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Municipal Lawyer

A publication of the Municipal Law Section of the New York State Bar Association, produced in cooperation with Touro Law Center

Message from the Chair

The Municipal Law Section continually strives to increase our diversity and expand our membership in order to enable us to enhance our services to our members. Walking through the Association forest, we have just had an enhancement acorn serendipitously fall into our membership pocket: the Committee on Attorneys in Public Service (CAPS) is looking for a new home within a Section. And the ideal home for these State attorneys—and indeed for all State attorneys, who are currently homeless within the Association—is our own Municipal Law Section. Expanding the Section to include State attorneys, as well as inside and outside counsel to municipalities and attorneys who appear before and against municipalities, would offer the Section many benefits:

- New and energetic blood for our committees and committee co-chairs;
- Greater diversity;
- More young members to bring up through the ranks to lead the Section in the future;
- Assumption of CAPS' highly regarded *Government, Law and Policy Journal* as a forum for longer articles about municipal, as well state, law;
- Bestowal of the revered Public Service Award;
- Expansion of CAPS' excellent blog to include municipal law issues;
- Integration of programs, reports, and articles on matters of state and municipal concern, such as environmental, open government, ethics, and green development issues; and
- Other benefits yet to be named.

All of this is at no additional cost to the Section, as the Association has promised to commit the resources necessary to fund the expansion, including the cost of a major outreach to State attorneys, both members and non-members of the Association, and the ongoing cost of the *Journal* and the Award.

Inside

NYSBA

To be sure, due diligence dictates that the Section's officers and Executive Committee address any concerns that might arise as a result of such an expansion, such as:

- Nailing down exactly what short and long term monetary and other assistance the Association will provide to the Section;
- Ensuring that expansion will enhance, not dilute, the services the Section provides to its current members; and
- Ensuring that attorneys who appear before and against municipalities remain welcome and active members of the Section.

Expansion of the Section to include State attorneys would require:

- Changing the name of the Section to reflect the inclusion of State attorneys;
- Establishing new committees to address the needs and interests specific to State attorneys, such as a State Counsel Committee and possibly an Administrative Law Judge Committee, and to incorporate the *Journal*, the Public Service Award, and the blog into the Section;
- Including State attorney co-chairs, initially from among CAPS' members, on existing Section committees, as appropriate, such as the State and Federal Constitutional Law Committee, the Membership and Diversity Committee, and the Ethics and Professionalism Committee;
- Expanding the Section's CLE offerings at its Fall and Annual meetings to address matters of concern to State attorneys, creating two-track programs as appropriate, as the Section now does when it joins with other Sections for those meetings; and
- Expanding the *Municipal Lawyer* and the Section's website to reflect the expanded mission of the Section.

Candidly, provided that we assure ourselves that the above concerns have been fully addressed, I see little, if any, downside to expanding the Section to include State attorneys. To the contrary, we have, I believe, very much to gain.

Mark Davies

From the Editors

Good things come in threes, or so the saying goes. In that spirit, this issue of the *Municipal Lawyer* has three types of articles: updates, summaries of recent cases, and—introducing a new feature—an ethics quiz. We hope you find all of them to be good; we certainly did.

The issue begins with Lisa Cobb's article on *Colin Realty Co. v. Town of North Hempstead*, in which the New York Court of Appeals addressed the standard to be used for reviewing requests for off-street parking variances. The Court specifically held that such requests should be reviewed using the standard for area variances rather than use variances, provided that the property is to be used for a purpose permitted in the applicable zoning district. Significantly, this decision ends years of uncertainty about whether to treat parking variances as use or area variances.

Next, we have a pair of ethics items. The first is our inaugural ethics quiz. The question is tricky; rest assured that we have provided the answer later in this issue. The second item is an ethics update by the indefatigable Mark Davies. He describes—and sharply criticizes—the New York State Legislature's "technical corrections" to Article 18 of the General Municipal Law. In Mark's view, these "technical corrections" repealed the authority of local ethics boards to redact from financial disclosure reports any information not exempt from the Freedom of Information Law (FOIL), repealed the authority of such boards to exempt municipal officials from disclosing information relating to their spouses and unemancipated children, and eliminated the exemption from FOIL that financial disclosure records had enjoyed.

We then return to the New York Court of Appeals. Karen Richards examines *Coleson v. City of New York*, a recent decision by a sharply divided court on the "special relationship" exception to municipal immunity from liability for provision of police services. As Karen notes, one of the dissenting judges objected to the decision on the grounds that it may have the effect of "encoura[ging] the police to forgo any meaningful communication or action that could be even *remotely* construed as creating a special relationship between complainant and police."

The second update reviews developments pertaining to municipal lawyers during the 2013-14 legislative session. As detailed in the article, the New York State Legislature passed more than 540 bills that have been signed into law. The new laws include not only the "tax freeze" that was passed as part of the 2014-2015 Executive Budget but many others that will affect municipalities.

Finally, Sarah Adams-Schoen discusses a case, *Reed v. Town of Gilbert*, that was pending at the United States Supreme Court when this issue went to press. Sarah observes that municipal officials and attorneys will want to watch the Supreme Court slip opinions in June for the Court's decision because, depending upon how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. Indeed, the American Planning Association in its amicus curiae brief in *Reed*, warns "that adoption of the strict scrutiny test [urged by the petitioner Clyde Reed] has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation."

Although we hope you will agree that the three types of articles in this issue are indeed good things, the real value lies in their content. And, in this issue, the content will help municipal lawyers better navigate some significant changes in the law, and thereby avoid potential traps for the unwary—something that is indeed a good thing.

Sarah Adams-Schoen and Rodger D. Citron

For the First Time in Forty Years, the Court of Appeals Addresses Off-Street Parking Variances

By Lisa M. Cobb

In *Colin Realty Co. v. Town of North Hempstead*,[1] the Court of Appeals held that requests for off-street parking variances should be reviewed using the standard for area variances rather than use variances, provided that the property is to be used for a purpose permitted in the applicable zoning district.[2] This decision, handed down in October 2014, marks the first time the court has addressed this topic since its decisions in *Overhill Building Co. v. Delaney*[3] and *Off Shore Restaurant Corp. v. Linden*[4] in the early 1970s.[5] The decision also ends years of uncertainty about whether to treat parking variances as use or area variances.

In the 1970s, and for at least two decades thereafter, an applicant seeking a parking variance faced an uncertain landscape, based upon then-existing precedent. The confusion was caused, at least in part, by the decisions of the Court of Appeals in *Overhill* and *Off Shore*. In *Off Shore*, the city's code required that current parking requirements be met whenever an existing use was "altered."[6] The applicant proposed to increase the seating for a proposed restaurant use.[7] In discussing whether a use- or area-variance standard was appropriate for parking, the court wrote that the requirements for off-street parking are "sometimes tied to a use and at other times to an area restriction, generally depending upon the problem created by the use or the limited area involved."[8] This statement by the court was not a model of clarity and in no way provided a bright-line test that could be employed without debate thereafter.

Following this pronouncement, practitioners and zoning boards variously applied the use- or area-variance standard depending upon whether the zoning code being interpreted based its parking requirements on the use to which the property would be put, or the square footage of the use. An example will help illustrate the conundrum. Assume that an applicant was proposing to open two identical restaurants in two neighboring towns, each restaurant consisting of twenty dining tables in a 400-square-foot dining room. One town's zoning code provided that a restaurant use required one parking spot for every table. The other town's zoning code provided that one parking spot was required for every twenty square feet of restaurant dining area. Thus, each restaurant would require twenty parking spots. For each property, the applicant is seeking a variance to require only fifteen spots.

The application of the court's language in *Off Shore* to the codes described above leads to the following anomalous result: Despite the proposed identity of the proposed restaurant use of the property, including the number of tables and the square footage devoted to dining, and despite the identity of the variance sought, in the first example, the language of that town's code would mandate that the area variance criteria be applied. In contrast, in the second example, the more stringent use variance standards would be applied to the identical application, based solely upon the different expression of the parking requirements in the code.

Compounding the problem, this murky standard also created a "gray area" in determining whether to apply a use variance standard or an area variance standard to a pending application for a parking variance, when parking requirements were expressed in the alternative, e.g., one parking spot for every table or every twenty square feet of restaurant dining area, whichever was greater. The *Off Shore* language created problems for practitioners since the decision was rendered.

In *Overhill*, the applicant was seeking to convert part of an existing parking garage to office space.[9] The applicant demonstrated a significant financial loss if unable to make the requested change.[10] The zoning board urged an interpretation that a use variance was required.[11] The Court of Appeals disagreed, finding an area variance standard to be appropriate, but concluded that the application was appropriately denied because the applicant was unable to demonstrate adequate financial hardship, i.e., that no viable commercial use could be made of the property in the absence of the requested variance.[12] *Overhill*, of course, was decided before the legislature codified the standards for each of the variances.

Twenty years after the decisions in *Overhill* and *Off Shore*, and about twenty years ago, the legislature "regularized" (the term used by the Court of Appeals in *Colin Realty*) the definitions of, and criteria for, use and area variances in Town Law in §§ 267(1) and 267-b.[13] The legislature clarified that the "practical difficulty" standard was no longer to be used as the test for area variances, substituting instead the now-familiar five-

factor analysis.[14] However, this statutory clarification of the variance standards did little to eliminate the confusion concerning which variance standard was applicable to off-street parking.

The continued relevance of *Overhill* and *Off Shore*, even after the legislative codification of the variance standards, is evidenced by the lengthy discussion of each of those cases in the recent Court of Appeals' decision in *Colin Realty*. Also evident is the fact that uncertainty remained concerning the appropriate standard for parking variances, despite the statutory codification.

"Practitioners should applaud the clarity of [the] holding [in Colin Realty*] and the end of forty years of uncertainty and debate, at least on this topic."*

The debate is made plain in the argument asserted by the petitioner in *Colin Realty*. It faulted the lower courts for relying on the Court of Appeals' decision in *Overhill* when determining whether to analyze the proposed variances under the use or area standard,[15] claiming that the court's decision in *Off Shore* was controlling. The petitioner argued that *Off Shore* mandated that the determinative factor to be considered was whether the local zoning code at issue imposed parking requirements based upon the square footage of the proposed use, or the intensity of the proposed use.[16] Consistent with the language from *Off Shore* quoted above, the petitioner argued that, in the former case, *Off Shore* mandated that the criteria for an area variance be applied.[17] In the latter, it argued, *Off Shore* indicated that use variance standards be applied.[18]

The Court of Appeals recognized the difficulty that had ensued from its earlier rulings. In *Colin Realty*, it observed that, because the *Off Shore* court had concluded that the applicant did not meet even the lesser standard applicable to an area variance then, technically, everything stated in that opinion concerning use variances could be viewed as dicta.[19] In addition, uncharacteristically criticizing its earlier *Off Shore* decision, the court held that it was improper to analyze parking variances based upon whether the local zoning code imposed parking requirements based upon square footage or the proposed use, classifying the distinction as "illusory."[20]

The applicant in *Off Shore* sought to change from one permitted use to another, which under the "new" (1992) statutory scheme did not require a use variance.[21] As a final point in *Colin Realty*, the court noted that its decision in *Off Shore* was based upon the applicant's inability to demonstrate the required practical difficulty if the variance were not granted, concluding that, "whether dictum or not, *Off Shore's* declarations about use variances for off-street parking requirements have effectively been superseded by statute."[22]

The Court of Appeals wrote that, under the statute, area variances seek "an authorization to use land 'in a manner which is not allowed by the dimensional or physical requirements' of the zoning regulations."[23] The court likened off-street parking requirements to those for minimum lot size or set-back restrictions.[24] Unequivocally, the court held that,

> [A]rea variance rules apply to requests to relax off-street parking requirements so long as the underlying use is permitted in the zoning district; use variance rules prevail only if the variance is sought in connection with a use prohibited or otherwise not allowed in the district.[25]

All justices concurred; there were no dissenting opinions.

Practitioners should applaud the clarity of this holding and the end of forty years of uncertainty and debate, at least on this topic.

Endnotes

1. 24 N.Y.3d 96, 996 N.Y.S.2d 559 (2014).
2. *Colin Realty Co. v. Town of North Hempstead*, 24 N.Y.3d 96, 100, 996 N.Y.S.2d 559, 560 (2014).
3. 28 N.Y.2d 449, 322 N.Y.S.2d 696 (1971).
4. 30 N.Y.2d 160, 331 N.Y.S.2d 397 (1972), *overruled by Colin Realty*, 24 N.Y.3d 96.
5. *Colin Realty*, 24 N.Y.3d at 103.
6. *Off Shore*, 30 N.Y.2d at 164-65.
7. *Id.* at 163.
8. *Id.* at 169.
9. *Overhill*, 28 N.Y.2d at 452.
10. *Id.* at 454.
11. *Id.* at 453.
12. *Id.* at 457.
13. *Id*. S*ee also* N.Y. Town Law §§ 267(1), 267-b. The five factors are:

    (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance. N.Y. Town Law § 267-b(3).

14. *Sasso v. Osgood*, 86 N.Y.2d 374, 382-84, 633 N.Y.S.2d 259, 263-64 (1995).
15. *Colin Realty*, 24 N.Y.3d at 104.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 112.
20. *Colin Realty*, 24 N.Y.3d at 112.
21. *Id.*
22. *Id.*
23. *Id.* (quoting N.Y. GEN. CITY LAW § 81-b(1)). *See also* N.Y. TOWN LAW § 267(1); N.Y. VILLAGE Law § 7-712(1).
24. *Colin Realty*, 24 N.Y.3d at 112.
25. *Id.* (citation omitted).

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New Feature

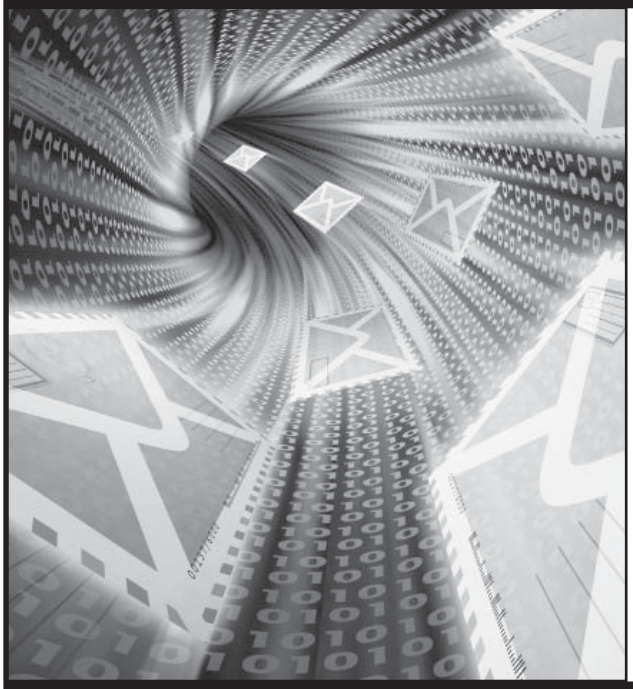
Government

Sponsored by the Section's Ethics and Professionalism Committee

Q When leaving a restaurant with her family one Saturday night, a village trustee's husband is struck by a village sanitation truck. The trustee's husband sues the village. Is the lawsuit prohibited?

Answer and analysis on page 15.

Request for Articles



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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

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State Legislature Trips Up Local Government (Again) on Ethics

By Mark Davies

The New York State Legislature can't seem to get anything right these days when it comes to government ethics. Sadly, sometimes others must pay for their mistakes. This time, it's local government.

The most recent debacle has come in the form of "technical corrections" to Article 18 of the General Municipal Law,[1] the state law regulating conflicts of interest in all 10,000 municipalities in New York State.[2] Had the Legislature consulted with experts on government ethics, including the New York State Bar Association's Municipal Law Section, the Legislature would have avoided the mess it has now created for local government. But it didn't. So here's the bad news: the "technical corrections" repealed the authority of local ethics boards to redact from financial disclosure reports any information, including categories of amounts, not exempt from the Freedom of Information Law (FOIL); repealed the authority of such boards to exempt municipal officials from disclosing information relating to their spouses and unemancipated children; and eliminated the exemption from FOIL that financial disclosure records enjoyed. Here's how and why.

In addition to setting forth conflicts of interest provisions, anemic and unworkable as they are,[3] Article 18 also mandates that every county, city, town, and village with a population of 50,000 or more must adopt a financial disclosure form, upon penalty of being subject to the lengthy state form.[4] All other municipalities may adopt a financial disclosure form but are not required to do so.[5] From January 1, 1991, until December 31, 1992, these provisions were overseen by the former Temporary State Commission on Local Government Ethics.[6]

The Commission's powers included, among others, the power to redact information from the public copy of the report upon request of the filer and the power to permit a filer to request an exemption from disclosing certain information relating to the filer's spouse or unemancipated children.[7] Furthermore, the Commission was expressly made exempt from FOIL and the Open Meetings Law, with the exception of specified documents, namely the financial disclosure statements themselves, notices of delinquency sent by the Commission to an official who failed to file his or her disclosure statement or filed a deficient statement, notices sent by the Commission to a filer stating that reasonable cause existed to believe that he or she had violated Article 18 or a local ethics code, and notices of civil assessment of penalties imposed by the Commission upon an official for violation of the financial disclosure requirements.[8] Excluded from those exceptions, however, were the categories of value or amount, "which shall remain confidential," and "any other item of information" deleted by the Commission from the publicly available report upon the request of the filer.[9]

Municipalities that adopted a financial disclosure form (or voted to continue an existing form) were expressly granted, in that regard, "such other powers as are conferred upon the [Commission]"[10] and were in fact required to confer those powers upon their local ethics board if the disclosure statements were to be filed locally and not with the Commission.[11] Accordingly, municipalities, in regard to financial disclosure reports, possessed the power to redact information from the public copy of the report upon request of the filer and the power to permit a filer to request an exemption from disclosing certain information relating to the filer's spouse or unemancipated children.[12] Furthermore, in the opinion of this author, who was the Executive Director of the Temporary State Commission throughout its existence, municipalities, in regard to the administration of financial disclosure mandates, were, like the Commission, exempt from FOIL and the Open Meetings Law.

These powers of municipalities and municipal ethics boards became even clearer upon the sunsetting of the Commission on December 31, 1992. The 1987 Ethics in Government Act, which enacted the financial disclosure requirements for political subdivisions and established the Commission, specified that the provisions of section 813, governing the powers and duties of the Commission,

> shall remain in effect until and including December thirty-first, nineteen hundred ninety-two; upon the expiration of such provisions, the powers, duties and functions of the temporary state commission on local government ethics shall be transferred, assigned and devolved upon the respective board of ethics, if there be one, or if not, upon the governing body, of political subdivisions which are required

> by the provisions of sections eight hundred eleven and eight hundred twelve of the general municipal law, or which have elected pursuant to such sections, to be subject to the jurisdiction of such temporary state commission….[13]

Clearly, therefore, upon the expiration of the Commission, its powers and duties, including the power to redact and exempt and its exemption from FOIL and the Open Meetings Law, devolved upon local ethics boards or, in the absence of a local ethics board, upon the municipality's governing body, in regard to financial disclosure.

Now the bad news. The "technical corrections" enacted by the Legislature, effective December 17, 2014, expunge from Article 18 all mention of the Temporary State Commission and section 813. The "technical corrections" repeal section 813 and delete references to the Commission in the other sections of Article 18. In particular, the conferral of the Commission's powers upon municipalities that adopt a financial disclosure form no longer exists. They may no longer redact information from a publicly available financial disclosure report nor may they exempt a filer from reporting information relating to his or her spouse or unemancipated children. No exemption from FOIL or the Open Meetings Law exists. Furthermore, categories of value and amount must now be provided to the public.[14]

Instead, the public availability of all municipal records relating to financial disclosure is now regulated solely by the Freedom of Information Law.[15] Thus, inadvertently reported bank account numbers or home telephone numbers or addresses may still be redacted, but generally not other information on the report.[16] In view of New York City's mandate that categories of amount and values be publicly disclosed and the Second Circuit's upholding of the legality of that requirement over privacy objections,[17] any argument that values and amounts disclosed on municipal financial disclosure reports may be redacted is likely to fall on deaf judicial ears.

I hope that my analysis of these "technical corrections" is wrong. If one of our readers can indeed point out the error of my ways here, we will publish it in the next issue of the *Municipal Lawyer*.

Endnotes

1. 2014 N.Y. Laws ch. 490.
2. *See* Gen. Mun. Law § 800(4) (broadly defining "municipality").
3. *See* Temporary State Commission on Local Government Ethics, *Final Report*, 21 Fordham Urb. Law J. 1 (1993); Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, Footnotes, Vol. 4, No. 2, at 5 (Winter 1996); Mark Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA Municipal Lawyer, Vol. 21, No. 3, at 4 (Summer 2007); Steven G. Leventhal, *Needed: A New State Ethics Code*, NYSBA Municipal Lawyer, Vol. 23, No. 4, at 16 (Fall 2009); Mark Davies, *How Not to Draft an Ethics Law*, NYSBA Municipal Lawyer, Vol. 24, No. 4, at 13 (Fall 2010).
4. N.Y. Gen. Mun. Law §§ 810(1) (defining "political subdivision" as a county, city, town, or village having a population of 50,000 or more) and 811(2) (providing that a political subdivision that failed to promulgate or elect to continue its own financial disclosure form by Jan. 1, 1991, would be subject to the state form set forth in Gen. Mun. Law § 812).
5. N.Y. Gen. Mun. Law § 811(1)(a) (permitting any municipality other than a political subdivision to adopt a financial disclosure form).
6. Former Gen. Mun. Law § 813; 1987 N.Y. Laws ch. 813, § 26.
7. Former N.Y. Gen. Mun. Law § 813(9)(h), (i).
8. Former N.Y. Gen. Mun. Law § 813(18).
9. Former N.Y. Gen. Mun. Law § 813(18)(a)(1).
10. Former N.Y. Gen. Mun. Law § 811(1)(c).
11. Former N.Y. Gen. Mun. Law § 811(1)(d).
12. *See* Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 Pace Law Rev. 243, 254-255 (1991).
13. 1987 N.Y. Laws ch. 813, § 26(c).
14. New York City is subject to different rules. *See, e.g.,* N.Y. Gen. Mun. Law § 811(1)(a-1); N.Y.C. Admin. Code § 12-110; N.Y.C. Charter § 2603(k).
15. N.Y. Pub. Off. Law Art. 6, §§ 84-90. The Committee on Open Government has long disagreed with the author's conclusion that financial disclosure records of an ethics board are governed by Article 18 and not by FOIL. *See, e.g.,* N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f7731 (May 28, 1993), No. FOIL-AO-10481 (Dec. 10, 1997). In any event, the disagreement has now been mooted. Bob Freeman won. Davies lost. That a financial disclosure report is a "record" for purposes of FOIL appears indisputable. *See* N.Y. Pub. Off. Law § 86(4) (definition of "record"); N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f8976 (July 18, 1995) ("financial disclosure statements, once they are maintained by or for the Town, would in my opinion constitute 'records' for purposes of the Freedom of Information Law"), No. FOIL-AO-13559 (Aug. 19, 2002).
16. *See* N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-13397 (June 24, 2002), No. FOIL-AO-13948 (March 20, 2003).
17. *See* N.Y.C. Admin. Code § 12-110(e); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983). The New York City financial disclosure law before the Second Circuit required disclosure of categories of amount. Former N.Y.C. Admin. Code § 1106-5.0(b)(6), as enacted by Local Law No. 1 of 1975 and amended by Local Law No. 48 of 1979 (available at http://www.nyc.gov/html/conflicts/downloads/pdf3/fd_leg_hist/leg_his_fd_1975_to_2012_wlinks.pdf). With the repeal of section 813, the Committee on Open Government's reliance upon it as a guide to determine whether information on a disclosure form is publicly available would now seem misplaced, especially in view of the New York City law and the *Barry* decision. *Cf.* N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f7731 (May 28, 1993), No. FOIL-AO-f9826 (Jan. 3, 1997).

Mark Davies is Chair of the Section and Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York. The views expressed in this article do not necessarily represent those of the Board or the City of New York.

Coleson v. City of New York: Is Silence Golden?

By Karen M. Richards

I. Introduction

A recent decision by a sharply divided Court of Appeals may have the effect of "encoura[ging] the police to forgo any meaningful communication or action that could be even *remotely* construed as creating a special relationship between complainant and police," warned dissenting Judge Pigott in *Coleson v. City of New York*.[1] After a brief summary of the "special relationship" exception to municipal liability, this article sets forth the courts' decisions in *Coleson*, where the primary issue was whether a special relationship existed between Jandy Coleson and the City.

II. The "Special Relationship" Exception

Providing police protection is a classic governmental function, and as a general rule, courts will not impose liability upon a municipality simply for failing to provide adequate police protection.[2] "When a claim is made that a municipality negligently exercised a governmental function, liability turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public."[3] A special duty is found when a "special relationship" exists between the plaintiff and the governmental entity.[4] This principle imposes liability in three instances:

> [1.] where the municipality has violated a duty commanded by a statute enacted for the special benefit of particular persons; [2.] where the municipality has voluntarily assumed a duty, the proper exercise of which was justifiably relied upon by persons benefited thereby; or [3.] where it assumes positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists.[5]

However, where a special relationship does not exist "a municipality does not owe a duty to its citizens in the performance of governmental functions, and thus courts will not examine the 'reasonableness' of the municipality's actions."[6] With respect to police protection in particular, the Court has observed that "a different rule 'could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits.'"[7]

In *Cuffy v. City of New York*, the Court of Appeals enumerated four elements (the "*Cuffy* elements") a plaintiff must prove before a municipality will be held liable for its failure to furnish police protection to an injured person:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm[, which requires a plaintiff to prove that the municipality's agents knew their inaction could lead to harm]; (3) some form of direct contact between the municipality's agents and the injured party; and (4) [the] party's justifiable reliance on the municipality's affirmative undertaking.[8]

III. *Coleson v. City of New York*[9]

A. The Events of June 23, 2004

Only one month after Plaintiff, Jandy Coleson, ordered her abusive husband, Samuel Coleson (Coleson), to leave their apartment, he tried to enter the building and threatened to kill her. Plaintiff called the police, but before they arrived Coleson fled the scene. The officers, including Officer Christine Reyes, searched for Coleson with Plaintiff's assistance. Coleson was found shortly before 10 a.m. in front of the superintendent's office with a screwdriver in his hand.[10]

Plaintiff applied for an order of protection. Previous orders of protection, issued in 2001 and 2002, had expired.[11]

The police transported Plaintiff to the precinct. Plaintiff testified at deposition that an officer at the precinct allegedly told her "they had arrested [Coleson], he's going to be in prison for a while, [and that she should not] worry, [she] was going to be given protection."[12] However, Plaintiff "was unable to state what, if any, protection the police had promised to provide, nor did she ask."[13]

Plaintiff was escorted by the police to a non-profit organization that provided services to domestic violence victims to meet with a counselor and receive other assistance.

At around 11:00 p.m., in a phone call lasting approximately two hours, Officer Reyes allegedly told Plaintiff that Coleson was in the Bronx County Courthouse "in front of the judge" and that he was going to be "sentence[d]."[14] Reyes also allegedly told Plaintiff

"everything was okay, that everything was in process, [and] that she was going to keep in contact with [her]."

B. The Events of June 24, 2004

The criminal court released Coleson on his own recognizance after arraignment.[15]

C. The Events of June 25, 2004

While Plaintiff was picking up her son, Rolfy Soto, from school, Coleson approached Plaintiff, grabbed a 13-inch kitchen knife from a barrel outside a car wash and stabbed her in the back.[16]

IV. The Supreme Court and Appellate Court Decisions

Plaintiff sued the City of New York and the New York Police Department (collectively, the "City") for negligence.[17] The City moved for summary judgment dismissing the complaint, contending that it did not assume a special duty to protect Plaintiff.[18]

Plaintiff argued a special relationship existed through the actions of City employees, including the police officers who responded to her call on June 23, 2004 after her husband threatened to kill her; those who searched the area with Plaintiff in a police car; the officers who transported her to the police precinct; the officer at the precinct who informed Plaintiff that her husband had been arrested and that the police would provide her with protection; and Officer Christina Reyes who telephoned Plaintiff to inform her that her husband was taken to court and that the matter was proceeding.[19] The Supreme Court, Bronx County, rejected Plaintiff's argument and granted the City's motion for summary judgment.[20] The court reasoned:

> However, all of this activity occurred before and including Samuel Coleson's arrest and processing which was the culmination of the efforts of the police to find and arrest Mr. Coleson. Plaintiff fails to demonstrate that the verbal assurance of protection at the precinct was followed by any visible police protection. Plaintiff also fails to show any post arraignment promise of protection. "In the few cases where courts have found justifiable reliance and thus a special relationship exception, a verbal assurance invariably has *been followed* by visible police protection of the plaintiff." *Valdez v City of New York*, 74, 80 AD3d 76 (lst Dept 2010) (emphasis added). Conversely, where the undertaking is based on a verbal assurance of protection but there is no visible police action thereafter, courts have followed *Cuffy* and found that no special relationship exists.[21]

In a brief decision, the Appellate Division, First Department, unanimously affirmed, finding there was no evidence the City assumed an affirmative duty to protect Plaintiff from attacks by her husband.[22] "The statements allegedly made by police officers and other employees of defendants—that plaintiff's husband would spend time in jail, and that the police would provide 'protection' of an unspecified nature—were too vague to constitute promises giving rise to a duty of care."[23]

V. The Majority's Opinion

Applying the four *Cuffy* elements, in a 4-3 decision, the Court of Appeals found there was a triable issue of fact as to whether a special relationship existed.[24] Regarding the first element, the Court determined "a jury could conclude the police officers made promises to protect [P]laintiff. Plaintiff was notified by the police that Coleson was arrested, that he was in front of a judge to be sentenced, would be in jail for a while, and that the police would be in contact with her."[25]

With respect to the second element, the Court found the police officers "conceivably" knew Plaintiff's husband would harm her if he was not apprehended, "as evidenced by his arrest and the issuance of an order of protection to plaintiff. Given that plaintiff was told by Officer Reyes that everything was in process and she would keep in contact, there is an issue of fact as to whether the police knew that their inaction could lead to harm."[26]

The third element was "easily met" because police responded to Plaintiff's call about Coleson's threats, arrested Coleson, escorted Plaintiff to the precinct, and Officer Reyes spoke to her on the phone for two hours.[27]

As to the fourth element, the Court found "assurances" made by Officer Reyes (that Coleson was in jail and would be there for a while) were not vague, and "a jury could find that it was reasonable for plaintiff to believe that Coleson would be jailed for the foreseeable future, and that the police would contact her if that turned out not to be the case."[28]

The Court maintained it was not seeking to discourage police from being responsible to crime victims and recognized their role, when responding to domestic violence victims, "is critical in allowing victims to feel consoled and supported," but "the police should make assurances only to the extent that they have an actual basis for such assurances, and to the extent that such assurances will not lull a victim into a false sense of security."[29] According to the Court, Officer Reyes's statements to Plaintiff "may have lulled her into believing that she could relax her vigilance for a reasonable period of time, certainly more than two days."[30]

VI. The Dissent's Opinion

Judge Pigott, writing for the dissent, expressed concern that a "paradox" was created by the majority's opinion: while proclaiming domestic crime victims would be protected "by allowing them to recover in tort against a municipality for a police officer's vague promises and assurances during an emotionally charged and dangerous situation," the majority's opinion would have the effect of encouraging "the police to forgo any meaningful communication or action that could be even *remotely* construed as creating a special relationship between the complainant and police."[31]

If the police had actually made specific assurances as to how Plaintiff would be protected, Judge Pigott hypothesized that a question of fact would have been presented, but, as he pointed out, Plaintiff could not "state what, if any, protection the police had promised to provide, nor did she ask."[32] He opined that Officer Reyes's "vaguely-worded statement, i.e., that plaintiff would be provided protection, without any indication as to the type of protection to be provided, [did not] constitute[] an action by police 'that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance,'"[33] and as he noted, the majority failed to explain how Plaintiff "could have justifiably relied upon such a vague offer of 'protection,' or how such a question could be answered by a jury without engaging in speculation, absent any specific assurances as to *how* that 'protection' would have been provided."[34]

"Equally troubling" to Judge Pigott was "that the majority appears to have added to the justifiable reliance prong of the *Cuffy* test, namely, that police may make assurances 'only to the extent that they have an *actual basis* for such assurances.'"[35] He questioned:

> Is it possible to make these situations any more difficult for the police and those they are called on to protect? Not only must the police watch what they say, they must also be prepared to back up what they say, no matter how vague the assurances may be. For example, statements such as, "It's going to be okay," or "We'll send him away so he doesn't hurt you again" will undoubtedly be utilized in potential civil suits as examples of assurances that the police made that had no "actual basis." Such statements are on the same spectrum as the vague promises of "protection" and to "keep in contact" that were made in this case. The end result, of course, is that police will be deterred from providing any assurances to victims of domestic violence, those victims will be less than willing to cooperate in the prosecution of their significant others (or family members), and the cycle will continue, with victims in all likelihood returning to their abusers, all because the police were (justifiably) wary about making any comment that could be considered a promise of safety.[36]

Judge Pigott found Officer Reyes's alleged statements that Coleson "was in front of a judge" and was going to be "sentence[d]," were not potential assurances of protection and did not raise a triable issue of fact on the issue of justifiable reliance.[37] These statements merely "appris[ed] the victim of the status of the victim's complaint."[38] He warned, "[u]nder the majority's holding, any status report akin to the one given in this case will expose a municipality to liability, even if, as in this case, the municipality has not made an affirmative undertaking."[39]

Judge Pigott also found Officer Reyes's statement that she would "keep in contact" did not mean she would contact Plaintiff if and when Coleson was released, and therefore, Officer Reyes's statement could not have lulled Plaintiff into inaction.[40] Further, as the dissent noted, Plaintiff did not make such a claim.[41]

VII. Conclusion

Judge Pigott cautioned, "the majority's holding [in *Coleson*] will encourage law enforcement to provide victims of domestic violence, or any victim of violent crime, with as little information as possible out of concern that anything they say can and will be used against them (and their employer) in a potential civil suit."[42] Perhaps, unfortunately, silence is golden.

Endnotes

1. *Coleson v. City of N.Y.*, 24 N.Y.3d 476, 485 (2014) (Pigott, J., dissenting in part) (emphasis in original).
2. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 374 (1987); *see* Karen M. Richards, *Police Protection and the Special Relationship Exception*, N.Y. St. B.J., Vol. 26, No. 2, at 9-13 (Summer 2013).
3. *Garrett v. Holiday Inns*, 58 N.Y.2d 253, 261, 460 N.Y.S.2d 774, 778 (1983).
4. *Id*.
5. *Id*. at 261-62 (citations omitted).
6. *Sorichetti v. City of New York*, 65 N.Y.2d 461, 468, 492 N.Y.S.2d 591, 595 (1985) (citations omitted).
7. *Id*.
8. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 374 (1987) (citations omitted).
9. Unless otherwise noted, the facts in this paragraph were taken from *Coleson v. City of N.Y.*, 106 A.D.3d 474, 964 N.Y.S.2d 419 (1st Dep't 2013) and *Coleson v. City of N.Y.*, 2012 WL 10478839 (Sup. Ct., Bronx Co. 2012).
10. Transcript of Oral Argument before the Court of Appeals, October 16, 2014, p. 8, l. 20-22.
11. *Coleson*, 106 A.D.3d at 475.
12. *Id*.

13. *Id.*

14. During oral argument, the City's attorney argued "this statement is not a promise or assurance. It's a statement of the process or the procedure." Transcript, p. 18, l. 13-14.

15. *Coleson v. City of N.Y.*, 106 A.D.3d 474, 476, 964 N.Y.S.2d 419, 421 (1st Dep't 2013). Judge Smith stated during oral argument:

> But wasn't the real failure letting the guy go and it's—isn't it clear that you can't sue for that. No matter how ill advised the judge was or how much the DA may have failed to make the point, you can't sue them for letting him go. Aren't you really trying to end run around that ruling here? Transcript, p. 12, l. 1-8.

Plaintiffs' attorney responded, "We can't sue—sue the judge for releasing him. That's right. But we're—we're talking about all the factors that occurred prior to that release." Transcript, p. 12, l. 11-14.

Judge Pigott stated:

> But the dilemma is this: if—if the arresting officer's back on the road and the—and the arraignment is at some different time, place, and he doesn't have a clue, how do you—how are we supposed to handle that? Transcript, p. 12, l. 15-19.

Plaintiff's attorney responded, "[t]hey should have told somebody at the station." Transcript, p. 12, l. 20-21. He later argued Plaintiff should have been told Coleson was released from custody. Transcript, pp. 34-35, l. 24-25, 1-2.

Judge Pigott responded that Plaintiff's attorney was suggesting "that half a precinct get lined up for this case so that—so that your client is properly protected…it seems like we're putting an awful burden on the police where they would—in the alternative say, you know what, we're not saying anything." Transcript, p. 13, l. 1-7.

16. *Coleson v. City of New York*, 24 N.Y.3d 476, 479, 999 N.Y.S.2d 810 (2014); *see also* Erika Martinez, *NYPD Daily Blotter*, New York Post, June 26, 2004, reported:

> A man plunged a 13-inch knife into his wife's back yesterday during a heated argument on a Soundview street, police sources said.
>
> Samuel Coleson, 43, of Boynton Avenue was walking down Bruckner Boulevard around 3 p.m. with his wife, Jandy Coleson, 30, when they began to argue.
>
> Samuel Coleson grabbed a kitchen knife from a barrel outside a car wash and rammed it into his wife's back, according to police sources.
>
> He was charged with assault, criminal possession of a weapon, aggravated harassment, and menacing. Jandy Coleson is listed in critical condition at Jacobi Hospital.
>
> Samuel Coleson also had been arrested for a domestic incident two days earlier, sources said.

17. Plaintiff also asserted a claim for negligent infliction of emotional distress on behalf of her son, Rolfy Soto, arguing that he was in the zone of danger during the incident. Rolfy saw Coleson chase Plaintiff with the knife while she screamed for help. As Rolfy hid behind a car, a man who worked at the car wash grabbed Rolfy and locked him inside a broom closet to protect him. Rolfy later testified that he saw his mother on the ground in a pool of blood, but he did not see Coleson stab her. *Coleson*, 106 A.D.3d at 476.

To recover for an emotional injury based on the zone of danger theory "a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury while in the zone of danger." *Coleson*, 2014 WL 66607352 (citations omitted). The Court of Appeals concluded Rolfy was not in the zone of danger because he was in a broom closet and did not witness the stabbing and was not immediately aware of the stabbing at the time it occurred. *Id*.

18. *Coleson v. City of N.Y.*, 2012 WL 10478839 at *1 (Sup. Ct., Bronx Co. 2012) (where the City also asserted it was immune from liability because its actions were discretionary and Rolfy Soto was not in the zone of danger).

19. *Id*. at *2.

20. *Id*. at *3.

21. *Id*. (*quoting Valdez*, 74 A.D.3d at 81).

22. *Coleson v. City of N.Y.*, 106 A.D.3d 474, 964 N.Y.S.2d 419 (1st Dep't 2013) (Moskowitz and Clark, JJ., concurring in a separate memorandum).

23. *Id*. at 474-75 (finding "The lack of any such duty also warranted the dismissal of the infant plaintiff's claim for negligent infliction of emotional distress.").

24. *Coleson v. City of N.Y.*, 24 N.Y.3d 476 (2014). Judge Abdus-Salaam wrote the majority opinion, with Chief Judge Lippman and Judges Graffeo and Rivera concurring. Judge Pigott dissented in part in an opinion in which Judges Read and Smith concurred.

25. *Id*. at 482.

26. *Id*.

27. *Id*.

28. *Id*.

29. *Coleson v. City of N.Y.*, 24 N.Y.3d 476, 483 (2014).

30. *Id*. Judge Pigott wrote, "I do not suggest, as the majority asserts, that the majority 'seek[s] to discourage police from being responsive to crime victims.' My point is that the majority's holding will have that *effect*." *Id*. at 484 n.* (Pinott, J., dissenting in part) (emphasis in original). The majority's stance was a retreat from recent Court decisions, according to Judge Pigott, that "reiterated the well-established rule that only an 'affirmative undertaking' that creates justifiable reliance can justify holding a municipality liable for negligence in performing a governmental function." *Id*. at 484 (*citing Valdez v. City of N.Y.*, 18 N.Y.3d 69 (2011); *DiNardo v. City of N.Y.*, 13 N.Y.3d 872 (2009); *McClean v. City of N.Y.*, 12 N.Y.3d 194 (2009); *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987)).

31. *Id*. Judges Read and Smith concurred in the dissent with Judge Pigott.

32. *Id.* at 485.

33. *Id.*

34. *Id.* (emphasis in original).

35. *Id.* (emphasis supplied by J. Pigott).

36. *Id.* at 485-86.

37. *Id.* at 486 (that Coleson "was in front of a judge" and was going to be "sentence[d] and that police would "keep in contact with [her]").

38. *Id*.

39. *Id.*

40. *Id.* at 486-87.

41. *Id.* at 487.

42. *Id*. at 486. At oral argument, Judge Smith asked "is it really a good idea to send a message to the police: be very careful how you talk to a domestic violence victim; if you're too reassuring you'll get sued?" Transcript, p. 35, l. 10-13.

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2014 Legislative Roundup: Laws Affecting Municipalities

By the Legislation Committee of the NYSBA Municipal Law Section

During the last legislative session (2013-2014), the NYS legislature passed more than 650 bills (exclusive of budget and appropriation bills). Of the bills passed, 541 have been signed into law (chapter laws) and 106 have been vetoed. And while municipal attorneys may be familiar with the "tax freeze" that was passed as part of the 2014-2015 Executive Budget, they may be less familiar with the scores of other laws that were enacted that will affect municipalities.

Municipal practitioners may also be less aware of a unique legislative process known as a "pocket veto" that is triggered by the end of the two-year session of the legislature. Ordinarily, the Governor has 10 days, exclusive of Sundays, to veto a bill, otherwise it becomes law. Nevertheless, the New York State Constitution provides that when, by its adjournment, the legislature prevents the return of the bill to the legislature, it shall not become a law without the approval of the governor. The Constitution goes on to say that "[n]o bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment."[1] Accordingly, once the legislature has finally adjourned for the session, a bill cannot become a law unless affirmatively signed by the Governor within 30 days. Non-action by the Governor becomes a default veto rather than default approval. This is commonly referred to as a "pocket veto."

As the legislature has a practice of not officially adjourning until the expiration of its two-year session, this rule seldom comes into play. It does apply, however, once every two years as the prior legislature has its final adjournment and a new legislature is set to convene. Such was the case for a bill that proposed to change the rules for police discipline.[2]

Senate Bill 7801 proposed to make police discipline a mandatory subject of negotiation. This bill is a direct response to the Court of Appeal's decision in *PBA of the City of New York, Inc. v. New York State Pub. Employment Relations Bd.*,[3] which held that police discipline is a prohibited subject of negotiation. The policy and reasoning underlying that decision was subsequently reinforced by the Court of Appeals in *Town of Wallkill v. Civil Serv. Employees Ass'n, Inc.*[4] In short, the Court of Appeals in each case held that the legislature has "expressly committed disciplinary authority over a police department to local officials."[5]

Senate Bill 7801 is the latest legislation that attempts to subject police discipline to negotiation. It passed both houses of the legislature in June, but was not delivered to the Governor's office until December 30, 2014—the day before the legislative session adjourned. Based on the process discussed above, the Governor had 30 days from the last adjournment of the legislature (December 31, 2014) to approve this bill. Those 30 days came and went without approval by the Governor, and on February 2, 2015, S.7801 was deemed vetoed.

The Legislation Committee of the Municipal Law Section has put together the following summary of the significant enacted laws that it believes to be of interest to those attorneys who represent or practice before local governments.

Enacted Laws

Chapter 541: Requires New York State Uniform Fire Prevention Code to include provisions mandating the installation of carbon monoxide detectors in certain commercial buildings.

Chapter 537: Amends employer notice requirements for wage payment violations to require an initial notice at the beginning of employment; increases the fines available to an employee that sustains a wage payment violation; sets forth that an employer that engages in a new enterprise will be considered the same employer for purposes of wage payment violations if the work and employees are essentially the same; increases employer reporting requirements if such employer commits wage payment violations; requires contractors and sub-contractors to notify all employees of any wage payment violations committed by such contractor/sub-contractor; provides that the statute of limitations for a wage reporting violation is tolled while the Commissioner of Labor investigates; establishes the wage theft prevention account.

Chapter 526: Allows municipalities that have been identified as experiencing fiscal stress and have elected to engage an external financial advisor to assist in multi-year planning, to be reimbursed from funds made available to the financial restructuring board for local governments for all or part of the cost of the financial advisor, within the discretion of the board.

Chapter 508: Amends Arts and Cultural Affairs Law § 57.35 to allow volunteer fire and ambulance companies to apply for records management

grants for local government records management improvement.

Chapter 499: Treats municipal employees who hold, or who have held, non-competitive class positions pursuant to Civil Service Law § 55-a (appointment of qualified persons with physical or mental disability) as competitive class employees for the purposes of layoffs or abolishment of position.

Chapter 496: Active volunteer firefighters or volunteer ambulance workers who provide services outside their jurisdiction and in the absence of a jurisdictional officer in command will be covered by the Volunteer Firefighters Benefit Law or the Volunteer Ambulance Benefit Law, so long as the fire company/ambulance company/municipality where service was provided has adopted a resolution granting coverage for such service.

Chapter 488: Exempts exhibitions on and entertainment on fair grounds from local approval except as required to protect the safety, health and well-being of persons. Local laws and ordinances shall not be construed to unreasonably prohibit or restrict an agricultural or horticultural corporation from receiving reimbursement from the Department of Agriculture and Markets for improvements to its grounds, buildings or structures.

Chapter 463: Reduces the threshold amount of acreage necessary for creating an agricultural district from 500 acres to 250 acres.

Chapter 436: Directs the Department of State and the Office of Parks, Recreation and Historic Preservation to jointly develop safety standards for moveable soccer goals. No person, firm, corporation or other legal entity shall erect a moveable soccer goal unless the goal complies with the safety regulations. It further provides for enforcement by the Attorney General's office, with penalties up to $500 per violation against those who knowingly violate this chapter.

Chapter 426: Requires the Department of Taxation and Finance to promulgate a list of documents to support establishing eligibility for a veterans' real property tax exemption.

Chapter 425: Increases the veterans' real property tax exemption from $5,000 to $7,500.

Chapter 416: Extends the deadline for eligible municipalities to exercise the provisions of the Superstorm Sandy assessment relief act.

Chapter 415: Allows the town clerk's deputy or other designee to accept affidavits for marriage licenses.

Chapter 409: Expands the definition of "clerical error" in the Real Property Tax Law to include the failure of an assessor to use the appropriate method when assessing low-income housing.

Chapter 403: Repeals laws that create and authorize urban renewal agencies that are now defunct or have otherwise ceased operations and have no outstanding liabilities. Vests all rights in the municipality hosting the agency.

Chapter 401: Designates yogurt as the state snack. Admittedly, this bill is not necessarily municipal related but it did lead to one of the greatest debates in the history of the Senate (why not the potato chip?). All are encouraged to watch the hour long debate on YouTube or catch the highlights on "The Daily Show" to get insight into the NYS legislative process.

Chapter 393: Adds a section to the Labor Law (§ 202-1) authorizing leaves of absence for volunteer firefighters and members of volunteer ambulance services during a state of emergency, provided that employers had previous documentation of employees status in the volunteer fire department or ambulance service.

Chapter 367: Amends General Municipal Law § 103 to authorize advertisements of bids in the procurement opportunities newsletter (The New York State Contract Reporter). Bids must still be published in the newspaper.

Chapter 366: Counties, cities, towns and villages are required to fly, on specified holidays, an official National League of Families POW/MIA flag at the building housing its local legislative body if such a flag has been provided to the municipality by a congressionally chartered veterans organization. The flags must fly on Armed Forces Day, Memorial Day, Flag Day, Independence Day, National POW/MIA Recognition Day and Veterans Day.

Chapter 363: Amends Real Property Tax Law § 470 to include additional green building certification standards when determining eligibility of green buildings for a tax exemption. Eligible properties must be certified under LEED, green globes rating system, national green building standards or a similar program.

Chapter 353: Requires property owners to notify the local building inspector when a pre-engineered wood truss roof is being used on any new construction, addition or rehabilitation to a residential building. The notification will appear on a separate form to be filed with the building permit. Local building inspectors must notify the local fire department authorities that truss type, pre-engineered wood construction is being utilized.

Chapter 289: Amends the Election Law for village elections by allowing the application and administration of absentee ballots to conform to those methods used by other municipalities during primary and general elections. Simplifies and standardizes the absentee ballot provisions.

Chapter 273: Extends the use of lever voting machines for school district, village and special district elections through December 31, 2015.

Chapter 254: Prohibits candidates in local elections from serving as poll watchers in the same election districts and in the same election in which they are a candidate.

Chapter 250: Requires lever voting machines to be locked against voting for a period of 30 days after the election or until 15 days before the next election, unless by court order or if a discrepancy discovered in recanvass makes it necessary to determine if the machine has malfunctioned.

Chapter 249: Eliminates the requirement that a notice of party caucus in village elections be filed with the county Board of Elections.

Chapter 198: Allows fire departments and fire companies to screen applicants for any sex offences that would require registration as a sex offender, and allows them to prohibit registered sex offenders from becoming volunteer firefighters.

Chapter 106: Increases the number of land banks allowed from 10 to 20.

Endnotes

1. N.Y. Const. art. 4, § 7.
2. 2014 N.Y. Senate Bill S.7801.
3. 6 N.Y.3d 563 (2006).
4. 19 N.Y.3d 1066 (2012).
5. 6 N.Y.3d at 570.

The Legislation Committee would like to thank the staff at the Association of Towns of the State of New York and the New York State Conference of Mayors and Municipal Officials for their assistance in putting this report together.

Answer to Government Ethics Quiz

(from page 6).

A Yes, the lawsuit is prohibited.

Analysis: Sections 800-802 of Article 18 of the General Municipal Law provide that 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. Gen. Mun. Law § 800(2) defines "contract" as "any claim, account or demand against or agreement with the municipality, express or implied…." Since the lawsuit is a claim or demand against the village, it is a "contract" with the village. Under § 800(3), an "interest" means "a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as a result of a contract with the municipality which such officer or employee serves." The trustee is deemed to have an interest in a contract of her spouse, pursuant to Gen. Mun. Law § 800(3)(a). The village trustee, therefore, has an "interest" in her husband's lawsuit. Section 801 prohibits interests in municipal contracts if the municipal official "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…." Since payments, including settlements, must be approved by the village board of trustees or by an auditor or board appointed or approved by the board of trustees (Village Law §§ 3-301(3), 5-524), the trustee is a member of a board that has the power or duty to approve payment to her husband of any judgment or settlement or the power to appoint those who do. Article 18 contains no exception to § 801 where the affected official recuses herself nor does any exception in § 802 apply here. In short, the trustee's lawsuit violates Article 18. Any award will be "null, void and wholly unenforceable" (Gen. Mun. Law § 804), and the trustee will have committed a misdemeanor (Gen. Mun. Law § 805).

For further discussion, see Mark Davies & Steven Leventhal, "Local Government Ethics: A Summary and Hypotheticals for Training Municipal Officials," NYSBA Municipal Lawyer*, Vol. 28, No. 3 (Summer 2014).*

The Section's Ethics and Professionalism Committee invites comments from readers on this problem, especially by those who disagree with the Committee's analysis. Please direct comments to Municipal Lawyer *editor Sarah Adams-Schoen at sadams-schoen@tourolaw.edu and include "Ethics Quiz" in the subject line.*

Land Use Law Update: Will *Reed v. Town of Gilbert* Require Municipalities Throughout the Country to Rewrite Their Sign Codes?

By Sarah J. Adams-Schoen

Municipal officials and attorneys will want to watch the Supreme Court slip opinions[1] in June for the Court's decision in *Reed v. Town of Gilbert*.[2] Depending on how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. Indeed, Susan Trevarthen, who represented the American Planning Association in its amicus curiae brief in *Reed*, warns "that adoption of the strict scrutiny test [urged by the petitioner Clyde Reed] has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation."[3]

"Depending on how the Court decides [Reed]*, municipalities may need to act quickly to amend their sign regulations."*

As local officials and attorneys know, local sign ordinances are generally recognized to be part of the local government toolkit for advancing substantial governmental interests such as traffic safety and aesthetics.[4] However, effective regulation of sign placement and aesthetics typically requires the governing jurisdiction to categorize signs by type, and such categorization often requires the regulator to read the sign to determine its function, and therefore its category.[5]

Thus, because these sign regulations require the regulator to review the content of the sign to determine its category, sign regulations pose distinct First Amendment problems for municipalities, which regulate the physical characteristics and placement of signs as part of the exercise of their police powers. Recognizing this, a unanimous Court observed in *City of Ladue v. Gilleo*[6] that signs present regulatory challenges not applicable to other forms of speech:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.[7]

Nevertheless, numerous litigants have brought claims alleging that temporary sign regulations that differentiate between sign types based on the function of the sign are content-based and therefore subject to strict scrutiny review. Varied judicial responses to these claims have led to a split of authority and resulting uncertainty in this area of law.[8]

The Court's ruling in *Reed* may resolve this split. Plaintiffs/appellants in *Reed* are the Good News Community Church and its pastor, Clyde Reed (collectively, "the Church"). Defendants/appellees are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (collectively, "the Town"). The Church is appealing a Ninth Circuit order that affirmed a district court order granting summary judgment to the Town and denying summary judgment to the Church.[9]

The basic facts are as follows. The Church rented space at an elementary school in Gilbert, Arizona, and placed signs in the surrounding area announcing the time and location of the Church's services. The Town has a sign code that restricts the size, number, duration, and location of many types of signs, including temporary directional signs. The code generally requires anyone who wishes to post a sign to obtain a permit, with numerous exceptions for specific types of signs including "ideological signs,"[10] "political signs,"[11] and "temporary directional signs relating to a qualifying event."[12] Treating the Church's signs as temporary directional signs, the Town issued a code enforcement notice to the Church, seeking to enforce the code restrictions applicable to temporary directional signs. The Church then sued the Town, claiming that the sign code violates the Free Speech Clause of the First Amendment

and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to the Church.

Following Supreme Court precedent that requires intermediate scrutiny for content-neutral regulations,[13] the district court found that the sign code was a content-neutral regulation that was reasonable in light of the government interests underlying the regulations, and therefore passed constitutional muster.[14] The Ninth Circuit agreed and held that, even though an official would have to read a sign to determine what provisions of the sign code applied, the restrictions were not based on the content of the signs, did not censor speech or favor certain viewpoints over others, and the sign code left open other channels of communication for the Church.[15]

The Town's permitting exemption for temporary signs, and, more specifically, its classification of the Church's signs as temporary directional signs, lies at the heart of the *Reed* case. The plaintiff/appellee church in *Reed*—joined by a host of amici representing various religious and libertarian interests, ten states, and the United States[16]—argues that if a municipal official has to read the content of a temporary sign to determine what kind of temporary sign it is, the regulation is "content-based" and subject to strict scrutiny. As a result, the Church argues, the Town of Gilbert's sign code is subject to strict scrutiny. Moreover, the Church argues that the Town's code cannot survive strict or intermediate scrutiny because the code is not narrowly tailored and alternative channels for communication do not exist.[17]

The United States, which filed a brief in support of the Church, argues instead that intermediate scrutiny applies to the Town's sign code, but the code fails to satisfy that standard. Specifically, the United States argues

> [I]ntermediate scrutiny applies in the particular context of a sign-regulation scheme premised solely on the government's substantial and content-neutral interests in safety and aesthetics. Those interests have long been understood as valid bases for limiting the proliferation of signs; they can justify not only general limitations on signs, but also exceptions for signs whose content promotes (or does not significantly detract from) safety and aesthetics; and the existence of such exceptions should not in itself trigger strict scrutiny. Even under intermediate scrutiny, however, respondents' ordinance…draws distinctions between different types of signs that are not sufficiently connected to safety and aesthetic rationales.[18]

The Town—joined by amici representing municipal and planning interests[19]—argues that intermediate scrutiny applies to sign ordinances that do not favor or censor viewpoints or ideas and the Town's code does not favor or censor viewpoints or ideas.[20] Moreover, amici in support of the Town argue that the Church's absolutist test would wreak havoc on municipalities' ability to further important traffic safety and aesthetic interests and is not necessary to protect speech because a municipality's review of a temporary sign's content to determine the sign's function is not a content-based review.[21]

How will the Court resolve the questions posed in *Reed*? Hopefully by recognizing that review of a sign's text to discern its function does not equate to regulation of the sign's content, but rather is most often a content-neutral safety or land regulation. Although clearly implicating free speech concerns, typical "[c]omprehensive sign regulations are not speech-licensing or censorship schemes but are chiefly concerned with the form and appearance of the development of land in a variety of zoning settings (residential, mixed-use, commercial, industrial, agricultural, and the like)."[22] Indeed, many local governments, including the Town of Gilbert, include beauty, community appearance, and safety among the enumerated purposes in their sign regulations.[23] These regulations cannot be effectively implemented if the municipality is hampered in its ability to discern the functions of the signs it regulates. As the National League of Cities argues in its amicus brief,

> Signs are speech and thus can be categorized or differentiated only by what they say. This makes it impossible to overlook a sign's content or message in attempting to formulate regulations on signage or even make exceptions required by law. If the mere categorization of signs by function renders them "content-based,"…few sign regulations will meet the exacting strict scrutiny test.[24]

An outcome that places local government sign codes under strict scrutiny whenever classification of sign types requires a review of the sign's content to understand the function of the sign would arguably place local governments in an impossible position—and require local governments to act quickly to amend their sign codes.

Endnotes

1. According to the Court's official website, the Court publishes slip opinions on its website "within minutes" of issuing its bench opinions. *See* Supreme Court of the United States, 2014 Term Opinions of the Court, Slip Opinions, Per Curiams (PC), and Original Case Decrees (D), http://www.supremecourt.gov/opinions/slipopinion/14 (last visited Feb. 27, 2015).
2. *See Reed v. Town of Gilbert*, 134 S. Ct. 2900 (2014) (granting certiorari). The Court heard oral argument in *Reed* on January 12, 2015, and a decision is expected by June. An audio recording of the oral argument can be accessed at http://www.supremecourt.gov/oral_arguments/audio/2014/13-502 (last visited Feb. 27, 2015).
3. Weiss Serota Helfman Cole & Bierman, Blog, *Susan Trevarthen Co-Authors Amicus Curiae Brief to the US Supreme Court*, http://www.wsh-law.com/blog/17146/#sthash.LemdFBTW.dpuf (last visited Mar. 5, 2015).
4. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (recognizing role of aesthetics in providing for public welfare); *Covenant Media of South Carolina v. Town of Surfside Beach*, 321 Fed. Appx. 251 (4th Cir. 2009) (promoting traffic safety and aesthetics are substantial governmental interests).
5. *See Wag More Dogs v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (recognizing that categorization for legitimate regulatory purposes requires review of sign content); *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349, 1376 (S.D. Fla. 2003) (recognizing that general rule against regulation of viewpoints "is not applicable in cases where 'there is not even a hint of bias or censorship in the [municipality's] enactment or enforcement of an ordinance'"), *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005).
6. 512 U.S. 43 (1994).
7. *Id.* at 48.
8. *Compare Wag More Dogs*, 680 F.3d at 365 (recognizing legitimate need to review sign content to categorize sign by function) *with Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[Preferring] the 'functions' of certain signs over those of other (e.g., political) signs is really nothing more than a preference based on content.").
9. The Ninth Circuit order is reported at 707 F.3d 1057 (9th Cir. 2013). The district court's unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
10. These are defined as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories. The only restriction on these signs is that they "be no greater than 20 square feet in area and 6 feet in height." Gilbert Sign Code § 4.402(D) and (J).
11. These are defined as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot. Such signs may be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in size; may be up to six feet in height; may remain in place for several days after the election; and are not generally limited in number. Gilbert Sign Code § 4.402.
12. These are defined as signs "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," that are "intended to direct pedestrians, motorists, and other passersby" to "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Such signs may be "no greater than 6 feet in height and 6 square feet in area"; no more than four such signs "may be displayed on a single property at any time"; and such signs may be displayed only "12 hours before, during, and 1 hour after" the event. They may not be displayed in "the public right-of-way" or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure." Gilbert Sign Code § 4.402.
13. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29 (1992) (acknowledging that law prohibiting newsracks when they contain certain types of publications could be content-neutral if distinction based on neutral rationales).
14. No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
15. 707 F.3d 1057 (9th Cir. 2013).
16. *See, e.g.*, Brief of Amicus Curiae General Conference of Seventh-Day Adventists in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726502 (Sept. 22, 2014); Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726503 (Sept. 22, 2014).
17. Brief for Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4631957 (Sept. 15, 2014); Petitioners' Reply Brief, *Reed v. Town of Gilbert*, 2014 WL 7145497 (Dec. 15, 2014).
18. Brief for the United States as Amicus Curiae Supporting Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726504, at *7-8 (Sept. 22, 2014).
19. Brief of the National League of Cities et al. Supporting Respondents, *Reed v. Town of Gilbert*, 2014 WL 6706843 (Nov. 21, 2014). The National League of Cities was joined in the amicus brief by United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America, Inc.
20. Brief for Respondents, *Reed v. Town of Gilbert*, 2014 WL 6466937, at *8-9 (Nov. 14, 2014).
21. Brief of the National League of Cities, *supra* n. 19, at *8.
22. *Id.*
23. *See, e.g.*, Gilbert Sign Code § 4.401; *see also* Brief of the National League of Cities, *supra* n. 19, at *6 (arguing same).
24. Brief of the National League of Cities, *supra* n. 19, at *3.

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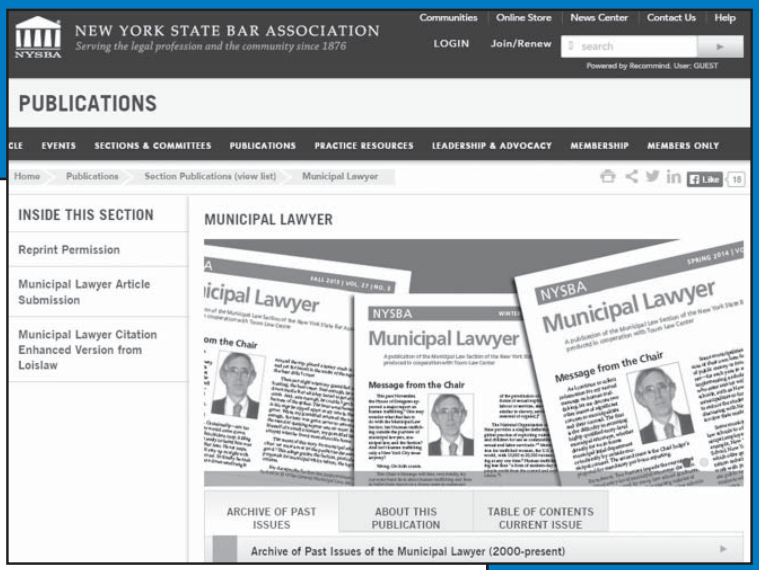

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