town of Gree.ce v. Galloway, 134 S. Ct. at 1818-28.
27. *Id.* at 1819 (citing County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989)).
28. *Id*.
29. *Id*.
30. *Id*. at 1820-21.
31. *Galloway*, 134 S. Ct. at 1819.
32. *Id*. at 1835.
33. *Id*. at 1829, 1831. *See also Galloway*, 134 S. Ct. at 1852 n.5 (Kagan, J., dissenting) ("Every month for more than a decade, the Board aligned itself, through its prayer practices, with a single religion. That the concurring opinion thinks my objection to that is "really quite niggling," *ante*, at 1829, says all there is to say about the difference between our respective views.").
34. *Id*. at 1844.
35. *Id*. at 1845.
36. *Galloway*, 134 S. Ct. at 1844.
37. *Id*. at 1838-41.
38. *Id*. at 1840, 41.
39. Hake v. Carroll Cnty, Civ. No. WDQ-13-1312, 2014 WL 2047448, at *2 (D. Md. May 15, 2014).
40. Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2283 (June 16, 2014).
41. *Id*.
42. *Id*. at 2285.
43. *Galloway*, 134 S. Ct. at 1818 (quoting *Marsh*, 463 U.S. at 792).
44. *Marsh*, 463 U.S. at 786.

Lisa M. Cobb is a litigator and municipal attorney with the law firm of Stenger, Roberts, Davis & Diamond, LLP in Wappingers Falls, Dutchess County, New York. She also does a substantial portion of the firm's appellate work. Ms. Cobb presently serves on the Executive Committee of the New York State Bar Association's Municipal Law Section and is a Co-Chair of its Land Use, Green Development and Environmental Committee.

Rocky Point Drive-In, L.P. v. Town of Brookhaven: Elusive Justice for Applicants

By Linda U. Margolin

The Spring 2014 issue of the *Municipal Lawyer* published an article on the recent decision by the Court of Appeals in *Rocky Point Drive-In, L.P. v. Town of Brookhaven* ("*Rocky Point*"), written by counsel for the defendant Town.[1] That article also discussed the overall import of that decision on the "special facts" rule. This article responds by exploring the significance of the *Rocky Point* decision from the perspective of property owners and land use approval applicants.

A property owner encountering what it perceives to be unjustified and illegal conduct by a municipality in connection with a land use application has several litigation alternatives that may aid in the pursuit of an approval. If the municipal agency has issued a decision denying the approval, an Article 78 proceeding allows the property owner to show why the determination was arbitrary, capricious or in contravention of existing laws, and to request relief in the form of an order annulling the determination and instead, directing issuance of the approval. If the property owner can show that it was clearly entitled to the approval it was seeking,[2] it can bring a federal civil rights action for damages, or a federal takings claim if the municipality used unfair and repetitive procedures to avoid a final decision.[3] But, if the application has been delayed at the hands of the municipality which then rezones the property so that the pending application is now barred by a new zoning classification, the litigation avenue that offers the possibility of moving the application forward, rather than damages, is the so-called "special facts" case.

"Special facts" is a court-created equitable doctrine that allows a land use applicant to avoid the impact of a change of zone enacted while the application is pending, by showing in a lawsuit that there was significant governmental delay of the application together with proof that, but for the delay, the plaintiff landowner would have been able to vest in its use before the zoning was changed. *Rocky Point* was a special facts case that the plaintiff (represented by the author) hoped would not only allow it to prevail, but would also clarify the special facts doctrine as applied to land use cases, and address the Appellate Division, Second Department's insistence over the past 20 years that a plaintiff's proof include proof of governmental malice.

The Court of Appeals decided that the plaintiff had no case, in a decision that highlights but unfortunately does not clarify New York's policy on when plaintiffs may take advantage of the special facts doctrine, and the level of proof they need in order to prevail.

Factual Background

The facts recited below were all undisputed in the record on appeal. The property at issue was a 17-acre parcel that had once been used as a drive-in movie theater, and more recently as a golf driving range. At essentially the same time in early 2000, the town initiated proceedings to rezone the property to a "commercial recreation" category that prohibited non-recreational uses, and the plaintiff's predecessor in title filed a site plan application for a commercial retail "big box" development. Although the town deemed that rezoning and another rezoning effort in 2001 effective, both were set aside as void by court rulings because the supermajority of board votes (triggered under N.Y. Town L. § 267 when the property owner filed a protest) was lacking. Absent the rezonings, the property reverted to its original zoning classification, J-2 Business. A feature of the town's zoning code was that commercial developments occupying sites of 5 acres or more were deemed "commercial centers" and prohibited in the J-2 zone. It was not until approximately two and a half years after the original site plan application was filed that the town properly adopted a rezoning by the requisite number of votes.

The plaintiff experienced a variety of delays between 2000 and late 2002 as it attempted to move its site plan to a public hearing while the invalid rezonings were being litigated. The town disputed that it had acted to delay the application, but it was undisputed that throughout this time the site plan application never appeared on the Planning Board's agenda, the zoning board of appeals ("ZBA") was made lead SEQRA agency although it had no pending application, and the ZBA's determination to require an environmental impact statement did not occur until another 10 months had passed. It was also undisputed that despite a 1996 comprehensive plan that envisioned town-wide rezonings to the commercial recreation category, only the plaintiff's property had been so rezoned at the time it filed its special facts case at the end of 2002.

In 2004, the town successfully moved for summary judgment dismissing the case on the grounds that plaintiff could not rely on the special facts doctrine because even under the J-2 zoning classification, its proposed big box development was not an as-of-right use. In 2007, the Second Department modified the lower court's order, and reinstated the complaint,[4] in view of the plaintiff's showing that it could prove selective enforcement by the town, because many other commercial site plans for properties exceeding 5 acres in size had received site plan approval without benefit of variances from the ZBA. The town never appealed this ruling. The case was ultimately tried; the trial court found that the town had intentionally delayed the application and that the plaintiff was entitled to have its site plan proceed to a public hearing under the J-2 zone without the need for any variances. In 2010, the Second Department reversed and dismissed the complaint,[5] finding that the plaintiff's proof below had not established malicious delay by the town.

The plaintiff successfully petitioned the Court of Appeals for leave to address what it claimed was an erroneous requirement by the Second Department that a special facts plaintiff prove malice in connection with any delay, a significant departure from the original quartet of Court of Appeals cases decided in the 1970s,[6] which indicate that proof of merely negligent and unexplained delay is sufficient to justify special facts relief if the plaintiff could also show that, but for the delay, the plaintiff landowner would have been able to vest in its use before the zoning was changed.

The Court of Appeals Decision

The decision addresses both prongs of what a special facts plaintiff must prove in order to prevail, but leaves open a host of questions. The Court described the as-of-right threshold for special facts this way: "In order for a land owner to establish entitlement to the request as a matter of right, the land owner must be in 'full compliance with the requirements at the time of the application,' such that 'proper action upon the permit would have given [the land owner] time to acquire a vested right.'"[7] But what exactly does "full compliance" mean? We can all agree that an application that could not be approved absent a *use variance* would not satisfy this standard. But what about an application that requires only a de minimis or pro forma *area variance*? The town in *Rocky Point* contended that the plaintiff's application proposed a use that was prohibited in the J-2 zone and required a *use variance*, but it was undisputed that several years before, a supermarket site plan was approved on an over-5-acre J-2 parcel after the owner applied for and received a pro forma *area variance*; the ZBA did not require proof of the elements specified by N.Y. Town L. §267-b for area variances.

The Court's decision also leaves unresolved the question of whether proof of malice is actually required or whether a plaintiff's "significant reliance on our decision in *Faymor Dev. Co. v. Bd. of Stds. & Appeals of City of N.Y.*" was justified.[8] *Faymor* held that special facts doctrine applied when a governmental agency "intentionally *or even negligently* delayed action on an application for a permit or license until after the law had been amended to authorize denial of the application."[9] The amicus curiae brief filed in support of the plaintiff's appeal by the Long Island Builders Institute urged that requiring proof of malice was an impossible real world standard because "the overall [land use approval] process is typically so complicated that it can be hard to pinpoint which municipal actors are responsible for delays, and impossible to ferret out statements from such persons acknowledging that delay was intentional."[10]

The Court of Appeals appears to have held that the plaintiff could not bring its case nor rely on *Faymor* because "it cannot meet the zoning requirements and did not have a vested right,"[11] a puzzling explanation since by its very nature, a special facts case is brought only when the delays encountered prevented the applicant from obtaining approval and thereafter vesting by construction before the zone change. But the Court left the question it posed, and the propriety of requiring proof of municipal malice, unaddressed. The Second Department decides over 90% of the land use cases in this state, overseeing an urban and suburban development environment that is sometimes described as a "high barrier to entry market"—that is, the process of obtaining land use approvals is often lengthy, difficult and expensive. While the Second Department insists that a plaintiff prove that municipal delays were caused by malice in order to make out a special facts case, there was no such requirement when the Court of Appeals elaborated on the special facts doctrine, which it saw as a way of creating meaningful redress for parties who were stymied in seeking governmental approvals.

In this author's opinion, the appellate courts of this state need to return to *Faymor*'s holding and eliminate the additional requirement that a special facts plaintiff prove governmental malice. Otherwise, the "court-created engine of justice"[12] envisioned by the Court of Appeals almost 40 years ago will cease to have any vitality in New York.

Endnotes

1. Maureen T. Liccione, *Rocky Point Drive-In, L.P. v. Town of Brookhaven*: *The Special Facts Rule*, Municipal Lawyer, Vol. 28, No. 2, at 4 (Spring 2014).
2. *See, e.g., Clubside, Inc. v. Valentin*, 468 F.3d 144, 154 (2d Cir. 2006).
3. *See Sherman v. Town of Chester*, 2014 U.S. App. LEXIS 9279 (2d Cir. May 16, 2014).

4. 37 A.D.3d 805 (2d Dep't 2007) ("The plaintiff's proof [opposing the defendants' summary judgment motion] indicated that the defendants selectively enforced the J-2 zoning prohibitions and selectively rezoned the subject property to a CR zone on its own motion.…").
5. 93 A.D.3d 655 (2d Dep't 2012).
6. *Our Lady of Good Counsel, Roman Catholic Church & School v. Ball*, 45 A.D.2d 66 (2d Dep't 1974), *aff'd on opn. below*, 38 N.Y.2d 780 (1975); *Matter of Pokoik v. Silsdorf*, 40 N.Y.2d 769 (1976); *Amsterdam-Manhattan Associates v. Joy*, 42 N.Y.2d 941 (1977); *Matter of Faymor Dev. Co., Inc. v. Bd. of Standards and Appeals of the City of New York*, 45 N.Y.2d 560 (1978).
7. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d 729, 737 (2013) (citations omitted).
8. *Id.* at 738, *citing Faymor Dev. Co., Inc. v. Bd. of Standards and Appeals of City of New York*, 45 N.Y.2d 560 (1978).
9. *Faymor,* 45 N.Y.2d at 565 (emphasis added).
10. Brief for the Long Island Builders Association as Amicus Curiae, *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d 729 (2013).
11. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d at 738.
12. *Matter of Pokoik v. Silsdorf*, 40 N.Y.2d 769, 773 (1976).

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Lobbying Regulation in New York State

By Mark Glaser

Introduction

New York State first required lobbyists to register and disclose their efforts to influence legislation nearly one hundred years ago, in 1906.[1] Proving, once again, that the more things change, the more they stay the same, the first person to register under the 1906 law was the Reverend A. S. Gregg, who represented the "International Reform Bureau of Washington" and was retained to lobby for an anti-gambling bill that would make gambling a felony within "racetrack inclosures."[2] The 1906 law required that lobbyists register with the Secretary of State, and, at the end of the legislative session, disclose their expenses.[3] This law remained in effect for seventy-one years until 1977 when the Temporary State Commission on Lobbying (the "Temporary State Commission") was created to receive lobbying filings and to issue advisory opinions on the application of the lobbying law.[4] Subsequent to the 1977 law, what is now the Lobbying Act was amended numerous times, nearly each time creating new regulatory bodies to regulate the lobbying industry in response to a perceived scandal.

Today, the New York State Lobbying Act covers activities far beyond the realm of legislation, regulating "lobbying activities" before New York State government—a term that is very broadly defined—and jurisdictions with a population of 50,000 or more. In addition, New York City has its own extensive lobbying regulatory structure,[5] and Suffolk County also has a local law pertaining to certain lobbying activities before the County.[6]

This article reviews the provisions of the New York State Lobbying Act, its breadth, disclosure requirements, and the many restrictions imposed on lobbyists and clients of lobbyists. As is highlighted below, a determination of whether an activity constitutes lobbying, or is reportable, depends on the specific facts of the particular situation. Thus, individuals and entities that interact with State or local government must always be cautious in determining whether an activity is, in fact, regulated lobbying activity. It is important to note that the information provided below is informed by advisory opinions and guidance documents issued by the former Commission on Public Integrity, the Commission on Lobbying and the Temporary State Commission. In 2011, the Public Integrity Reform Act of 2011 was enacted, creating the new Joint Commission on Public Ethics (sometimes referred to herein as "JCOPE" or the "Commission").[7] JCOPE is required to examine prior guidance and advisory opinions and to determine whether such advice is consistent with law. Although JCOPE may, on a going forward basis, revise prior interpretations, and, in fact, has issued revised guidance and proposed regulations,[8] there is a body of well-settled law and guidance.

New York State Lobbying Act

The New York State Lobbying Act (the "Act")[9] entails significant reporting and compliance requirements, and imposes stringent penalties for violations of its provisions. Furthermore, the Act (along with corresponding provisions in the Public Officers Law) makes it generally illegal for a lobbyist or a client to offer to give or to give a gift to a public official. However, before one can have an appreciation of the Act, one must understand what activities constitute lobbying.

Definition of Lobbying Activities

Section 1-c of the Act defines "lobbying" and "lobbying activities" as attempts to influence a broad range of governmental decision-making at the State, agency, tribal and local levels, specifically:

- The introduction, amendment, passage or defeat of State legislation;[10]
- The approval or disapproval of such legislation by the Governor;[11]
- The adoption or rejection by a State agency of a rule or regulation having the force and effect of law;[12]
- The outcome of a state agency rate-making proceeding;[13]
- The introduction, amendment, passage or defeat of a local law, ordinance, resolution or regulation by a covered jurisdiction;[14]
- The adoption or rejection of any rule or regulation having the force and effect of a local law, ordinance or regulation in a covered jurisdiction;[15]
- A rate-making proceeding by a covered local jurisdiction;[16]
- The State and local government procurement process where the value of the procurement is estimated to be greater than $15,000 on an annual basis;[17]

- Tribal-state compacts and other agreements, or other State actions with respect to Class III (casino) gaming;[18] or
- State or local government Executive Orders.[19]

Attempts to influence covered entities with regards to these issues are subject to the registration and reporting obligations that are described below. Similarly, lobbying of industrial development agencies, public authorities and public corporations (but not school districts) is also covered. It is important to remember that even if a person is only lobbying a local jurisdiction registration with JCOPE likely is required if the local jurisdiction has a population of more than 50,000.[20] In the case of lobbying the City of New York or Suffolk County government, registration and reporting may be required with both the municipality and JCOPE.[21] When simultaneous registration is required, registration with only one of these bodies is insufficient and, as described below, may result in penalties for failure to timely file registrations and reports.

The lobbying regulatory bodies have also interpreted "lobbying activity" very broadly. As has long been held by these bodies, lobbying activity encompasses "[a]ny activity intended to support, oppose, modify, delay, expedite or otherwise affect any of the [governmental] actions specified in" the Lobbying Act.[22] Furthermore, any activity intended to influence a covered official with respect to one of the enumerated lobbying activities "is lobbying irrespective of how contact is made."[23] Contact includes face-to-face meetings, printed communications and electronic communications (including phones, e-mail and faxes), billboards and other communications exhorting contact with public officials (grassroots lobbying).

Exclusions from Lobbying Activity

The Act excludes the following activities from the definition of lobbying activities:

- Engaging in drafting, advising clients on or rendering opinions on proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts,[24] or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming as provided in 25 U.S.C. § 2701, when such professional services are not otherwise connected with state or municipal legislative or executive action on such legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming as provided in 25 U.S.C. § 2701;
- Publication or broadcast of news items, editorials or other comments, or paid advertisements by newspapers and other periodicals and radio and television stations, and owners and employees thereof, in connection with proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, tribal-state compacts, memoranda of understanding or other tribal-state agreements related to Class III gaming as provided in 25 U.S.C. § 2701, or procurement contracts by a state agency, municipal agency, local legislative body, the state legislature, or the unified court system;
- Participating as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency when all such participation by a person is part of the public record thereof and all preparation by such person for such participation;
- Attempts to influence a state or municipal agency in an adjudicatory proceeding, as "adjudicatory proceeding" is defined by section 102 of the state administrative procedure act;
- Preparing or submitting a response to a request for information or comments by the state legislature, the governor, or a state agency or a committee or officer of the legislature or a state agency, or by the unified court system, or by a legislative or executive body or officer of a municipality or a commission, committee or officer of a municipal legislative or executive body; and
- Any attempt by a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a federal income tax return under paragraph 2(A)(i) of section 6033(a) of Title 26 of the United States Code or a religious order that is exempt from filing a federal income tax return under paragraph (2)(A)(iii) of such section 6033(a) to influence passage or defeat of a local law, ordinance, resolution or regulation or any rule or regulation having the force and effect of a local law, ordinance or regulation.[25]

Procurement Lobbying

As noted previously, any attempt to influence any determination by a public official (defined to mean virtually any officer or employee of the State or a covered municipal entity), or by a person or entity working in cooperation with a public official related to a governmental procurement, constitutes lobbying activity.[26] The rules regarding procurement lobbying are extensive, nuanced, and not always intuitive.

In addition to the provisions that make procurement activities lobbying, it is important to understand

that the Lobbying Act prohibits certain contacts with State government officers and employees during the time that a procurement is pending.[27] This limitation on contacts, known as the "restricted period," is one of the most comprehensive in the nation. The restricted period is discussed in more detail below, but it is important to stress that the penalty for violating the restricted period is draconian.[28] Another unusual aspect of the procurement lobbying rules is that procurements by an officer or employee of the Unified Court System, or by those working in cooperation with such officers or employees, are also covered, as are procurements by the State Legislature.[29] This is the only instance where lobbying the Judicial branch of government constitutes covered activity.

But what constitutes a "governmental procurement"?

Section 1-c(p) of the legislative law provides that a governmental procurement means:

1) the public announcement, public notice, or public communication to any potential vendor of a determination of need for a procurement, which shall include, but not be limited to, the public notification of the specifications, bid documents, request for proposals, or evaluation criteria for the procurement contract;

2) solicitation for a procurement contract;

3) evaluation of a procurement contract;

4) award, approval, denial or disapproval of a procurement contract;

5) approval or denial of an assignment, amendment (other than amendments that are authorized and payable under the terms of the procurement contract as it was finally awarded or approved by the comptroller, as applicable), renewal or extension of a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the offerer.[30]

The Legislative Law instructs that covered procurement contracts relate to the governmental procurement of commodities, services, a technology, a public work, construction, a revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property.[31] A "revenue contract" means "any written agreement between a state or municipal agency or a local legislative body and an offerer whereby the state or municipal agency or local legislative body gives or grants a concession or a franchise."[32]

Commission Guidelines provide that procurement lobbying activities do not begin until a covered entity makes a "determination of need" for the product or service to be procured.[33] Accordingly, attempts to influence a procurement prior to the issuance of such a determination do not constitute lobbying. Thus, true business development activities, before a governmental entity has decided that it "needs" a product or service, are not lobbying.

The Commission recognizes that not all covered entities actually make a formal determination of need, and thus, to avoid a violation of the restricted period, specifically authorizes a limited inquiry to the entity to ask whether or not it has made a determination of the need for the product or service.[34] The Commission has advised that this inquiry always be made before attempting to influence a procurement.[35]

The Act provides a limited list of activities that are excluded from the definition of procurement lobbying, including:

- Activities of commissioned salespersons with respect to governmental procurements. Commissioned salespersons are defined in the statute to mean persons who are primarily employed to cause or promote the sale of, or to influence or induce another to make a purchase of, an article of procurement, and who are paid in whole or in part based on a percentage of all or substantial part of their sales.[36]

- Persons engaged in drafting procurement contracts, advising clients on or rendering opinions on proposed procurement contracts, but only when such professional services are not otherwise connected with governmental action on the procurement contract.[37]

- Activities relating to procurements under Section 162 of the State Finance Law (Preferred Sources). Such sources include agencies for the blind and other severely disabled persons and veteran's workshops. This exception is limited, however; it does not apply to attempts to influence the issuance or terms of the specifications that serve as the basis for bid documents, requests for proposals, invitations for bids, or solicitations of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract.[38]

- Participation in bid conferences.[39]

- Negotiations between a purported successful bidder and the governmental entity.[40]

- Communications between a governmental entity and the holder of an existing procurement contract for the purpose of negotiating the terms of a purchase of a commodity, service, technology or other article of procurement pursuant to that existing contract, except that communications with a local legislative body relating to the terms of a franchise renewal remain within the definition of lobbying activity.[41]
- Parties to a bid protest, appeal or other review proceeding before the governmental entity conducting the procurement seeking a final administrative adjudication or in subsequent judicial proceedings.[42]
- Bringing of complaints of alleged improper conduct in a procurement to the attorney general, inspector general, district attorney or court of competent jurisdiction.[43]
- Submission of written protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's office approval is required by law, and where such communications and any responses are made in writing and are required to be entered in the procurement record.[44]
- Bringing of complaints of alleged improper conduct in local government procurements to the State Comptroller's office.[45]
- Submission of a bid or proposal (orally, written or electronically) in response to a solicitation intending to result in a procurement contract.[46]
- Offerers[47] submitting written questions to a designated contact of the procuring governmental entity when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the solicitation.[48]
- Contacts during the procurement process between designated staff of the procuring entity involved in the procurement and officers and employees of bidders or potential bidders, or their subcontractors, "who are charged with the performance of functions relating to contracts and who are qualified by education, training or experience to provide technical services to explain, clarify or demonstrate the qualities, characteristics or advantages of an article of procurement."[49] Such contacts must: (i) be limited to providing information to the staff of the procuring entity to assist them in understanding and assessing the qualities, characteristics or anticipated performance of an article of procurement; (ii) not include any recommendations or advocate for any contract provisions; and (iii) occur only at such times and in such manner as authorized under the procuring entity's solicitation or guidelines and procedures. The law further restricts this exception by defining technical services to mean "analysis directly applying any accounting, engineering, scientific or other similar technical disciplines."[50] Note that this exception does not permit use of consultants, outside experts or agents.[51]
- After award, communications by an officer or employee of the offerer, when such communications are in the ordinary course of providing the article of procurement and within the assigned duties of the officer or employee. Registered lobbyists, as well as agents and independent contractors whose primary duty is to engage in lobbying activities, are not eligible to take advantage of this exception.[52]
- Persons who communicate with public officials, where such communications are limited to obtaining factual information related to benefits or incentives offered by a State or municipal agency and where such communications do not include recommendations or advocate governmental action or contract provisions and are not otherwise connected with legislative or executive action or determinations. Registered lobbyists are not eligible to take advantage of this exception.[53]

Restricted Contact Rules for Procurement Activities

As noted previously, one of the most significant provisions of the Lobbying Act is the imposition of a restricted period, prohibiting most lobbying activity by lobbyists or their clients during a governmental procurement.[54] The restricted contact provisions are applicable to all State governmental entities, industrial development agencies located in a municipality with a population of more than 50,000 and local public benefit corporations. Note, however, that except as provided above, the restricted period provisions are not applicable to local governments. Pursuant to § 1-n of the Legislative Law, the restricted period runs from the date of the first written notice, advertisement or solicitation for the procurement and ends with the final contract award, including, where applicable, approval by the State Comptroller.[55] The Commission has interpreted this provision to mean that the restricted period begins at the earliest written notice of a formal (whether written or oral) solicitation of a response from offerors.

During the restricted period, lobbyists and clients may not:

- Contact any person within the procuring entity, except for the person or persons designated to receive such contacts, relating to the procurement. This prohibition is applicable to all New York State procuring entities.[56]
- Engage in lobbying activities concerning a procurement by contacting any person in a State agency other than the procuring agency.[57] The definition of a State agency is broad and includes "any department, board, bureau, commission, division, office, council committee or officer" of the State, or a public benefit corporation or public authority, at least one of whose members is appointed by the Governor, and authorized by law to make rules or to make final decisions in adjudicatory proceedings.[58] Note, however, that in some circumstances, contact with members of the legislature and legislative staff may be permitted provided that when the legislature is the procuring entity, such contact is also prohibited. Note also that this prohibition against contacts with agencies other than the procuring entity does not apply to local governments. Finally, it is also worth noting that some procurement contract solicitations, on both the State and local government level, may impose a restriction on contacts that may be more stringent than the requirements of State law.[59]

Penalties for violating these prohibitions during the restricted period are severe, including fines, loss of the contracting opportunity, and for repeated offenses, debarment of the client and lobbyist.[60]

There are a number of exceptions to the restricted contact rules which are deemed not to be lobbying activities, and, therefore, are permissible. These are similar to the exceptions to procurement lobbying activity enumerated above, and are not repeated here.

There is one exception, however, that bears special mention. Contacts with members of the State Legislature concerning governmental procurements by a State agency, the unified court system or a municipal agency are expressly permitted by the Act. Note that contact with a State legislator is not authorized with respect to procurements by the House of the State Legislature in which the legislator serves.[61]

Who Is a Lobbyist?

Under the Act, every person or organization retained, employed or designated by any client to engage in the lobbying activities described above is considered a lobbyist.[62] Unlike in some other jurisdictions, this definition encompasses employees of entities who, as part of their duties, interact with government in a way that constitutes lobbying activities. For the purposes of registration, these employee lobbyists will generally not be the registrant, but must still be identified as an "additional lobbyist" of the entity employer.

Registration and Disclosure Obligations of Lobbyists and Clients of Lobbyists

a. Statements of Registration, Bi-Monthly Reports, and Semi-Annual Reports

All lobbyists who expend, incur or receive, or reasonably anticipate that they will expend, incur or receive in the coming year, compensation or expenses in excess of $5,000 for lobbying during the calendar year, must annually file a Statement of Registration with the Commission[63] as well as bi-monthly reports.[64] For lobbyists who reasonably anticipate being paid more than $5,000 for lobbying services, the Statement of Registration must be filed by January 1 if they are retained prior to December 15.[65] If retained or hired after December 15, then the registration must be filed within 15 days of being retained or within 10 days of expending or receiving any monies for lobbying activities.[66] Of note to municipal attorneys, lobbyists must report on the Statement of Registration the resolution or municipal ordinance numbers of resolutions or municipal ordinances lobbied or expected to be lobbied.[67] The lobbyist registration must be accompanied by a $200 fee, but only if the lobbyist expects to incur or expend in excess of $5,000.[68]

Additionally, clients of lobbyists (i.e., entities or persons who retain or employ lobbyists) must file semi-annual reports.[69] Semi-annual reports are cumulative for all lobbying activities on behalf of the client during the reporting period and must contain the same information required to be reported on the Lobbyist bi-monthly reports.[70] Clients must remit a $50 filing fee with their semi-annual reports.[71]

The registration and reporting forms are supplied by the Commission. The Commission prefers electronic filing of all forms and reports. These forms are available at the Commission's website: http://www.jcope.ny.gov/.

b. Reportable Expenses

Expenses are to be listed in the aggregate if $75 or less.[72] If any one expense for the purpose of lobbying is more than $75, the expense must be detailed as to amount, purpose, to whom paid and, if an expense greater than $75 is on behalf of any individual person, the name of the person is required to be reported.[73] Expenses, however, do not include: (1) personal sustenance, lodging and travel disbursements of the lobbyist; or (2) expenses, not in excess of $500 in any one calendar year, directly incurred for the printing or other means of production or mailing of letters, memoranda or other written communications.[74]

Expenses for salaries, other than that of the lobbyist, are to be reported in the aggregate. Thus, the allocable expenses incurred for an in-house lobbyist's secretary and other clerical help are required to be reported, but aggregated in a lump sum.[75]

Expenses of more than $50 are required to be paid by check or substantiated by receipts. The checks and receipts are required to be maintained on file for a period of three years.[76]

c. Filing Dates for Reports

As noted previously, bi-monthly reports must be filed within 15 days after the close of the applicable reporting period, and semi-annual reports must be filed by July 15th for the first semi-annual filing period, and by January 15th of the following year, for the second semi-annual filing period.[77]

Other Disclosure Obligations of the Act

a. Reportable Business Relationships

Since 2012, lobbyists and clients of lobbyists have been required to disclose all "reportable business relationships."[78] A "reportable business relationship" means any relationship where a lobbyist or a client pays more than $1,000 "for any goods, services or anything of value," to any state public officer, legislator, or employee, or "any entity in which the lobbyist or client of a lobbyist knows or has reason to know [that such government official] is a proprietor, partner, director, officer or manager, or owns or controls ten percent or more of the stock of such entity," or one percent or more of stock in a publicly traded entity.[79] Lobbyists are now required to report such relationships as part of their statement of registration. Clients are similarly required to disclose any such business interaction on their semi-annual reports.

b. Source of Funding Disclosure

Also since 2012, lobbying entities and clients of lobbyists are required to disclose the names of persons and entities that financially contribute to a lobbying effort.[80] Pursuant to regulations recently adopted by JCOPE, any entity that: (1) engages in lobbying on its own behalf (as opposed to a lobbying firm that represents clients); (2) spends more than $50,000 in lobbying compensation and expenditures during the prior calendar year or in the 12 months preceding the relevant bi-monthly reporting period; and (3) devotes at least 3% of its total expenditures during the same period towards lobbying activity in New York State, will be required to identify the names of all sources that provided more than $5,000 to support the entity's lobbying activities, and the amount that each source provided. The lobbying entity is required to report this information on the bi-monthly reports due on July 15. Clients of lobbyists filing semi-annual reports on that same date will also have to disclose the name and amount of funding provided if the client spent more than $50,000 in lobbying compensation and expenditures during prior calendar year or in 12 months preceding the relevant bi-monthly reporting period; and devoted at least 3% of its total expenditures during the same 12 month period towards lobbying activity. This client report obligation exists even for those entities that did not engage in any lobbying on its own behalf, but raised funds to pay an outside consultant for the lobbying effort.

The law provides for only very narrow exceptions to the new obligation to disclose the sources that provide funding for the covered entity's lobbying effort:

- Charitable organizations that are registered with the New York State Attorney General and exempt from taxation pursuant to Internal Revenue Code 501(c)(3); and,
- organizations that are registered with the New York State Attorney General and exempt from taxation pursuant to Internal Revenue Code 501(c)(4), if the entity can establish that disclosure of the contributors would "lead to harm, threats, harassment, or reprisals" to the donor; and governmental entities, are excluded from this new reporting.[81] JCOPE has been very reticent to issue a waiver under this exception.

c. Disclosure of Lobbying Activities Related to Grants

Lobbying with respect to grants receives special treatment under the Act.[82] Although not considered lobbying activity, lobbyists who are already required to register and file lobbying reports, who also seek to influence the solicitation, award or administration of a grant, loan, or agreement involving the disbursement of public monies in excess of $15,000 (other than a governmental procurement), must file an additional report.[83]

It is worth noting that persons seeking grants through the State legislative process (*e.g.*, as part of the State budget) or through a similar local process where the lobbyist seeks to influence local laws or resolutions, are likely engaged in traditional lobbying activity that is required to be reported.

Gift Restrictions

Lobbyists and clients of lobbyists are prohibited from offering or giving any gift of more than nominal value to any public official.[84] Recently adopted regulations define nominal value as "an item or service with a fair market value of ten dollars or less."[85] As noted below, exceptions to the gift rules are limited. In addition, some agencies have more stringent gift prohibitions than those set out below.

The definition of a public official is extremely broad, covering all statewide elected officials, state employees, members of the legislature, legislative employees, members and commissions of boards, commissions and public benefit corporations.[86] In addition, local elected officials and local government employees of municipalities of 50,000 or more are also included within this definition. Note that gifts include meals, tickets to sporting events and entertainment, and anything else of value given to a public official. However, gifts do not include:

- Complimentary attendance, including food and beverage, at bona fide charitable or political events.[87]
- Food and beverage valued at $15 or less.[88]
- Complimentary attendance, food and beverage offered by the sponsor of a widely attended event (or in good faith intended to be widely attended), but only if attendance at the event is: (a) related to the attendee's duties or responsibilities as a public official, or (b) allows the public official to perform a ceremonial function appropriate to his or her position.[89] Note that the Act provides a safe harbor provision with respect to when a public official's duties or responsibilities are related to an event, providing that a "public official's duties or responsibilities shall include, but not be limited to either (1) attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at the event or meeting; or (2) for elected public officials or their staff attending with or on behalf of such elected officials, attending an event or a meeting at which more than one-half of the attendees…are residents of the county, district or jurisdiction from which the elected public official was elected."[90]
- Awards, plaques, and other ceremonial items, but only if the award is: (a) publicly presented, or intended to be publicly presented; (b) in recognition of public service; (c) of the type customarily bestowed at such or similar ceremonies; and, (d) otherwise reasonable under the circumstances.[91]
- An honorary degree by a public or private college or university.[92]
- Promotional items having no substantial resale value such as pens, mugs, calendars, hats and t-shirts that bear an organization's name, logo or message in a manner that promotes the organization's cause.[93]
- Goods and services, or discounts for goods and services, offered to the general public or a segment of the general public and offered on the same terms and conditions as offered to the general public or segment thereof.[94]
- Gifts from family members, members of the same household, or persons with a personal relationship with the public official, including invitations to attend personal or family social events, but only if it is the family, household, or personal relationship that is the primary motivating factor as determined by the following considerations: (a) the history and nature of the relationship between the donor and the recipient, including whether items have been previously exchanged; (b) whether the item was purchased by the donor; and, (c) whether or not the donor at the same time gave similar items to other public officials. Note that this exception does not apply if the donor seeks to charge or deduct the item as a business expense or seeks reimbursement from a client.[95]
- Political contributions reportable under Article 14 of the Election Law.[96]
- Travel reimbursement or payment for transportation, meals and accommodations for an attendee, panelist or speaker at an informational event but *only if* the reimbursement or payment is made by a governmental entity, or an in-state accredited public or private institution of higher education that hosts an on-campus event provided that lodging may only be accepted at the location on or within close proximity to the host campus and only for the night preceding and the nights of the days on which the attendee, panelist or speaker actually attends the event.[97]
- Provision of local transportation only to inspect or tour facilities, operations or property owned or operated by the entity providing the transportation. But, note that payment or reimbursement of lodging, meals or travel expenses to and from the locality will be treated as a gift and, therefore, are prohibited unless covered by a separate exception to these gift rules.[98]
- Meals or refreshments when participating in a professional or educational program and the meals are provided to all participants.[99]
- When, under the circumstances, it is not reasonable to infer that the gift was intended to influence the public official. This is a very narrow exception that is strictly construed. The facts and circumstances of the gift and the relationship between the donor and donee must clearly demonstrate that it cannot reasonably be inferred that the gift was intended to influence the public official.[100] An improper gift will always be pre-

sumed where reimbursement from the employer of the lobbyist or client is sought, or where the client actually pays for the gift.[101]

- Recipient pays the fair market value of the item received. The Guidelines explain that any "payment in reimbursement from a public official must be given contemporaneously with the offer of the gift or promptly thereafter." Any offsetting payment must be made within a commercially reasonable period of time of the receipt of the thing of value. "The making of a payment in reimbursement after a party to the transaction learns than an investigation has been commenced is presumptively unreasonable."[102]

Contingent Retainers Prohibited

The Lobbying Act prohibits the use of contingent retainers or success fees whereby the compensation of the lobbyist is dependent, in whole or in part, on the outcome of the lobbying effort. A violation of this prohibition is punishable as a Class A misdemeanor.[103]

Penalties for Violation of the Act

The Act contains numerous penalties for violations, including late filings and false filings.[104] Where an organization is required to file, the Chief Administrative Officer of the organization is responsible for making and filing the reports unless another individual is designated as the responsible individual prior to the due date of the filing.

A knowing and willful failure to file a statement or report, or a violation of the prohibition on giving gifts, is punishable as a class A misdemeanor.[105] A second violation of this provision within a 5-year period is punishable as a Class E Felony and debarment.[106] In addition, significant civil penalties may be assessed. Lobbyists or clients who knowingly and willfully: (1) fail to file timely reports or statements may be subject to a penalty of up to $25,000 or three times the amount that the person or entity failed to disclose; (2) file false statements are subject to a civil penalty of up to $50,000 or five times the amount that the person or entity failed to disclose; (3) violate the restriction on providing gifts to public officials shall be subject to a civil penalty not to exceed the greater of $25,000 or three times the amount that the person impermissibly contributed, expended, gave, or received; (4) violate the restricted contact period during a governmental procurement shall be subject to a civil penalty not to exceed $10,000 for an initial violation; if the same lobbyist or client is found to violate the same restriction within four years of the first finding, they may be subject to a 4 year debarment and a civil penalty of up to $25,000; (5) engage in lobbying activities after being debarred, shall be subject to a civil penalty of up to $50,000 plus an amount equal to fifty times the value of any gift, compensation, or benefit received in connection with the violation; or (6) fail to retain records as required by the Lobbying Act shall be subject to a civil penalty of up to $2,000 for each violation.[107] Furthermore, late statements and reports are subject to a $25.00 per day late fee, except if the filer had not previously been required to file a statement or report, the late fee is $10.00 per day.[108] This late fee can be, and usually is, imposed without regard to whether the violation was intentional.

Record Keeping Obligations

Lobbyists and clients are required to keep records of compensation and expenses for a period of three years.[109]

Random Audits

JCOPE is authorized to, and routinely does, conduct random audits of clients and lobbyists with respect to compliance with the Lobbying Act. The Commission possesses subpoena power in order to enforce its audit powers.[110]

Conclusion

New York's Lobbying Act is one of the broadest such acts in the country. As one can see from the foregoing description of its provisions, the Act is extraordinarily comprehensive and detailed. Notably, the Act covers many activities that attorneys may view as simply the practice of law. While that is true, the fact that such activities may constitute legal work is not an exemption from registration or reporting under the Act. This is particularly true with respect to local government activities that do not involve interactions with State government, and thus, it is not apparent that State reportable lobbying may be occurring. Attorneys should familiarize themselves with the provisions of the Act and, if engaging in lobbying activity, take the necessary actions to be compliant with the Act.

Endnotes

1. N.Y. Laws of 1906, Ch. 321.
2. *First Lobbyist to Register*, N.Y. Times, May 1, 1906.
3. N.Y. Laws of 1906, Ch. 321.
4. N.Y. Laws of 1977, Ch. 937.
5. N.Y.C. Admin. Code §§ 3-211, *et seq.*
6. Suffolk Cty. Code § 580.
7. N.Y. Laws of 2011, Ch. 399.
8. As of the date that this article was written, the comment period for JCOPE's proposed regulations governing gifts from lobbyists had expired. JCOPE is expected to finalize those regulations in the near future.
9. N.Y. Legis. Law, §§ 1-a, *et seq.*

10. N.Y. Legis. Law § 1-c(c)(i).
11. N.Y. Legis. Law § 1-c(c)(ii).
12. N.Y. Legis. Law § 1-c(c)(iii).
13. N.Y. Legis. Law § 1-c(c)(iv).
14. N.Y. Legis. Law § 1-c(c)(vii).
15. N.Y. Legis. Law § 1-c(c)(viii).
16. N.Y. Legis. Law § 1-c(c)(x).
17. N.Y. Legis. Law § 1-c(c)(v); see *infra* notes 26-61 and accompanying text (discussing procurement lobbying and related provisions).
18. Section 1329 of the Racing, Pari-mutuel and Breeding Law, as enacted by Chapter 174 of the Laws of 2013, authorizing casino gaming in New York State, includes a separate and distinct requirement for persons who seek to influence the New York State Gaming Commission to register with the Secretary of the Gaming Commission.
19. N.Y. Legis. Law § 1-c(c).
20. N.Y. Legis. Law §§ 1-c(a)(iii), 1-c(k).
21. N.Y. Admin. Code §§ 3-211 *et seq.*; Suffolk Cnty. Code § 580.
22. N.Y. State Joint Commission on Public Ethics, Guidelines to the New York State Lobbying Act § 1-c(c) (eff. April 24, 2014) ("Guidelines"), a*vailable at* http://www.jcope.ny.gov/about/lob/Lobbying%20Guidelines%204_24_12revised2.pdf.
23. Advisory Opinion # 97-39, issued by the former Commission Lobbying.
24. N.Y. Legis. Law § 1-c(g).
25. N.Y. Legis. Law § 1-c(a).
26. N.Y. Legis. Law § 1-c(c).
27. N.Y. Legis. Law § 1-n.
28. *See* N.Y. Legis. Law § 1-o. *See also infra* notes 104-08 and accompanying text (discussing penalties).
29. N.Y. Legis. Law § 1-c(c)(v)(B).
30. N.Y. Legis. Law § 1-c(p).
31. N.Y. Legis. Law § 1-c(o).
32. N.Y. Legis. Law § 1-c(n).
33. *See* Guidelines, *supra* note 22, § 1-c(p).
34. *Id*.
35. *Id*.
36. N.Y. Legis. Law § 1-c(c)(U). The Guidelines provide that a person qualifies under this exemption only if the individual satisfies all of the following criteria: (i) the person's primary purpose of employment is the sale of products or services through direct contact with potential purchasers; (ii) the person receives a commission in the form of a percentage of all or substantially all of the sales the person has caused, promoted, influenced or induced; (iii) the person is not otherwise required to file a statement of registration by virtue of engaging in lobbying activity; (iv) the person is either an employee or has a contract with a vendor for a definite term of not less than six months. A discretionary bonus which is based upon factors including success in meeting sales targets, but which is not calculated as a percentage of sales, does not constitute commission income. Guidelines § 1-c(c)(O).
37. N.Y. Legis. Law § 1-c(c)(A).
38. N.Y. Legis. Law § 1-c(c)(G).
39. N.Y. Legis. Law § 1-c(c)(H).
40. N.Y. Legis. Law § 1-c(c)(I).
41. *Id*.
42. N.Y. Legis. Law § 1-c(c)(J).
43. *Id*.
44. *Id*.
45. *Id*.
46. N.Y. Legis. Law § 1-c(c)(K).
47. Offerers are bidders and their representatives, employees, agents, and consultants. N.Y. Legis. Law § 1-c(q).
48. N.Y. Legis. Law § 1-c(c)(L).
49. N.Y. Legis. Law § 1-c(c)(M).
50. N.Y. Legis. Law § 1-c(c)(M)(iii).
51. *Id.*
52. N.Y. Legis. Law § 1-c(c)(P).
53. N.Y. Legis. Law § 1-c(c)(Q).
54. N.Y. Legis. Law § 1-n.
55. *Id*.
56. *Id*.
57. *Id*.
58. N.Y. Legis. Law § 1-c(j)(e).
59. N.Y. Legis. Law § 1-n.
60. N.Y. Legis. Law § 1-o.
61. N.Y. Legis. Law § 1-n(3).
62. N.Y. Legis. Law § 1-c(a).
63. N.Y. Legis. Law § 1-e.
64. N.Y. Legis. Law § 1-h. The reporting periods for bi-monthly reports are: January 1 through the last day of February, due on March 15th; March 1 through April 30th, due on May 15th; May 1 through June 30th, due on July 15th; July 1 through August 31st, due on September 15th; September 1 through October 30th, due on November 15th; and November 1 through December 31st, due on January 15th of the ensuing year. *Id.* Bi-monthly reports require disclosure of the following information with respect to each reporting period: (1) identifying information pertaining to the lobbyist and the client, similar to that required in the Statement of Registration; (2) a description of the general subject or subjects lobbied, the bill numbers of legislation, and the rule, regulation or rate making numbers with respect to which the lobbyist has lobbied; (3) the name of the person, organization, or legislative body before which the lobbyist has lobbied; and, (4) the compensation paid or owed to the lobbyist, and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying. *See infra* notes 72-76 (discussing reportable expenses).
65. N.Y. Legis. Law § 1-e.
66. *Id*.
67. The Statement requires disclosure of the following information: (1) name, address, telephone number of each lobbyist and each employee of the lobbying firm; (2) name, address, telephone number of the client retaining or employing the lobbyist; (3) if no written retainer/employment agreement is provided, a written authorization from the client; (4) description of the general subject or subjects and the legislative bill numbers of any bills and the rule, regulation, and rate making numbers of any rules, regulations, or rates or proposed rules, regulations, or rates on which the lobbyist is, or expects to lobby; (5) the name of the person, organization, or legislative body before which the lobbyist is lobbying or expects to lobby; (6) Executive Order numbers, or if none, the subject matter of the exclusive order; (7) subject matter of, and tribes involved, in tribal-state compacts, memoranda of understanding, or other state-tribal agreements and any state actions related to Class III gaming lobbied or expected to be lobbied; (8) resolution or municipal ordinance numbers of resolutions or municipal ordinances lobbied or expected to be lobbied; and (9) titles and any

identifying numbers of any procurement contracts or other documents disseminated by a State agency, either house of the Legislature, the unified court system, municipal agency or local legislative body, in connection with a government procurement. If the lobbyist is retained or employed pursuant to a written agreement, a copy of the agreement must be filed; if there is no written agreement, a statement of the substance of the oral agreement must be provided on the form. *Id*.

68. *Id*.
69. N.Y. Legis. Law § 1-j.
70. *Id*.
71. *Id*.
72. *Id*. at (b)(5)(ii).
73. *Id*.
74. *Id*. at (b)(5)(iii).
75. *Id*. at (b)(5).
76. *Id*. at (b)(5)(v).
77. N.Y. Legis. Law § 1-j(b).
78. N.Y. Legis. Law §§ 1-c(w), 1-e(c)(8)(i)-(iii), & 1-j(b)(6)(i)-(iii).
79. N.Y. Legis. Law §§ 1-c(w), 1-e(c)(8)(i)-(iii), & 1-j(b)(6)(i)-(iii).
80. 19 N.Y.C.R.R. Part 938.
81. N.Y. Legis. Law § 1-h(4)(ii).
82. N.Y. Legis. Law § 1-l.
83. This report must contain the following: (1) the name, address and telephone number of the lobbyist and individuals employed by the lobbyist who are engaged in public monies lobbying activities; (2) the name address and telephone number of the client by whom, or on whose behalf, the lobbyist is retained, employed or designated to perform such lobbying activity; (3) a description of the grant, loan or agreement involving the disbursement of public monies on which the lobbyist lobbied; (4) the name of the person, organization or legislative body before which the lobbyist has engaged in public monies lobbying; and (5) the compensation and expenses paid or owed to the lobbyist for such public monies lobbying. *Id*.
84. N.Y. Legis. Law § 1-c(l).
85. See, generally, 19 NYCRR 934.1.
86. N.Y. Legis. Law § 1-c(l).
87. N.Y. Legis. Law § 1-c(j)(i).
88. N.Y. Legis. Law § 1-c(j)(xii).
89. N.Y. Legis. Law § 1-c(j)(ii).
90. *Id.*
91. N.Y. Legis. Law § 1-c(j)(iii).
92. N.Y. Legis. Law § 1-c(j)(iv).
93. N.Y. Legis. Law § 1-c(j)(v).
94. N.Y. Legis. Law § 1-c(j)(vi).
95. N.Y. Legis. Law § 1-c(j)(vii).
96. N.Y. Legis. Law § 1-c(j)(viii).
97. N.Y. Legis. Law § 1-c(j)(ix).
98. N.Y. Legis. Law § 1-c(j)(x).
99. N.Y. Legis. Law § 1-c(j)(xi).
100. N.Y. Adv. Op. 08-01 (N.Y. Commn. Public. Int.), 2008 WL 5772564 (March 25, 2008).
101. N.Y. Legis. Law § 1-m.
102. N.Y. Legis. Law § 1-c(j); *see also* Guidelines, *supra* note 22, § 1-c(j).
103. N.Y. Legis. Law § 1-k.
104. *See* N.Y. Legis. Law § 1-o.
105. *Id*. at § 1-o(a)(i).
106. *Id*. at (a)(ii).
107. N.Y. Legis. Law § 1-o.
108. N.Y. Legis. Law § 1-h(c)(3).
109. N.Y. Legis. Law § 1-e(4)(b)(ii).
110. N.Y. Legis. Law § 1-d.

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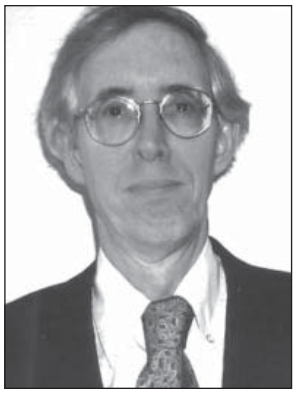
Local Government Ethics: A Summary and Hypotheticals for Training Municipal Officials[1]

By Mark Davies and Steven G. Leventhal



Mark Davies

New York State's standards of ethical conduct for municipal officials,[2] contained in Article 18 of the General Municipal Law and in relevant judicial decisions, present a complex and confusing array of rules for local government officers and employees, requiring careful training by municipal counsel. In the authors' experience, a discussion of hypothetical situations provides the most effective training. This article sets out—in bullet point format—each of the relevant rules, followed by hypotheticals that municipal attorneys may employ to help explain those rules.[3]

Prohibited Interests in Municipal Contracts

Relevant Gen. Mun. Law Sections: 800-805.

Penalty for Violation: The contract is void and cannot be ratified. A willful and knowing violation by an official is a misdemeanor.[4]

Rule: A municipal officer or employee may not have an "interest" in a "contract" with the municipality if he or she has any control over the contract, unless an exception applies.

Elements of a Violation:

(1) "*Contract.*" The matter must involve a contract with the municipality. "'Contract' means any claim, account or demand against or agreement with a municipality, express or implied.…"[5] Note that the official does not have to be a party to the contract.

Hypothetical: When leaving a restaurant with her family one Saturday night, a village trustee is struck by a village sanitation truck. The trustee sues the village. The lawsuit is a "contract with the municipality."

Hypothetical: The village clerk requires an area variance to build a deck onto his home. In one instance, the Zoning Board of Appeals ("ZBA") grants the variance. In another instance, the ZBA refuses to grant the variance, and the village clerk brings an Article 78 proceeding against the ZBA. The variance is not a contract with the village. The Article 78 proceeding is.

Steven G. Leventhal

(2) "*Interest.*" The municipal officer or employee, or a person or firm associated with the officer or employee, must have an interest in the contract, that is, the officer or employee or associated person or firm must receive a financial benefit as a result of that contract.

"Interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves.… [A] municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.[6]

Hypothetical: A town board member's thirty-five-year-old son owns a small construction company, which the town hires to repair the porch on town hall. The town board member has no financial interest in the firm and no financial relationship with his son. The town board member votes to award the contact to his son. The town board member has no "interest" in the contract because neither he nor any of the associated persons cited in the law receives a "pecuniary or material benefit" as a result of the contract.

Hypothetical: A village mayor hires her husband as her secretary in village hall. The mayor is not deemed to have an interest in the employment contract between the village and the mayor's husband because employment contracts are excluded from the definition of "interest."

Hypothetical: A town solicits sealed bids for a major renovation of town hall. The wife of one of the bidders sits on the town board, but she completely recuses (disqualifies) herself from having anything to do with the project. The husband's firm proves to be the lowest bidder. The town board member is deemed to have an "interest" in that contract between her husband and the town, and the contract is prohibited even though the bids were sealed and she recused herself.

Hypothetical: A town board member in the Southern Tier is a partner in a firm that owns the only dump in the area for bulk items. The town contracts with the firm to pick up and dispose of such items for town residents. The town board member recuses himself from having anything to do with the contract, either on behalf of the town or on behalf of the firm, and forgoes all profit from the contract, assigning it to his partner. Despite recusing himself and forgoing any profit, the town board member is deemed to have an interest in the contract, and the contract is prohibited.

Hypothetical: Same facts as in the preceding example, except the firm is a corporation in which the town board member is an investor only—that is, he has no managerial or other responsibility—owning five percent of the stock of the corporation. Same result. The contract is prohibited.

(3) ***Control***. The municipal officer or employee must have some control over the contract. The interest in the contract is prohibited

> [W]hen such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above[7]

Note that additional rules apply to chief fiscal officers, treasurers, and their deputies and employees.[8]

Hypothetical: A village trustee is a partner in an environmental engineering firm. The village planning board hires the firm to assist in reviewing a major proposed development. The village trustee recuses himself from any involvement in the matter, both on behalf of the village and on behalf of the firm, and assigns all profits from the matter to his partners. The village trustee has the requisite control over the contract because he is a member of the board that appoints the planning board members. As noted above, his recusal and forgoing of profits make no difference. The contract is prohibited.

(**4**) ***Exceptions.*** In addition to contracts of employment, the law, in sections 802(1) and 802(2), specifies sixteen exceptions to the prohibition on a municipal officer or employee having an interest in a contact with the municipality if he or she has any control over that contract.[9] The most common exceptions involve*:*

- Having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the officer or employee is only an officer or employee of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation at the firm affected by the contract;[10]
- Having an interest in a contract between the municipality and a not-for profit organization;[11]
- Having an interest in an existing contract at the time the officer or employee joins the municipality (but this exception does not apply to the renewal of the contract);[12]
- Having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls, directly or indirectly, less than five percent of the stock;[13] and
- Having an interest in municipal contracts where the total amount paid under the contracts is no more than $750 during the fiscal year.[14]

Hypothetical: A common council member is counsel to a local law firm. As counsel, he does not participate in the profits of the firm but receives a percentage of the billings from his clients. The city contracts with the law firm to provide certain legal services to the city. The common council member is not involved in the matter at the firm and receives no compensation as a result of the firm's work on the matter. His interest in the firm's contract with the city is not prohibited. Note that, if he were a partner in the firm, the exception would not apply and the contract would be prohibited.

Hypothetical: A city council member is the executive director of a non-profit social services agency, with which the city contracts. Although a portion of the city council member's salary as executive director will be paid by the city contract, his interest in that contract is not prohibited because the agency is a not-for-profit organization.

Hypothetical: The wife of an insurance agent who has an insurance contract with a town is elected to the town board. The town board member's interest in the town's insurance contract with her husband is grandfathered; however, the contract may not be renewed as long as she serves on the town board.

Hypothetical: A city IT director owns $25,000 in Dell stock. He purchases for the city 100 Dell computers. His interest in the contract with Dell is not prohibited because he owns less than five percent of Dell's stock.

Hypothetical: A village trustee owns a stationery store from which the village makes occasional purchases, amounting to no more than $500 in any one fiscal year. Because the total amount paid to the trustee's stationery store does not exceed $750 in the fiscal year, her interest in the village's contracts with the store is not prohibited.

Caveat: The above provisions address only prohibited interests. They do not address prohibited conduct. Some local ethics codes prohibit a municipal officer or employee from taking an action that benefits himself or herself or an associated person or firm. The common law, discussed below, may also prohibit such self-dealing. Accordingly, recusal is often required, even if the contract is not otherwise prohibited.

Special Note for Nassau County: Certain prohibited interest restrictions apply to members of municipal governing boards in regard to real property in Nassau County.[15]

(5) ***Violations.***

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract, and no exception applies, then the interest is prohibited.[16] As stated above, the contract is void and cannot be ratified, and a willful and knowing violation by the official is a misdemeanor.[17]

If the municipal officer or employee has an interest in a contract with the municipality *but no* control over that contract, then interest is *not* prohibited but the official must disclose the interest, as discussed in the next section.[18]

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in General Municipal Law § 802(1) applies*, then interest is *not* prohibited but the official must disclose the interest, as discussed in the next section.[19]

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in General Municipal Law § 802(2) applies*, then interest is *not* prohibited and the official need *not* disclose the interest.[20]

These rules may be summarized as follows*:*

Interest in Contract with Municipality	Control Over Contract	Exception Applies	Required Action
No	N/A	N/A	None—interest not prohibited
Yes	No	N/A	None—interest not prohibited
Yes	Yes	No	Interest prohibited
Yes	Yes	§ 802(1) exception	Interest not prohibited but disclosure required
Yes	Yes	§ 802(2) exception	Interest not prohibited and no disclosure required

(6) ***Penalties***

If the official's interest in the municipal contract is prohibited, then the contract is "null, void and wholly unenforceable."[21] Furthermore, the official who has willfully and knowingly violated the prohibition has committed a misdemeanor.[22]

Neither sealed bids, nor the official's recusal, nor the forgoing of any financial benefit obtained as a result of the contract will cure the violation. Furthermore, the municipality may not ratify the void contract and waivers of the prohibited interest provision are not available, although—in certain instances—the rule of necessity may apply, as discussed below in the section on common law conflicts of interest.

Interests in Municipal Contracts*:* Disclosure

Relevant Gen. Mun. Law Section: 803.

Penalty for Violation: A willful and knowing violation by an official is a misdemeanor.[23]

Rule: In certain instances, a municipal officer or employee who has an interest in a contract with his or her municipality must disclose that interest.

When Disclosure is Required:

If a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement,

or other agreement, including oral agreements, with his or her municipality, he or she must publicly disclose the interest.[24]

If the spouse of a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement, or other agreement, including oral agreements, with the municipal officer or employee's municipality, the municipal officer or employee must publicly disclose the interest.[25]

Note that disclosure is required where the spouse of the official has an interest in the contract even where that interest is not imputed to the official (for example, where the spouse's partnership has an interest in the contract).[26] Further, a potential interest in a contract, or even a proposed contract, must be disclosed, even though the potential interest in a contract, or the actual interest in a proposed contract, is not prohibited.[27]

Hypothetical: A law firm, in which a village trustee is a partner, contracts with the village to provide legal services. The trustee's interest in the contract is prohibited, and the trustee must publicly disclose that interest.

Hypothetical: A law firm, in which a village trustee is an associate, contracts with the village to provide legal services. The trustee has nothing to do with the contract either on behalf of the village or the law firm, and her compensation from the law firm is not affected by the contract. The trustee's interest in the contract is not prohibited, but she must publicly disclose that interest.

Hypothetical: A corporation, a director of which is the husband of a village trustee, contracts with the village to supply computers. The husband's interest in the corporation is not imputed to the trustee (and therefore the trustee has no interest in the corporation's contract with the village), but the trustee must still publicly disclose her husband's interest.

Hypothetical: A town board member owns a law firm that will be merging with another law firm. That other law firm has bid on a town contract to provide legal services. The town board member must publicly disclose that future interest in the proposed contract with the town. If the contract is awarded to the law firm, the town board member will have a prohibited interest in the contract after the merger, and he will be required to resign from the town board or from the law firm.

What Disclosure is Required: The municipal officer or employee "shall publicly disclose the nature and extent of such interest in writing…"[28]

To Whom Disclosure Must Be Made: The disclosure must be made to the official's immediate supervisor and to the governing body of the municipality. Written disclosure must be made and set forth in the official record of the proceedings of the body.[29]

When Disclosure Must Be Made: The disclosure must be made "as soon as [the official] has knowledge of such actual or perspective interest."[30]

Exceptions: Disclosure is not required where the interest falls within one of the exceptions in section 802(2) of the General Municipal Law.[31]

Interests in Applicants in Land Use Matters*:* Applicant Disclosure

Relevant Gen. Mun. Law Section: 809.

Penalty for Violation: A knowing and intentional violation is a misdemeanor.[32]

Rule: Applicants in land use matters must disclose any interests of state and local municipal officials in the applicant.

When and What Disclosure is Required: Applicants in land use matters before a municipality must disclose (1) the name and residence of state officers, officers and employees of the municipality, and officers and employees of any municipality of which the municipality is a part, who have an interest in the applicant (that is, the person, partnership, or association making the application, petition, or request) and (2) the nature and extent of the official's interest, to the extent known to the applicant.[33]

To Which Land Use Applications the Disclosure Requirement Applies: The requirement applies to every application, petition, or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license, or permit, pursuant to the provisions of any ordinance, local law, rule, or regulation constituting the zoning and planning regulations of a municipality.[34]

Deemed Interests in Applicant: An official is deemed to have an interest in the applicant when the official or his or her spouse, sibling, parent, child, grandchild, or the spouse of any of those family members is

- the applicant;

- an officer, director, partner, or employee of the applicant;
- legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant; or
- a party to an agreement with such an applicant, express or implied, whereby he or she may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of the application, petition, or request.[35]

Special Rule for Nassau County: In Nassau County, the foregoing rules also apply to party officers.[36]

Recusal: Although Article 18 does not require recusal by an official interested in the applicant or the application, the common law does.[37]

Hypothetical: The wife of a social worker with the county Department of Social Services is an office assistant with a construction firm, which applies to the planning board of a village within the county for site plan approval. The application for site plan approval must disclose the name, residence, and county position of the social worker, unless the construction firm is unaware that the husband of its office assistant works for the county.

Exception: Ownership of less than five percent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges does not constitute an interest for the purposes of the applicant disclosure requirements.

Prohibited Conduct: Introduction

In addition to prohibiting, and requiring disclosure of, certain interests in municipal contracts and applicants in land use matters, Article 18 also contains, in very anemic form, certain restrictions on conduct by municipal officials. These provisions, adopted in 1970, are set forth in section 805-a of the General Municipal Law.

Gifts

Relevant Gen. Mun. Law Section: 805-a(1)(a).

Penalty for Violation: None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.[38]

Rule: A municipal officer or employee may not request nor accept a gift in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, where BOTH of the following conditions are present:

Value of Gift:

The gift is worth seventy-five dollars or more (or, by implication, where multiple gifts are worth seventy-five dollars or more in the aggregate), and

Circumstances of Gift:

- It "might reasonably be inferred" that the gift was intended to influence an official action;
- The gift could "reasonably be expected" to influence an official action; or
- The gift was intended as a reward for an official action.

Exception: A public officer authorized by law to solemnize a marriage may accept compensation having a value of $100 or less for the solemnization of a marriage at a place other than the public officer's normal public place of business, and at a time other than the public officer's normal business hours.[39]

This rule has been criticized as not providing adequate guidance to municipal officers and employees as to the gifts that they may accept and those that are prohibited. In his article proposing a model code of ethics,[40] co-author Mark Davies recommended a clearer standard for adoption by local municipalities in their own codes of ethics. Professor Davies recommended that local municipalities prohibit officers and employees from *soliciting* gifts from a donor who has received or sought a benefit within the previous twenty-four months, and from *accepting* gifts from donors who the officer or employee knows or has reason to know has received or sought a benefit within the previous twenty-four months.[41] Because a local municipality cannot "opt out" of the minimum standards of conduct established by Article 18, a local ethics code may reduce or eliminate the monetary threshold for prohibited gifts, but may not raise the threshold to an amount greater than seventy-five dollars.[42]

Clarity of regulation is particularly important in areas where the standards of conduct in the public sector differ from those of the private sector, and where the unwary public officer or employee may unwittingly transgress. The regulation of gifts is a notable example of standards applicable in the public sector that differ markedly from the practices prevalent in the private sector. In the private sector, gifts are freely exchanged. The practice is so widely accepted that federal tax law recognizes business entertainment as an "ordinary and necessary" tax-deductible business expense.[43] However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.[44]

Hypothetical: A town board member and a local developer are long ime personal friends. They and their spouses traditionally celebrate their birthdays together at an expensive local restaurant. The cost of dinner always exceeds the sum of seventy-five dollars per person. Each friend picks up the tab on the birthday of the other. Shortly after the board member's fiftieth birthday, the developer applies to the town board for approval of a major development project. The cost of the birthday celebration is a gift to the town board member. The value of the gift exceeds the threshold amount of seventy-five dollars. However, based on the longtime friendship and history of birthday celebrations, it would not be reasonable to infer that the gift was intended to influence the board member's official action; nor would it be reasonable to expect that the gift would have such an influence. For the same reasons, it would be unreasonable to conclude the gift was intended as a reward for a previous official action. General Municipal Law Section 805-a would not prohibit the gift.

Hypothetical: The president of a county funded not-for-profit organization invites the County Executive to attend its annual dinner dance. Tickets to the event are sold at a price that exceeds seventy-five dollars each. The County Executive attends, and presents the president with a citation recognizing the organization's charitable work. Complimentary attendance at the ceremonial event for an official purpose, and even consumption of food and beverages incidental to such attendance, would not constitute a prohibited gift to the County Executive. The County Executive may also send a representative to attend in her place.

Hypothetical: In the previous example, the president of the county-funded not-for-profit organization invites the County Executive to bring her spouse to the dinner dance, also as a guest of the organization. Complimentary attendance at the dinner dance by the County Executive's spouse would not serve any official purpose and it might reasonably be inferred that the gift was intended to influence or reward the County Executive in connection with the county funding of the organization. Therefore, the County Executive may not accept the invitation to bring her spouse to the dinner dance as a guest of the organization.

Hypothetical: A village vendor makes the maximum contribution allowed by law to the campaign of the incumbent mayor. The amount of the contribution exceeds the sum of seventy-five dollars. Campaign contributions are not regulated by General Municipal Law Section 805-a, and therefore are not gifts for the purposes of that statute.[45] Rather, campaign contributions are subject to regulation under the New York Election Law.[46]

Hypothetical: A worker employed in the county parks department is responsible for coordinating special events at a county-owned nature preserve. The worker coordinates a film director's use of the facility for the filming of a movie scene. Several days later, two cases of wine are delivered to the worker's office together with a thank you note from the grateful film director. Each individual bottle of wine has a retail value of less than seventy-five dollars, but the cost of the two cases of wine exceeds that amount. The worker asks the county Board of Ethics whether the bottles may be divided among all of the workers at the facility, with each worker receiving only one bottle of wine. The Board of Ethics advises the worker that "re-gifting" the wine would not reduce the value of the original gift to the worker and, therefore, the gift of wine may not be accepted.

Bribery and Related Offenses (Penal Law Art. 200)

New York's bribery statutes prohibit the offering or conferring of a "benefit" on a public servant pursuant to an agreement or understanding that his or her "vote, opinion, judgment, action, decision or exercise of discretion as a public servant" would be influenced.[47] For purposes of the Penal Law, "benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary."[48] If the benefit is conferred as a reward for the official's actual violation of his or her duty, it may also constitute a felony.[49] The donor and the beneficiary are both subject to prosecution.[50] The sentencing range increases with the amount of the bribe and the gravity of the official's misconduct.[51]

In a bribery prosecution, the People must prove beyond a reasonable doubt that there was a corrupt purpose in making the offer or conferring the benefit.[52] Even in the absence of a corrupt purpose, a defendant may be convicted of the misdemeanor of "giving or receiving unlawful gratuities" where a benefit is offered to or conferred upon an official "for having engaged in official conduct" which the official was required or authorized to perform, and for which that official was not entitled to any additional compensation.[53] The New York Penal Law does not provide a safe harbor for gratuities having a value of less than any stated threshold. Simply put, there can be no "tipping" in government service.

Hypothetical: After two police officers complete an investigation, clearing the president of a trucking company of any wrongdoing in connection with a motor vehicle accident, the trucking company president gives them ten dollars, saying "Here, you fellows, buy

some coffee for all the homework you have done." The gift could not have influenced the police investigation because it was given after the investigation was completed. Nevertheless, the company president was prosecuted and convicted of the crime of giving an unlawful gratuity. The court held that "there need not be a possibility or probability of preferential treatment to have a violation.…" Instead, a prosecutor need only show that the donor's "purpose in giving the gift was to give additional compensation, or a reward, gratuity or some other favor" for an official to act.[54]

Confidential Information

Relevant Gen. Mun. Law Section: 805-a(1)(b).

Penalty for Violation: None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.[55]

Rule: A municipal officer or employee may not disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

The term "confidential information" is not defined in the General Municipal Law, nor in the Public Officers Law, which contains a similar provision applicable to state employees.[56]

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. However, in the public sector, openness and transparency in government are viewed as a fundamental public policy, essential to keep government accountable and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law (FOIL), which makes most government records available for public inspection and copying, and the Open Meetings Law (OML), which makes most government meetings open to attendance by the public.[57]

In order to reconcile the ethical duty of confidentiality under GML § 805-a with the duty to disclose under FOIL and the OML, it is reasonable to conclude that the term "confidential information" has a different meaning for purposes of the GML than it does for purposes of FOIL and the OML; and that GML § 805-a would be violated if a municipal officer or employee made an unauthorized disclosure of information that satisfied either of the following two criteria*:*

Mandatory Denial of Access: Information that is prohibited from disclosure by Federal or state law; or

Discretionary Denial of Access: Information that the municipality has made a reasoned decision to withhold from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.[58]

Under this approach, each discretionary denial of access would be subject to Article 78 review to determine whether the municipality abused its discretion.[59]

Generally, government information is presumptively subject to public disclosure.[60] However, that same information may be presumptively confidential if the custodian of the information is a former government attorney. Government attorneys must adhere not only to the standards of conduct applicable to their conduct as government officers or employees, they also must adhere to the standards of conduct applicable to attorneys engaged in the practice of law.

Rule 1.6 of The Rules of Professional Conduct[61] regulates the disclosure of confidential information by public and private sector attorneys. The Rule defines confidential information as information 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.

Rule 1.11 imposes additional ethical requirements for current and former government attorneys. This Rule defines "confidential government information" as "information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public."[62] A former government attorney is disqualified from representing a private client where the lawyer obtained confidential government information about an adverse party that could be used to the disadvantage of the adverse party.

Hypothetical: An inmate files a FOIL request seeking the entire personnel file of the arresting officer. Pursuant to N.Y. Civil Rights Law section 50-a, personnel records used to evaluate performance toward continued employment or promotion under the control of any police agency or department of the state or any political subdivision are confidential, and *may not* be disclosed without the express written consent of the police officer or a court order.[63] The responsible information officer must review the record to distinguish between information protected by the Civil Rights Law, and information that may be disclosed pursuant to FOIL.[64] Information that is not protected from disclosure may still fall within a FOIL exception, such as the exception for information the disclosure of which would result in an unwarranted invasion of personal privacy (such as the police officer's residence address). Where an excep-

tion applies, the municipality *may* deny access to the information, subject to judicial review.

Hypothetical: In the previous example, the inmate's attorney requests the information through a discovery demand during the course of pending litigation. The inmate's counsel also demands production of any written advice given by the municipal attorney to the corrections department regarding its policy for conducting strip searches at the jail. A former staff attorney—now serving as outside counsel—represents the municipality in the case. The attorney must adhere to the statutory confidentiality imposed by the Civil Rights Law and, further, may not disclose privileged information without the consent of the municipality.[65]

Other examples of information protected by federal or state law include social security numbers, certain information concerning students, and patient health information.

Compensation for Matters Before an Official's Own Agency

Relevant Gen. Mun. Law Section: 805-a(1)(c).

Penalty for Violation: None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.[66]

Rule: A municipal officer or employee may not receive, or impliedly or expressly agree to receive, compensation for services rendered in relation to any matter before the official's own agency or an agency over which the official has jurisdiction or the power to appoint any official.

Hypothetical: A village resident asks a village trustee for help in a matter the resident has before the village planning board. The trustee tells the resident that, while the trustee cannot himself be involved in the matter, the resident may wish to call the trustee's law partner. The trustee also states that he will recuse (disqualify) himself from having anything to do with the matter should it appear before the village board. The trustee has reached an implied agreement with the resident to receive compensation, by way of the law firm, in relation to a matter pending before an agency the members of which the trustee has the power to appoint. The trustee's recusal will not cure the violation.

Hypothetical: A town zoning board of appeals hires its own separate counsel, who does not represent any other town agency. The counsel may appear before the planning board on behalf of a private client.

Hypothetical: A town zoning board of appeals hires its own separate counsel. The town attorney, who never represents the ZBA, may appear before the ZBA on behalf of a private client.

Caveat: The above provisions address prohibited representation only under the General Municipal Law. Some local ethics codes contain more extensive restrictions on a municipal official representing individuals in regard to matters before his or her municipality. In addition, the Rules of Professional Conduct governing the practice of law may prohibit representation that the General Municipal Law would allow.

Contingency Fee Agreements

Relevant Gen. Mun. Law Section: 805-a(1)(c).

Penalty for Violation: None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.[67]

Rule: A municipal officer or employee may not receive, or enter into an agreement to receive, compensation for services to be rendered in connection with a matter pending before any agency of the municipality, where the compensation is dependent upon the agency's action in the matter.[68] This rule does not prohibit the fixing at any time of fees based on the actual value of the services rendered.

Caveat: Some local ethics codes contain more extensive restrictions on a municipal official receiving compensation in connection with matters before his or her municipality.

Hypothetical: A deputy county clerk is knowledgeable about real estate matters, and agrees to act as the representative of an applicant seeking site plan approval from the County Planning Commission. The deputy clerk is confident that she will succeed in obtaining approval of the application. She agrees to forgo any compensation unless the application is approved and, in that case, to accept a fee equal to one percent of the property's appraised value. The deputy clerk may not enter into an agreement to accept compensation that is dependent on the Planning Commission's approval of the application. The deputy clerk may receive a fee based on the actual value of her services, unless such an arrangement is prohibited by the local code of ethics.

Common Law Conflicts of Interest

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.[69]

Courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves or where decision-making officials have been improperly influenced by a conflicted colleague. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearance is speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced a decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or bias.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices and should recuse themselves only when the circumstances actually merit recusal.[70] Members of voting bodies, and elected legislators in particular, should exercise such restraint because recusal and abstention by a member of a voting body has the same effect as a "nay" vote,[71] and, in the case of an elected legislator, also has the effect of disenfranchising voters.

Hypothetical: On the eve of a change in its membership, the Town Board votes to approve a major development project. The decisive vote is cast by a trustee who is vice president of a public relations firm under contract to the developer's parent company. Despite the fact that the Board member's vote did not violate Article 18 of the New York General Municipal Law,[72] the court annulled the Board's decision approving the development project due to the likelihood that the Board member's vote was influenced by his personal interests rather than by the public interest.[73]

Hypothetical: A controversial development project is approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, two Board members, who are employed by the applicant, cast the decisive votes. At the Town Board, a Board member who is employed by the applicant casts the decisive vote. Despite the fact that the respective board members' votes did not violate Article 18 of the New York General Municipal Law, the Court annulled the decisions of the ZBA and the Town Board approving the development project.[74]

The Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine "public confidence in the legitimacy of the proceedings and the integrity of the municipal government."

Hypothetical: Three members of the Village Planning Board sign a petition in support of a developer's project and application for rezoning. In addition, the Planning Board's chairperson writes a letter to the Mayor in support of the project and application for rezoning, stating that she would really like to see new housing available to her should she decide to sell her home and move into something that would not require maintenance. Despite the fact that the Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law, the court held that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.[75]

Hypothetical: The Village Board of Trustees approves an amendment to the Zoning Code that would allow cluster zoning of properties owned by the board members. Most land in the Village is similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters. The board members were not precluded from voting on the zoning amendments. A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.[76]

Hypothetical: In the previous example, the Board of Trustees votes to change the zoning status of only a handful of properties in the village, all of which are owned by members of the board. The court distinguished between the "clear and obvious" conflict that would arise from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the

zoning status of other properties in which they had no interest.[77]

Hypothetical: The Town Planning Board grants preliminary approval of a residential subdivision. The developer hires a member of the Town Board to construct a road meeting specifications required by the Town Engineer, and offers the road for dedication to the Town, together with a bond to guarantee the repair of any damage to the road surface that might occur during construction. A dispute arises between the developer and the contractor/board member over his alleged failure to pay a subcontractor. When the Town Board considers the offer of dedication, the Town Engineer recommends that the offer of dedication be declined until a sufficient number of homes are constructed. With the contractor/board member recusing himself from the vote, the Town Board disapproves the dedication. The developer challenges the decision in an Article 78 proceeding, alleging, among other things, that the Town Board made its decision in advance of the vote and that the contractor/board member had recused himself from the official vote only to conceal his conflict of interest and efforts to undermine the subdivision project by influencing members of the Town Board to disapprove the road dedication. The Court held that the allegation that the contractor/board member's dispute with the developer resulted in the Town Board's denial of the dedication, if proved at trial, would provide a basis for setting aside the Town Board's determination, even though the conflicted Board member recused himself from the vote.[78]

Recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.[79] The New York Attorney General has opined that*:*

> The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board. Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.[80]

Hypothetical: The applicant is a long-term member of the board, but disqualifies himself from any Board consideration of a particular application. The wife of one of the board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. The applicant is active in local politics. One of the board members purchased homeowners' and automobile insurance from the applicant. The mother-in-law of a board member voiced her criticism of opponents to the applicant's project. The court concluded that these claims did not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.[81] Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.[82]

Hypothetical: A board chairman is president of a local steel fabrication and supply company that sells products to a local construction firm owned by one of the applicant's principals. During the previous three years, the construction firm purchased between $400 and $3,000 in steel products from the chairman's steel company. During the same period, the chairman's steel company had annual gross sales of approximately $2,000,000 to $3,000,000. Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the chairman was required to recuse himself in the matter. However, the town board of ethics reached a contrary conclusion, reasoning that the amount paid to the chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest. The court found that the determination of the town board of ethics was rational and entitled to considerable weight and found that under the circumstances, the likelihood that such a de minimis interest would or did in fact influence the chairman's judgment or impair the discharge of his official duties was little more than speculative. The court concluded that the chairman was not required to recuse himself.

Not every financial relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. As the court observed*:*

> Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of

> employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act.[83]

We hope that this discussion of the ethics rules for municipal lawyers and accompanying hypotheticals has been informative. Education and training are vital components of an effective municipal ethics program. They provide helpful guidance to honest officers and employees in recognizing ethical issues when they arise, and in avoiding unintended missteps.

Endnotes

1. This article is based in part on the authors' prior articles about ethical conduct for municipal officials. *See* Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, 19 MUN. LAW. 10 (Summer 2005); *see also* Steven G. Leventhal, *How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest*, 25 MUN. LAW. 11 (Spring 2011).
2. At the outset, one should emphasize that Article 18 defines both "municipality" and "municipal officer or employee" broadly. "Municipality" includes not just political subdivisions (counties, cities, towns, and villages) but school districts, public libraries, Boards of Cooperative Educational Services (BOCES), consolidated health districts, urban renewal agencies, town and county improvement districts, industrial development agencies, and fire districts, as well as many other agencies. *See* N.Y. GEN. MUN. LAW § 800(4) (McKinney 2014). Similarly, "municipal officer or employee" includes all officers and employees of the municipality, *whether paid or unpaid*, with certain exceptions. *Id.* § 800(5) (emphasis added).
3. This article does not address the administrative provisions of Article 18 contained in N.Y. GEN. MUN. LAW §§ 806-808. Nor does this article discuss the financial disclosure provisions set forth in N.Y. GEN. MUN. LAW §§ 810-813. For a discussion of these matters, *see* Mark Davies, *Enacting a Local Ethics Law—Part II: Disclosure*, 21 MUN. LAW. 8 (Fall 2007); *see also* Mark Davies, *Enacting a Local Ethics Law—Part III: Administration*, 22 MUN. LAW. 11 (Winter 2008); Mark Davies, *Local Ethics Laws: Model Administrative Provisions*, 22 MUN. LAW. 14 (Summer 2008); Steven G. Leventhal, *Running a Local Municipal Ethics Board*, 22 MUN. LAW. 9 (Fall 2008); Julia Davis, *Review of Annual Disclosure Reports*, 26 MUN. LAW. 19 (Summer 2012); Steven G. Leventhal & Carol L. Van Scoyoc, *The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclosure under FOIL and the OML*, 27 MUN. LAW. 54 (Winter/Spring 2013). This article also does not address such standards of conduct as may be contained in the local code of ethics adopted by a particular municipality.
4. N.Y. GEN. MUN. LAW §§ 804, 805 (McKinney 2014).
5. *Id.* § 800(2).
6. *Id.* § 800(3).
7. *Id.* § 801.
8. *Id.* § 801(2). *See also* N.Y. GEN. MUN. L §§ 800(1), (6) (McKinney 2014) (defining the terms "chief fiscal officer" and "treasurer," respectively).
9. N.Y. GEN. MUN. LAW § 802 (McKinney 2009).
10. *Id.* § 802(1)(b).
11. *Id.* § 802(1)(f).
12. *Id.* § 802(1)(h).
13. *Id.* § 802(2)(a).
14. N.Y. GEN. MUN. LAW § 802(2)(e) (McKinney 2009).
15. *See id.* § 804-a (listing certain prohibited interest restrictions that apply to members of the governing board of a municipality in Nassau County).
16. *Id.* § 801.
17. N.Y. GEN. MUN. LAW §§ 804, 805 (McKinney 2014).
18. *Id.* (emphasis added).
19. *Id.* §§ 801, 803(1) (emphasis added).
20. N.Y. GEN. MUN. LAW §§ 801, 803(2) (McKinney 2005) (emphasis added).
21. *Id.* § 804.
22. *Id.* § 805.
23. *Id.*
24. *Id.* § 803(1).
25. N.Y. GEN. MUN. LAW § 803(1) (McKinney 2005).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. N.Y. GEN. MUN. LAW § 803(1) (McKinney 2005).
31. *Id.* § 803(2).
32. N.Y. GEN. MUN. LAW § 809(5) (McKinney 2014).
33. *Id.* § 809(1).
34. *Id.*
35. *Id.* § 809(2).
36. *Id.* § 809(3). ("Party officer shall mean any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by subdivision four of section two of the election law.").
37. *See, e.g.*, Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Tuxedo, 418 N.Y.S.2d 638 (2d Dep't 1979) (invalidating a town board resolution approving a special permit where the decisive vote was cast by a board member who was a vice-president of an advertising firm which handled the account of the parent corporation of one of the developers); Conrad v. Hinman, 471 N.Y.S.2d 521 (N.Y. Sup. Ct. 1984) (holding invalid the grant of a variance by a town board where the board member who cast the tie-breaking vote was co-owner of the property). These matters are discussed in greater detail in the section on common law conflicts of interest, below.
38. N.Y. GEN. MUN. LAW § 805-a(2) (McKinney 2014).
39. N.Y. GEN. MUN. LAW § 805-b; *see also* N.Y. DOM. REL. LAW § 11 (McKinney 2011) (providing a detailed list of who may solemnize a marriage).
40. Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61 (1993).
41. *Id.*
42. N.Y. GEN. MUN. LAW § 806 (McKinney 2006).
43. *See* 26 U.S.C.A. § 162 (West 2014) (allowing deduction of ordinary and necessary business expenses); *see also* 26 U.S.C.A. § 274 (West 2014) (limiting the deductibility of certain entertainment expenses).
44. *See* N.Y. PENAL LAW §§ 200.00-.56 (McKinney 2004) (codifying crimes of bribery involving public servants).
45. *See* DiLucia v. Mandelker, 501 N.E.2d 32 (N.Y. 1986) (construing New York City Charter section 2604); *see also* 2005 N.Y. Op. (Inf.) Att'y Gen. 10.

46. N.Y. Elec. Law § 14-114, -116, -120, -130 (McKinney 2014).
47. *See supra* note 44.
48. *See* N.Y. Penal Law § 10.00(17) (McKinney 2013) ("'Benefit' means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.").
49. *See supra* note 44.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* § 200.30; *see also* N.Y. Penal Law § 200.35 (McKinney 2014) ("A public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.").
54. People v. La Pietra, 316 N.Y.S.2d 289 (N.Y. Sup. Ct. 1970), *aff'd*, 316 N.Y.S.2d 292 (2d Dep't 1970).
55. N.Y. Gen. Mun. Law § 805-a(1)(b) (McKinney 2007).
56. N.Y. Pub. Off. Law § 74 (McKinney 2010).
57. *See* N.Y. Pub. Off. Law §§ 84-90 (McKinney 2014) (Freedom of Information Law); *see also* N.Y. Pub. Off. Law §§ 100-11 (Open Meetings Law).
58. *See* Steven G. Leventhal & Carol L. Van Scoyoc, *The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclosure under FOIL and the OML*, 27 Mun. Law. 54, 59 (Winter/Spring 2013).
59. *See* Washington Post Co. v. New York State Ins. Dept., 463 N.E.2d 604 (N.Y. 1984).
60. *Id*.
61. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.00, Rule 1.6 (2014).
62. A municipality may claim not only the attorney-client privilege, but also several privileges not available to a private citizen, such as the deliberative privilege and the executive privilege. For a more complete discussion of a municipal attorney's obligations under Rule 1.11, *see* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated (2014 ed.).
63. N.Y. Civ. Rights Law § 50-a (McKinney 2011).
64. *Id.*
65. *See supra* note 56. *See also In re* County of Erie, 473 F.3d 413 (2d Cir. 2007) (holding that communications passing between a government attorney without policy-making authority and a public official were protected by the attorney-client privilege where the communications evaluated the legality of a policy and proposed policy alternatives because the communications were made for the predominant purpose of soliciting or rendering legal advice)
66. N.Y. Gen. Mun. Law § 805-a(1)(c) (McKinney 2014).
67. *Id.*
68. N.Y. Gen. Mun. Law § 805-a (McKinney 2014).
69. *See*, *e.g.*, Zagoreos v. Conklin, 491 N.Y.S.2d 358 (2d Dep't 1985); *Tuxedo*, 418 N.Y.S.2d at 640.
70. For a helpful discussion of the principles applicable to recusal and abstention, *see* Lester D. Steinman, *Recusal and Abstention from Voting: Guiding Principles*, 22 Mun. Law. 17-19 (Winter 2008).
71. N.Y. Gen. Constr. Law § 41 (McKinney 2000).
72. The vote did not violate section 801 of the New York General Municipal Law because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract. But here, there was no contract with the Town and the vote did not violate section 809 of the New York General Municipal Law because that section only requires the disclosure of any interest of an officer or employee in a land use applicant—it does not mandate recusal by the interested officer or employee.
73. *Tuxedo*, 418 N.Y.S.2d at 640.
74. *Zagoreos*, 491 N.Y.S.2d at 363. As in *Tuxedo*, *supra*, the vote did not violate section 801 of the New York General Municipal Law because there was no contract with the Town. Nor did the vote violate section 809 of the New York General Municipal Law because that section only requires disclosure of any interest of an officer or employee in a land use applicant. *Id.*
75. Schweichler v. Vill. of Caledonia, 845 N.Y.S.2d 901 (4th Dep't 2007). As in *Tuxedo* and *Zagoreos*, *supra*, the vote did not violate section 801 of the New York General Municipal Law because there was no contract with the Village. Nor did the vote violate section 809 of the New York General Municipal Law because the Planning Board members did not have an interest in the applicant as defined in that section. *Id.* Further, section 809 of the New York General Municipal Law only requires disclosure of any interest of an officer or employee in a land use applicant. *See* N.Y. Gen. Mun. Law § 809(1) (McKinney 2014).
76. Town of N. Hempstead v. Vill. of N. Hills, 342 N.E.2d 566 (N.Y. 1975). *See* Byer v. Town of Poestenkill, 648 N.Y.S.2d 768 (3d Dep't 1996) (holding that a town board member was not disqualified from voting on changes to zoning code that affected all property owners equally); *see also* Segalla v. Planning Board of Amenia, 611 N.Y.S.2d 287 (2d Dep't 1992) (holding that a planning board member was not disqualified from voting to approve master plan that affected nearly every property in the Town equally).
77. Friedhaber v. Town Bd. of Sheldon, 851 N.Y.S.2d 58 (N.Y. Sup. Ct. 2007), *aff'd*, 872 N.Y.S.2d 361 (4th Dep't 2009). *See also* Peterson v. Corbin, 713 N.Y.S.2d 361, 364 (2d Dep't 2000) ("[I]n both *Tuxedo* and *Zagoreos*, the conflicts of interest on the part of the public officials were clear and obvious.").
78. Eastern Oaks Dev., LLC v. Town of Clinton, 906 N.Y.S.2d 611 (2d Dep't 2010).
79. 1995 Op. (Inf.) Atty. Gen 2; *see also* Cahn v. Planning Bd. of Gardiner, 557 N.Y.S.2d 488, 491 (3d Dep't 1990) ("[The Planning Board members] not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions.") (citations omitted).
80. 1995 Op. (Inf.) Atty. Gen. 2.
81. *See* Ahearn v. Zoning Bd. of Appeals, 551 N.Y.S.2d 392 (3d Dep't 1990); Karedes v. Vill. of Endicott, 746 N.Y.S.2d 96 (3d Dep't 2002); *see also* Lucas v. Bd. of Appeals, No. 06-10960, 2007 WL 62691, at *7 (N.Y. Sup. Ct. Jan. 9, 2007), *aff'd*, 870 N.Y.S.2d 78 (2d Dep't 2008) (applying the arbitrary and capricious standard for proceedings under Article 78).
82. *Ahearn*, 551 N.Y.S.2d at 394.
83. *Id.* at 572-73.

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Book Review

Municipal Attorneys Can Find Answers in the Newly Released Third Edition of *Commercial Litigation in New York State Courts*

Reviewed by Patricia E. Salkin

Patricia E. Salkin

Municipal attorneys are constantly in search of up-to-date treatises to assist not just in our counseling function but also in various aspects of litigation. The newest edition of COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (WEST), edited by former New York County Lawyers President Robert Haig of Kelley Drye & Warren LLP, is an invaluable addition not for the library shelf but for prime desk space on the busy working lawyer's desk. Even former New York Court of Appeals Chief Judge Judith Kaye said of the set, "I can't imagine contemplating commercial litigation without checking the subject matter indices."[1] While the most recent edition of the treatise has been widely reviewed statewide,[2] there is little if any attention to the value of the set specifically for municipal attorneys.

Before addressing the content of particular interest to municipal lawyers, a bit of noteworthy history is in order. This set, first published in 1995, has now grown to 106 chapters contributed by 144 authors who represent a "who's who" of leading practitioners and judges. The six-volume set (plus a CD-ROM of jury instructions, forms and checklists) is more than an annotated version of the CPLR because its approach produces a unique and helpful blending of procedure with substantive law. As will be pointed out in the chapter review, a main strength of the treatise is the insights offered by the experienced writers who provide thoughtful commentary to help both plaintiff and defense counsel. The treatise, a collaborative effort of many, is a project of the New York County Lawyers Association, initially designed to assist commercial litigation lawyers, that has grown in scope and importance, and now offers much to the municipal practitioner.

Of the nineteen new chapters added to the third edition, chapters on crisis management, litigation technology and CPLR Article 78 Challenges to Administrative Determinations may be of greatest interest to municipal attorneys. Updated chapters from the previous edition on Governmental Entity Litigation, Environmental and Toxic Tort Litigation, and Appeals to the Appellate Division are equally important. While all litigators will benefit from the detailed methodical chapters on taking a case from start to finish, for purposes of this review the focus will be on two chapters of greatest substantive interest to municipal lawyers: CPLR Article 78 challenges, the bread and butter practice in our world; and governmental entity litigation, a close second in workload.

Chapter 102, *CPLR Article 78 Challenges to Administrative Determinations*, is authored by Court of Appeals Associate Judge Victoria A. Graffeo. Perhaps the best place to begin is with Judge Richard Platkin's assessment of this chapter, "Given the harsh consequences of failing to timely and properly commence an Article 78 proceeding, this chapter should be required reading for commercial practitioners whose clients may be affected by the actions of state and local government."[3] The 56 pages that make up this chapter are among the best, most concise presentations and explanations of the Article 78 process from commencement of the action through judgment. As Judge Graffeo states, and case law demonstrates, "The ever-burgeoning expansion of state and local government regulations…has made the availability of Article 78 proceedings an important tool for lawyers in achieving results for…clients."[4] While the chapter examines the use of the tool through the lens of lawyers who initiate these actions to protect their business clients, in reality the chapter is equally valuable to attorneys who defend these actions and for attorneys who represent individual, non-business interests, before various governmental bodies.

Beginning with a brief history explaining the common law roots to this 1937 statute, Judge Graffeo walks practitioners through a well-organized assessment of whether an Article 78 proceeding is appropriate. The section on commencement of the proceeding raises crucial issues such as named parties and standing. This is followed by a discussion of pleadings, what constitutes sufficient papers and applicable statutes of limitation. Focus then shifts to declaratory actions and venue. The interplay between the supreme court and the appellate division on transfer of "substantial evidence" issues and original proceedings in the appellate division is explained clearly and raises important practice tips. Standards governing judicial review are then examined, including substantial evidence, arbitrary or capricious, shocks the conscience, and agency deference. The chapter concludes with a review of judgments including remittals to administrative agencies, incidental monetary

relief (remember, Article 78 proceedings are not used to seek routine monetary relief), and the prayer for relief. Essentially, this chapter is a terrific primer on the Article 78 process.

Chapter 101, *Governmental Entity Litigation*, was contributed by Michael S. Feldberg, the head of Allen & Overy's U.S. Litigation Department. Perhaps because this is the "third edition" of this chapter, it has developed over the years and represents a more detailed coverage of the subject matter. The introduction sets forth succinctly the strategic considerations that must factor into the choice (where there is choice) of venue (e.g., supreme court or court of claims) as well as the statutory options that provide different forms of relief. This is followed by a discussion of the various types of governmental immunities—including a detailed explanation of sovereign immunity. After attention to various applicable statutes of limitations, the chapter turns to actions and then notices of claim. Section 1983 actions are discussed in some detail, with a mention of defenses and alternative dispute resolution.

In a time of dwindling resources for practice aids and books, everyone is looking for value. This set provides just that for all litigators, including municipal plaintiff and defense counsel. The set is also fully searchable on Westlaw.

Endnotes

1. Judith S. Kaye, *Commercial Litigation in New York State Courts, 3rd Ed., Edited by Robert L. Haig (West, 2010)*, N.Y. St. B.J., January 2011, at 53 (Jan. 2011) (book review).
2. *See, e.g.*, Book Review: More Critical Acclaim For Commercial Litigation Treatise, The Metropolitan Corporate Counsel (August 23, 2012), http://www.metrocorpcounsel.com/articles/20211/book-review-more-critical-acclaim-commercial-litigation-treatise (last visited July 16, 2014).
3. Richard A. Platkin, *Book Review: Commercial Litigation in New York State Courts, Third Edition* (Robert L. Haig, Editor-in Chief), 75 Alb. L. Rev. 331, 339 (2011-2012).
4. The Honorable Victoria A. Graffeo, 4C N.Y. Prac., Com. Litig. in New York State Courts § 102:1 (3d ed.) (2010).

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The Expansion of the Municipal Power to Take Property for "Public Use"

By Brian Walsh

Introduction

The Takings Clause of the Fifth Amendment of the U.S. Constitution protects the individual's right to own private property without interference from the government. Specifically, the Fifth Amendment provides that "No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[1]

However, judicial interpretation of the Takings Clause has evolved significantly over time.[2] Generally, governmental takings must satisfy two requirements: (1) the property must be taken for a public use and, (2) the owner must be justly compensated for his land.[3] While early case law describes land taken for public use as including traditional governmental uses such as "forts, armories, and arsenals,…navy-yards and light houses,…custom houses, post offices, and court houses,"[4] the modern view of public use is far more expansive, covering such things as private redevelopment for economic revitalization.[5] Although some scholars and practitioners lament that the expansion of the definition of public use is beyond the scope of the framers' intent, federal takings jurisprudence continues to give nearly unfettered deference to legislative and municipal determinations of what constitutes a public use.

This essay provides a primer on the evolution of the public use doctrine, and discusses an alternative approach that could, arguably, more appropriately balance local democracy concerns with individuals' fundamental right to own property.

I. Evolution of the Public Use Doctrine

In the area of Fifth Amendment jurisprudence, a taking of property can occur in two ways. The first is a direct, physical taking, the definition of which is relatively uncontroversial.[6] The other, far more contentious taking is known as a regulatory taking.[7] A regulatory taking occurs when the government enacts a regulation that takes away an intangible property right, or diminishes property value by limiting its use.[8] While a number of modern commentators have interpreted the Takings Clause to regulate only direct, physical takings of property,[9] the Supreme Court has recognized regulatory takings as well.[10] However, the Court, by its own admission, has never provided a justification for the rule of regulatory takings.[11] Nevertheless, the Court has held that when a regulation denies any economically beneficial use of the land, a regulatory taking has occurred.[12]

The definition of public use has evolved along with society, environmental science and the progression of the function of government in the forum of property development.[13] Under early takings jurisprudence, public uses encompassed takings simply for "use by the public,"[14] and included, for example, the taking of private land for the purpose of building railroad tracks.[15]

However, as eminent domain cases became more complex and the line between public and private use became blurred, the courts found this standard to be unworkable.[16] Recently, the Supreme Court has gone so far as to include economic revitalization, ranging from blight removal to simply acquiring and developing land for the purpose of increasing tax revenue.[17]

Broadly speaking, a two-step test is used to determine whether a taking for a public use violates the U.S. Constitution.[18] The state must first show that its use of eminent domain is rational, and then prove the taking is related to a conceivable governmental purpose.[19] Notably, this inquiry is highly deferential to the government, consistent with the level of scrutiny normally reserved for rights deemed by the courts to not be fundamental under the Constitution.

A. Early Eminent Domain Doctrine

In order to better understand the significance of the public use doctrine in the Takings Clause, we must first examine its history. The power of eminent domain, a phrase coined in the Seventeenth Century by the legal scholar Hugo Grotius, is broadly defined as the sovereign's inherent power to have control over its own lands,[20] and has been traced as far back as the Early Roman Empire.[21] In England, the sovereign power of the King to acquire any property deemed necessary to the crown was remarkably broad.[22] Further, the land taken by the King was routinely taken without compensation to the landowner.[23] In contrast, property acquisition was markedly different in the colonies, as settlors were given sole title to small plots of land when arriving in America.[24]

The Founders sought to permanently protect the citizens' right to property.[25] One of the most vocal sponsors of this protection, James Madison, stated, "Government is instituted to protect property of every sort. This being the end of government, that alone is a

just government, which impartially secures to every man, whatever his own."[26] While Madison recognized eminent domain as a power inherent in the sovereign, he was greatly influenced by the writings of John Locke, who was a staunch advocate for personal property rights.[27] Therefore, by requiring that land taken be for a public use,[28] it appears Madison intended to limit the government's ability to take land to situations that benefit the citizenry overall.[29]

Nevertheless, early American Supreme Court jurisprudence interpreting the Fifth Amendment recognized the power of eminent domain as essential to that of a sovereign government.[30] The practice of eminent domain had historically been used in the United States to procure land for the purpose of building public utilities such as railroads, public roads, schools and post offices.[31] This was generally accepted in early American society, as the federal government was not forced to cite the power of eminent domain in a Supreme Court case until 1875.[32]

Kohl v. U.S.,[33] the Supreme Court's first attempt at balancing individual property rights with the government's power of eminent domain, involved an invocation of the eminent domain power by the federal government to procure lands in Cincinnati to be used for a post office.[34] The Court took the opportunity to lay a strong judicial foundation for the protection of the government's power of eminent domain. The Court made clear that the acquisition of land by the federal government cannot be contingent on the approval of any private citizen or State government. Instead, the government may take an individual's land against his will, as long as the use is for an acceptable public purpose.[35] The Court then delineated a list of public purposes, including "forts, armories, and arsenals, for navy-yards and light houses,…custom houses, post offices, and court houses."[36]

Furthermore, the Court held the eminent domain powers vested "by the Constitution in the general government demand for their exercise the acquisition of land in all States."[37] Just as each person is a citizen of his or her State, and subject to each State's power of eminent domain, so to are the individual States subject to the eminent domain power of the federal government.[38] Thus, the issue in *Kohl* was as much about the issue of eminent domain as it was about federalism.

B. "Protecting the Public Welfare" as a Public Use

As the United States recovered from the Second World War, the government began to pass nationwide programs aimed at redeveloping economically depressed urban areas. Congress passed one such program, called the District of Columbia Redevelopment Act, in 1945.[39] The purpose of the Act was to condemn economically distressed areas in the District of Columbia and redevelop the land through a designated agency appointed by Congress. Residential property owners within one targeted area, whose property was not itself economically distressed but was surrounded by distressed property, brought suit challenging the power of Congress to use its eminent domain power to obtain property "merely to develop a more balanced, attractive community."[40]

In 1954, the Supreme Court issued its opinion in *Berman v. Parker*, expanding upon the scope of legitimate public uses for the first time since *Kohl*.[41] In *Berman*, a unanimous Court held in favor of the government's plan for using eminent domain for the purpose of economic redevelopment.[42] The Court held that Congress had made a legislative determination that the land needed to be condemned and acquired using its eminent domain powers for the benefit of the public welfare, a concept the Court described as "broad and inclusive."[43] Protecting the public welfare, the Court stated, is inherent in the police powers of each state,[44] the definition of which is essentially a product of "legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[45]

Within this concept of protecting the public welfare, Congress is responsible for making determinations with regard to the health, cleanliness and balance of the community.[46] Once Congress has made its determinations using a wide variety of values, it is not the job of the judiciary to reassess them.[47] The Court went on to describe the government's power of eminent domain as a means to an end,[48] explaining that the method of acquisition is irrelevant, as long as Congress has determined that the acquisition itself is for a public purpose.[49]

The *Berman* decision was significant for a number of reasons. First, it greatly expanded the government's power to acquire property. As long as the legislative body invoking its eminent domain power does so for the purpose of a public use, as defined by that same legislative body, the judiciary has no basis for review. Further, in an effort to avoid a holdout by a single landowner, the Court again deferred to the legislature to determine the breadth of each project, as "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis."[50] Some scholars assert that, by disavowing even a rational basis of review, the Court relinquished any responsibility for reviewing legislative public use determinations.[51]

Finally, the Court acknowledged that blight removal, in addition to slum clearance, is well within the definition of a public use.[52] Prior to the *Berman* decision, eminent domain was widely reserved for the clearance of inner city slums.[53] Following from *Berman*,

not only does the legislature have an interest in clearing unlivable housing, it also has the power to "determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[54] This broad and abstract expansion of public purpose arguably granted legislatures nearly unfettered access to private property for any conceivable reason.

C. Public Use Examined Under Rational Basis Scrutiny

Thirty years after the *Berman* decision, the Supreme Court was again confronted with the issue of the public use doctrine in *Hawaii v. Midkiff*.[55] In the 1950s and 1960s, the ownership of Hawaiian land gradually became more consolidated into a land oligopoly, whereby the vast majority of the land in Hawaii was owned by a relatively small percentage of the population, with the remainder of citizens as lessors of smaller parcels.[56] In order to "reduce the perceived social and economic evils" of this system of land ownership, the Hawaiian Legislature enacted the Land Reform Act of 1967.[57] The Act formed a system of condemnation whereby titles of the smaller parcels of land were taken from the lessors and transferred to the lessees in order to reduce the concentration of land ownership.[58] The determination of whether or not the State's acquisition of each parcel of land was to "effectuate the public purposes" of the Act was made individually by the Hawaiian Housing Authority.[59] This led to a challenge of the law by the relatively few landowners of Hawaii based on their claim that the condemnation of their property for sale to their lessees violated the public use requirement of the Fifth Amendment.

Justice O'Connor wrote a unanimous opinion that built upon the definition of public use described in *Berman* as "coterminous with the scope of a sovereign's police powers."[60] However, the Court acknowledged a role for the courts to play in reviewing the judgment of a legislature as to what constitutes a public use, albeit "an extremely narrow one."[61] This extremely narrow form of judicial review is triggered under *Midkiff* only when the public use determination is "shown to involve an impossibility."[62] In order to avoid judicial interference in legislative findings, the Court may only examine a public use determination if the use is "palpably without reasonable foundation."[63] Thus, the *Midkiff* Court outlined some sort of judicial check on the power of the legislature to condemn property for a public use, albeit a relatively small one.

In doing so, the Court applied what is commonly known as a rational basis of review to public use determinations. When the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court will find the taking to be within the boundary of the Fifth Amendment.[64] In applying this basis of review, the *Midkiff* Court had no trouble finding that Hawaii's Land Reform Act of 1967 was Constitutional.[65] The Court saw the Act as a comprehensive and rational approach to curing a market failure.[66] Whether this approach would actually correct the market failure was irrelevant, because the Constitutional public use requirement is "satisfied as long as the legislature rationally could have believed that the Act would promote its objective."[67]

In the latter part of its decision, the Court dealt with the issue of whether or not this transfer of land was a purely private taking, as was contended by the Hawaiian landowners. A purely private taking, that is, a taking for no reason other than to "confer a private benefit on a particular private party," cannot survive the scrutiny of the public use requirement.[68] In this case, the Court found the Act not to benefit a particular class of individuals, but to "attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose."[69] As this public purpose was not irrational in the eyes of the Court, the requirements of the Fifth Amendment were met.

D. "Public Purpose" as a Public Use

In 2005, the Court again tackled the issue of what constitutes a public use. In *Kelo v. City of New London*, the Court was forced to directly decide whether or not municipalities may use economic revitalization as a justification for exercising their eminent domain powers.[70]

The decision addressed a development plan approved by the City of New London, Connecticut, aimed at "revitaliz[ing] an economically distressed city."[71] This plan was preceded by a determination in 1990 by a city agency that the City of New London was a "distressed municipality."[72] The development plan passed in 2000 designated a private non-profit agency, the New London Development Corporation (NLDC), as in charge of the implementation of the revitalization plan.[73] The plan itself was meant to create jobs, generate tax revenue, make the City more attractive, and "create leisure and recreational opportunities."[74] The NLDC targeted real estate in a 90-acre area, and began making offers to the landowners within the area for acquisition of the property. While some landowners accepted the offers, some residents refused, including the petitioners in the case, and the NLDC initiated condemnation proceedings that gave rise to the suit.[75]

The *Kelo* case gave the Court an opportunity to reiterate some of its previous eminent domain determinations, while also broadening the definition of public use. While the plan was found to not benefit a particular class of individuals, some of the land to be acquired was not to be used by the general public.[76] A section of the property to be acquired was earmarked for commercial space for private businesses.[77] Still, the Court cited the continuous expansion of the public use

requirement, finding that the definition of public use as "use by the public" was an unworkable standard.[78] In doing so, the Court embraced a broader and "more natural interpretation of public use as 'public purpose.'"[79] While the term "public purpose" had been used previously in Supreme Court eminent domain cases, this was the first time the Court unambiguously adopted the much broader public purpose definition of public use.

Writing for the majority, Justice Stevens found economic revitalization to be a sufficient public purpose, satisfying the public use requirement of the Fifth Amendment.[80] While the City was not confronted with the need to remove blight, the Court found that the City's determination that the area was sufficiently distressed to justify a program of economic rejuvenation was entitled to the Court's deference.[81] In comparing the City's goals to those of the legislatures in *Midkiff* and *Berman*, the Court held it had no basis to exempt economic development from its "traditionally broad understanding of public purpose."[82]

II. Reaction to the Public Use Expansion

Some scholars argue the courts have expanded inappropriately upon the original meaning of public use within the Takings Clause,[83] while others believe the Court's public use interpretation is rightfully expansive.[84] In debating the appropriate scope of the public use doctrine, many scholars look to evidence of the framers' intent.[85] While some scholars see the attitudes at the time of the founding of the United States as fiercely protective of property rights and therefore inconsistent with modern public use jurisprudence,[86] others interpret historical documents and early U.S. government regulation of land as consistent with the expansive judicial view of public use.[87]

Arguably striking a balance between these competing views, Justice Kennedy, in his concurring opinion in *Kelo*, concluded that the City of New London's plan did not warrant a more stringent standard of judicial review, but a more narrowly drawn category of takings may be appropriate for increased judicial scrutiny.[88] One such category may be "private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption of invalidity is warranted under the Public Use Clause."[89] In the *Kelo* case, the private parties were unknown at the time of the drafting of the redevelopment plan.[90]

Justice Kennedy expressed concern that a "broad *per se* rule or a strong presumption of invalidity… would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause."[91] However, he acknowledged that "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose."[92]

Justice Kennedy seems to be suggesting that if a municipality draws up a plan with a specific private party involved for development, suspicions of favoritism may lead to a rebuttable presumption of invalidity.[93] In order to rebut the presumption of invalidity, the State would have to show the transfer of land is not aimed at conferring "benefits on particular, favored private entities, and with only incidental or pre-textual public benefits."[94] Nevertheless, Justice Kennedy concluded in *Kelo* that the inclusion of a private developer at the latter stages of planning by the City of New London was not enough to warrant an exception to the public use doctrine developed through *Midkiff* and *Berman*.

The dissenters in *Kelo* proposed an approach that would rein in the government's ability to take land for attenuated public benefit.[95] The dissent asserted that, by allowing private property to be taken "under the banner of economic development," all private property may now be vulnerable to a governmental taking, as long as the legislature deems that the new party will use it in a more publicly beneficial way.[96] Not only is all private property now vulnerable to governmental taking, Justice O'Connor wrote, but to hold that "the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause."[97]

Justice O'Connor went on to question the Court's reliance on the "secondary benefits" to be enjoyed by the public as a result of the revitalization plan as evidence of the satisfaction of the public use requirement.[98] When the legislature's aim is to cure a pre-existing harm, such as in *Midkiff* and *Berman*, the public purpose was realized when the harmful use was eliminated.[99] "Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."[100] But, under the City of New London plan, Justice O'Connor argued, the result of the revitalization plan was a mere upgrade, adding only peripheral benefits to the public.[101] These benefits were not meant to cure some pre-existing harm to the local landowners, such as the blight and unequal landownership dealt with in earlier eminent domain cases.

The dissenting Justices in the *Kelo* case foreshadowed a bevy of criticism aimed at the Supreme Court, with many scholars claiming the government has been granted a free pass to obtain private property for almost any conceivable reason.[102]

In support of her argument that the expansion of the judicial definition of a public use is unjustified, Katherine McFarland points out that the courts have continually asked the legislatures for increasingly higher levels of justification for encroachments on individual rights outside the takings arena.[103] While courts continue to question government intrusion into citizens' freedom of expression and equal protection, the level of scrutiny courts give to government takings has consistently diminished over the past five decades.[104]

Frequently, scholars who argue against the expansion of the public use definition point to the potential for legislative abuse of eminent domain brought on by powerful special interests. Examples that purport to show this include large companies using the legislature to condemn property needed for strip malls and casinos.[105] As the argument goes, this continued expansion of the public use definition has made enforcement of the public use requirement impossible, distorted natural market forces, and could cause a detrimental effect on States unwilling to use the courts' broadened definition.[106]

In contrast, other scholars contend that not only is the public use definition used today in line with the Founders' intent, but that the words "public use" as written in the Fifth Amendment are no more than a description of a type of taking that is compensable.[107] They argue that the judicial interpretation of the public use requirement is correct in that "the members of the founding generation generally understood that the power to take property for public use is reserved to the legislature alone and is a function of the principle of consent inherent in a representative government."[108] As a result, they argue, those who read the public use requirement as a limitation on the legislative power of eminent domain are misreading the intent of the drafters.[109]

While it is true that legislatures often use their eminent domain powers for the economic benefit of their communities,[110] if the Founders had intended the modern definition of public use, that is, "if the only requirement were that the federal government be acting pursuant to a legitimate purpose," the phrase "for public use" would not be needed at all, "since that requirement is implicit throughout the Constitution."[111] The modern interpretation of public use is so broad as to be "simply duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses."[112]

In fact, if the phrase "for public use" is not a narrowing requirement for the taking of land under the Fifth Amendment, the clause is essentially meaningless.[113] Specifically, the Fifth Amendment contains two other prepositional phrases beginning with the word "for" in addition to the phrase "for public use."

> No person shall be held to answer *for a capital, or otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury…; nor shall any person be subject *for the same offence to be twice put in jeopardy of life or limb*;…nor shall private property be taken *for public use*, without just compensation.[114]

In each case " the prepositional phrase cannot be read as broadening rather than narrowing the clause's scope."[115]

Conclusion

As America grows older, the need for urban revitalization has increased. The use of eminent domain by Congress, state legislatures, and local municipalities as a means of effectuating change has also increased. While these governments often use their eminent domain powers for the economic benefit of their communities, the expansive, nearly unfettered governmental authority to determine what constitutes a public use has led to a bevy of criticism. The *Kelo* concurrence and dissent provide roadmaps to two possible reforms that could respond to these criticisms by, at least arguably, more appropriately harmonizing the sovereign's inherent power over the lands under its control with the people's fundamental right to property.

Under the dissent's approach, the Court would recognize the right to property as a fundamental right, thereby making it subject to strict judicial scrutiny. The use of strict scrutiny for public use determinations would arguably be consistent with the text of the Takings clause and the Founder's intent. A heightened form of review for a narrow category of cases, as proposed by Justice Kennedy's concurrence, would provide more protection for property rights and respond to criticism regarding abuse of the government's unfettered right to make public use determinations, while continuing to defer in most cases to legislative determinations of public use.

Endnotes

1. U.S. Const. amend. V.
2. *See, e.g., Kohl v. U.S.*, 91 U.S. 367, 368 (1875); *Berman v. Parker*, 348 U.S. 26 (1954); *see Kelo v. City of New London*, 545 U.S. 469 (2005); *see generally* Sara B. Falls, *Waking A Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After Hawaii Housing Authority v. Midkiff*, 44 Washburn L.J. 355 (2005).
3. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).
4. *Kohl v. U.S.*, 91 U.S. 367, 368 (1875).
5. *Kelo*, 545 U.S. at 483.
6. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (defining a taking as a "direct appropriation of property").

7. *See* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U. L. Rev. 181, 242 (1999) ("It is quite possible, but far from clear, that the original understanding of the Takings Clause included regulatory takings. Original intent may raise questions regarding the current incarnation of regulatory takings law, but it hardly resolves the question of whether regulatory takings deserve compensation generally.").
8. *Id.* at 232 n. 314; *see also Woodruff v. Neal*, 28 Conn. 165, 170 (1859) (requiring compensation for regulation that took usage rights from landowners by requiring them to allow others to graze cattle on their land); *Fletcher v. Auburn & Syracuse R.R. Co.,* 25 Wend. 462, 464 (N.Y. Sup. Ct. 1841) (ordering compensation for denial of right of access between owner's dwelling house and the street caused by a railroad company's construction of an embankment).
9. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 711 (1985).
10. *Lucas*, 505 U.S. at 1015 n.5 ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land*.'") (emphasis in original).
11. *See id.* at 1017 ("We have never set forth the justification for [the regulatory takings] rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").
12. *Id.* at 1019.
13. 26 Am. Jur. 2d Eminent Domain § 44.
14. *See Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112 (1896).
15. *Aldridge v. Tuscumbia, C. & D.R. Co.*, 2 Stew. & P. 199, 201 (1832).
16. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).
17. *See id.*
18. *Id.*
19. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).
20. Katherine M. McFarland, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. Pub. Int. L.J. 142, 161 n.17 (2004).
21. Steven E. Buckingham, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. Rich. L. Rev. 1279, 1295 n.127 (2005).
22. McFarland, *supra* note 20, at 147.
23. *Id.*
24. *Id.*
25. *Id.* at 145.
26. *Id.* at 142 (citing James Madison, *Property National Gazette* (Philadelphia) Mar. 29, 1772 at 174).
27. *Id.* at 145; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 817 (1995).
28. An argument has been made that the text of the Takings Clause requires the government to compensate landowners *only* for land taken for a public use and takings via taxation are not compensable; therefore, the public use language in the Fifth Amendment is meant to be descriptive, not proscriptive. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1248 (2002).
29. *See generally* McFarland, *supra* note 20, at 145; Treanor *supra* note 9, at 709 (discussing further evidence of Madison's intention to protect citizens' rights to property).
30. *See, e.g., United States v. City of Chicago*, 48 U.S. 185, 194 (1849) ("It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain.").
31. *See id.*
32. *Kohl v. U.S.*, 91 U.S. 367 (1875); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49 (1998).
33. *Kohl*, 91 U.S. at 367.
34. *Id.* at 377.
35. *Id.* at 371.
36. *Id.*
37. *Id.* at 368.
38. *Id.*
39. *Berman v. Parker*, 348 U.S. 26, 28 (1954).
40. *Id.* at 31.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 32.
45. *Id.*
46. *Id.*
47. *Id.* (citing *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-30 (1894)).
48. *Id.*
49. *Id.*
50. *Id.* at 36.
51. McFarland, *supra* note 20, at 148; *see also* Paul W. Tschetter, Kelo v. New London*: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of "Public Use*," 51 S.D. L. Rev. 193, 221 (2006) (arguing that the rational basis standard regarding the review of public use determinations culminated in *Berman*).
52. *Berman*, 348 U.S. at 33.
53. *See* Olga V. Kotlyarevskaya, *"Public Use" Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development*, 5 Conn. Pub. Int. L.J. 197, 203 (2006).
54. *Berman,* 348 U.S. at 33.
55. 467 U.S. 229 (1984).
56. *Id.* at 229.
57. *Id.*
58. *Id.* at 230.
59. *Id.*
60. *Id.* at 240.
61. *Id.*
62. *Id.* at 241.
63. *Id.* (citing *U.S. v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).
64. *Id.*
65. *Id.* at 242.
66. *Id.*
67. *Id.* (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672 (1981)).

68. *Id.* at 245.
69. *Id.*
70. 545 U.S. 469 (2005).
71. *Id.* at 472.
72. *Id.*
73. *Id.* at 475.
74. *Id.*
75. *Id.*
76. *Id.* at 479.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 485.
81. *Id.* at 483.
82. *Id.*
83. *See, e.g.*, McFarland, *supra* note 20; Kochan, *supra* note 32.
84. *See, e.g.*, Harrington, *supra* note 28, at 1248.
85. *See, e.g.*, McFarland, *supra* note 20, at 144 ("To understand the true purpose of the eminent domain power, it is necessary to look both to its historical use and to the understanding of property rights at the time of the nation's founding."); William Michael Treanor, *supra* note 9; John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996).
86. *See, e.g.*, Bernard H. Saigen, *Land Use Without Zoning* 227 (1972).
87. *See, e.g.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1281 (1996) ("Property ownership was 'not an absolute right that exempted the individual owner from corporate oversight,' but rather 'a right of stewardship that the public entrusted to an individual, for both private and public benefit.'") (citing Barry A. Shain, *The Myth of American Individualism*: The Protestant Origins of American Political Thought 183 (1994)).
88. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).
89. *Id.*
90. *Id.*
91. *Id.* at 492.
92. *Id.*
93. *Id.* at 494.
94. *Id.*
95. *Id.* at 496 (O'Connor, J., dissenting). Justice O'Connor was joined in the dissent by Chief Justice Roberts, Justice Scalia and Justice Thomas.
96. *Id.*
97. *Id.*
98. *Id.* at 498.
99. *Id.* at 500.
100. *Id.* (emphasis in original).
101. *Id.*
102. *See, e.g.,* Justin B. Kamen, *A Standardless Standard: How A Misapplication of Kelo Enabled Columbia University to Benefit from Eminent Domain Abuse*, 77 Brook. L. Rev. 1217 (2012); Martin E. Gold, Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 Fordham Urb. L.J. 1119 (2011).
103. McFarland, *supra* note 20, at 142.
104. *See* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 287 (2000) ("The conclusion that follows is that so far as the federal courts are concerned neither the state legislatures nor Congress need be concerned about the public use test in any of its ramifications.").
105. *See, e.g., Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d. 102 (N.J. Super. 1998); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981); *Walser Auto Sales, Inc. v. City of Richfield*, 644 N.W.2d 425 (Minn. 2002).
106. Kristi M. Burkard, *No More Government Theft of Property! A Call to Return to A Heightened Standard of Review After the United States Supreme Court Decision in* Kelo v. City of New London, 27 Hamline J. Pub. L. & Pol'y 115, 132 (2005).
107. *See, e.g.*, Harrington, *supra* note 28, at 1247.
108. *See, e.g., id.*
109. *See, e.g., id.*
110. *See, e.g.*, Tschetter, *supra* note 58, at 226.
111. Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531, 537 (1995).
112. Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1079 (1993).
113. *Id.* (citing Richard Epstein, *Takings* 161 (1985)).
114. U.S. Const. amend. V (emphasis added).
115. Clegg, *supra* note 111, at 537.

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Land Use Law Update: The Court of Appeals Issues a Victory for Home Rule in *Wallach v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*

By Maureen T. Liccione and Sarah Adams-Schoen

Maureen T. Liccione

Sarah Adams-Schoen

In the midst of the often heated controversy swirling around the issue of hydraulic fracturing (commonly referred to as "hydrofracking" and "fracking"), the Court of Appeals recently issued a straightforward ruling, which focused on long-established precedent concerning the right of municipalities to regulate mining land uses, rather than focusing on the contentious economic or environmental issues surrounding the fracking debate.

Wallach and *Dryden* were two appeals brought on behalf of gas and oil interests that sought to overturn two Third Department rulings rejecting challenges to the upstate towns of Dryden's and Middlefield's zoning enactments, which banned fracking operations within their boundaries.[1] Appellants Norse Energy Corp. USA and Cooperstown Holstein Corporation asserted that the towns lacked the authority to proscribe fracking because the text of section 23-0303(2) of the Environmental Conservation Law (ECL), which is the supersession clause in the Oil, Gas and Solution Mining Law (OGSML), demonstrated that the state legislature intended to preempt local zoning laws that curtailed energy production.

On June 30, 2014, a 5-2 majority of the Court of Appeals affirmed the Third Department in a single opinion authored by Judge Graffeo. The majority applied Article IX of the State Constitution,[2] which is the "home rule" provision, the Municipal Home Rule Law,[3] and the Court's holdings in *Frew Run Gravel Products v. Town of Carroll*[4] and *Matter of Gernatt Asphalt Products v. Town of Sardinia*[5] to arrive at the conclusion that "the Oil, Gas and Solution Mining Law ("OGSML") does not preempt the home rule authority vested in municipalities to regulate land use."[6]

New York State Constitution Article IX is the provision that grants local governments the authority to regulate land use and provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law…except to the extent that the legislature shall restrict the adoption of such local law."[7]

According to the majority, the OGSML is not such a restriction on the adoption of zoning laws because it only supersedes "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" and not the designation of areas in which mining is either permitted or prohibited.[8] Since zoning does not regulate mining or the mining industry, but rather designates the *areas* where mining is permitted, the Court found that local zoning laws do not constitute regulation of the industry and are therefore not covered by the OGSML supersession clause.

This language in the OGSML is virtually identical to language in the Mined Land Reclamation Law (MLRL) considered by the Court in *Frew Run* 25 years ago.[9] In *Frew Run*, the Court of Appeals held that the MLRL's prohibition against "local laws relating to the extractive mining industry" did not preempt local zoning laws. The *Frew Run* Court had interpreted this language in conjunction with municipal home rule powers and concluded that "local laws that purported to regulate the 'how' of mining activities and operations were preempted whereas those limiting 'where' mining could take place were not."[10] Thus, it would seem that the only path the Court could have taken to strike Dryden's and Middlefield's zoning laws would have been to overrule *Frew Run*.

In the authors' opinion, the Court's analysis conforms to traditional concepts of municipal zoning authority. Practically speaking, zoning laws have always regulated where businesses, such as retail stores, banking, and gas stations may be located, but not how they operate (e.g., hours of operation and labor policies).[11] No basis in law exists for treating zoning related to extractive mining processes differently.

What then of the Towns of Dryden's and Middlefield's absolute ban on mining via their zoning laws? Weren't they regulation of mining?

Not according to the majority. While the local ordinance in *Frew Run* delineated the zoning districts in which mining was banned, the local law under consideration in *Gernatt*, the other case upon which

Judge Graffeo's opinion relied, eliminated mining as a permitted use anywhere in the town borders. In *Gernatt*, the Court of Appeals, relying on *Frew Run*, ruled that an absolute mining ban was a reasonable use of a town's police and zoning powers.[12]

Relying on *Gernatt*, Judge Graffeo upheld the two towns' actions:

> Manifestly, Dryden and Middlefield engaged in a reasonable exercise of their zoning authority as contemplated in *Gernatt* when they adopted local laws clarifying that oil and gas extraction and production were not permissible uses in any zoning districts.…
>
> [T]here is no meaningful distinction between the zoning ordinance we upheld in *Gernatt*, which "eliminate[d] mining as a permitted use" in Sardinia, and the zoning laws here classifying oil and gas drilling as prohibited land uses in Dryden and Middlefield.[13]

The opinion was also careful to emphasize that it was passing no judgment on the merits of fracking and noted that "[t]hese appeals are not about whether hydrofracking is beneficial or detrimental to the economy, environment or energy needs of New York."[14] Rather, the Court explained, the appeals are concerned only with "the relationship between the State and its local government subdivisions, and their respective exercise of legislative power."[15]

Writing for the dissent, Judge Pigott took the view, in which Judge Smith concurred, that the zoning laws of "Dryden and Middlefield do more than just regulate land use, they regulate oil, gas, and solution mining industries under the pretext of zoning."[16] The dissent argued that the Dryden and Middlefield ordinances are distinguishable from the ordinances in *Frew Run* and *Gernatt*, because the Dryden and Middlefield ordinances apply to the entire municipality and do more than eliminate fracking as a permitted use by, for example, going into detail concerning prohibitions against gas storage, petroleum exploration, and production materials and equipment.[17]

Rejecting these arguments, the majority reaffirmed that "the regulation of land use through the adoption of zoning ordinances [is]…one of the core powers of local governance,"[18] noting that the Court has "repeatedly highlighted the breadth of a municipality's zoning powers 'to provide for the development of a balanced, cohesive community' in consideration of regional needs and requirements."[19] The majority explained that the Court does not "lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, [the Court] will invalidate a zoning law only where there is a 'clear expression of legislative intent to preempt local control over land use."[20] And here, following the analytical framework articulated in *Frew Run*, the Court reaffirmed that the OGSML did not contain a clear expression of legislative intent to preempt local control over land use.

Endnotes

1. Mark S. Wallach, who is the Chapter 7 bankruptcy trustee for Norse Energy Corp. USA, was substituted as the petitioner in the case.
2. N.Y. Const., Art. IX, §2(c)(ii).
3. Municipal Home Rule Law §10(1)(ii)(a)(12).
4. 71 N.Y.2d 126, 524 N.Y.S.2d 25 (1987).
5. 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996).
6. *Matter of Wallach v. Town of Dryden*, No. 130, NYLJ 1202661419812, at *1-2 (Ct. of App., Decided June 30, 2014).
7. *Id*. at *7, *citing* N.Y. Const., Art. IX, §2(c)(ii).
8. ECL 23-0303(2).
9. *See* former ECL 23-2703(2).
10. *Wallach,* NYLJ 1202661419812, at *12, *citing Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 131, 524 N.Y.S.2d 25, 27 (1987).
11. *See, e.g., St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988); *Sunrise Check Cashing v. Town of Hempstead*, 20 N.Y.3d 481, 964 N.Y.S.2d 64 (2013).
12. *Matter of Gernatt Asphalt Prods. v. Town of Sardinia,* 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 174 (1996).
13. *Wallach,* NYLJ 1202661419812, at *27 (citation omitted).
14. *Id*.
15. *Id.*
16. *Id.* at *29 (Pigott, J., dissenting).
17. *But see id.* at *29-31 (Pigott, J., dissenting).
18. *Id.* at *8.
19. *Id.* (citations omitted).
20. *Id.* at *9, *citing Matter of Gernatt Asphalt Prods. v. Town of Sardinia,* 87 N.Y.2d 668, 682, 642 N.Y.S.2d 164, 172-73 (1996).

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