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Municipal Lawyer

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Message from the Outgoing Chair

I recently had the opportunity to make two presentations on the topic of financial disclosure laws and was reminded, once again, of the need for a clear alignment between financial disclosure obligations and the applicable ethics code. What follows is a summary of my remarks at the 36th Annual Conference of the Council on Governmental Ethics Laws in Pittsburgh on December 8, 2014, and at the New York City Conflicts of Interest Board's 21st Annual Citywide Seminar on Ethics in New York City Government on May 20, 2015.[1]

Financial Disclosure: More Sunscreen, Less Sunshine

On June 4, 1974, at the height of the Watergate Scandal, seven months after Richard Nixon's your-president-is-not-a-crook speech and just nine weeks before he resigned the office of President, California voters approved Prop 9, the Political Reform Act of 1974, which included the granddaddy of financial disclosure legislation.

California in fact had a financial disclosure law already in place in 1974. Former § 3700 of the California Government Code provided:

> Prior to the 15th of April of each year, every public officer shall file, as a public record, a statement describing the nature and extent of his investments, including the ownership of shares in any corporation or the ownership of a financial interest in any business entity, which is subject to regulation by any state or local public agency, if such investment is in excess of ten thousand dollars ($10,000) in value at the time of the statement.

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Thus, prior to 1974, all that needed to be disclosed was investments worth $10,000 or more ($48,000 in today's dollars[2]) in entities subject to state or local regulation.

The 1974 California Act not only established the Fair Political Practices Commission and expanded or enacted campaign disclosure, limitations on expenditures, registration and reporting requirements and prohibitions for lobbyists, and conflicts of interests provisions but also greatly increased the scope of annual financial disclosure by elected state officers, members of the board of supervisors and chief administrative officers of counties, mayors, city managers, chief administrative officers and members of city councils, and candidates for election to any of those offices. So, for all this financial disclosure stuff, we have, as usual, only California to blame—and I say that as a native prune picker myself.

Even so, you'll note that the number of officials subject to the 1974 filing requirement was still quite small—only elected officials and chief administrative officers.

Let me then bounce back to our coast, to New York City, which six months later, in January 1975, enacted its own financial disclosure law, Local Law No. 1 of 1975. New York City went California one (or two) better: greatly expanding *who* had to file and what they had to *disclose*—outside paid positions, sources of earned income, capital gains, reimbursements, honoraria, gifts, creditors, real property and trusts, along with more information as to the value of each item. And filers included not just elected officials, candidates for elected office, and the chief operating officer, but also board members, agency heads, deputy agency heads, assistant agency heads, and anyone with a salary of $25,000 or more. It was Prop 9 on steroids. And in the past 40 years, it has only gotten worse.

Of course, the feds then hopped on the financial disclosure bandwagon three years later with the Ethics in Government Act of 1978.[3] And an industry was born. (As usual, New York State was late to the party, not adopting a financial disclosure law until 1987.[4])

But my question for readers is this: shouldn't we just repeal every financial disclosure law in the state, if not in the country, and go back to the old pre-Political Reform Act of 1974, to that one sentence-one requirement California law?

None of these financial disclosure schemes, I would suggest, makes sense because they do not reflect *any* understanding of the purpose of a financial disclosure law, which is the same as the purpose of ethics laws generally: namely, to promote both the reality and the perception of integrity in government by *preventing* unethical conduct—or, more accurately, conflicts of interest violations—from occurring. To guide *honest* public officials, not to catch dishonest ones. That's why annual financial disclosure is very, very important. But financial disclosure forms do not catch crooks—never have, never will. No one has ever reported on a financial disclosure form: "Bribes accepted, $10,000."

Prevention is what it's all about, not catching crooks. And that prevention happens because annual disclosure forces the official to focus at least once a year on the ethics code and on where his or her potential conflicts of interest lie under that code and also alerts the public and the media—who are the watchdogs of ethical conduct—to that official's potential conflicts. "Mr. Speaker, is it not a fact that you own stock in this company you are proposing to award this contract to?" Oh-oh. Therefore, the financial disclosure requirements *must* be tied to the code of ethics. Requesting information that cannot reveal any possible violation of the ethics law just gums up the works, treats public servants like criminals, and engenders justified resentment by filers.

Drafting a sensible annual disclosure form is simple. There are just three rules. First, as noted, the disclosure form must be tied *directly* to the municipal code of ethics, that is, it must ask *only* those questions that may reveal a potential, significant violation of the ethics code. Second, therefore, creating an annual disclosure form is an exercise in zero-based drafting: one begins with a blank sheet of paper and asks *only* those questions that may reveal a potential, significant violation of the ethics code. Third, one must never let the perfect be the enemy of the good. A properly drafted, short and simple annual disclosure form will reveal 95% of the potential conflicts of interest. Doubling the size of the form in an attempt to squeeze out another 3% will make the form far more intrusive, with TMI. If in doubt, leave it out.

These rules also mean that no need exists for an annual disclosure form to ask the *amount* of any interest. An annual disclosure form should contain no amounts or even categories of amounts. Whether the conflict is a $10,000 one or a $10 million one, it is still a conflict and still prohibited. Once the disclosure form is tied to the ethics code, amounts become irrelevant. By contrast, information about the interests of a filer's spouse *is* significant because a financial benefit to one spouse almost always benefits the other spouse. So, too, the employer, business, and local real estate interests of immediate family members become significant if the ethics code prohibits—as any good ethics code will prohibit—the filer from taking an action that would benefit one of those interests where doing so impermissibly benefits the family member. This information should not only be disclosed to the ethics board but should also be public (as NYS law in fact requires[5]), although

(continued on page 42)

Letter from the Editors

The pieces in the *Municipal Lawyer*, like many of the discussions on the Section's listserv and at our programs, are part of a discourse. As a verb, "discourse" means to speak or write authoritatively about a topic, and our authors certainly do that.

But, as a noun, a discourse is a communication or debate that has its roots in the *process of reasoning*—which is what the term discourse in Late Middle English denoted. Far from solitary or static, this process is recursive and enhanced by argument. Indeed, the Oxford Dictionaries explain that the Old French *discours* and Latin *discursus* literally meant "running to and fro"—clearly denoting the dynamic action involved in the reasoning that underlies authoritativeness. So, we encourage you to pick up your pen (or sit down at your keyboard) and run to and fro with us. In doing so, you will enhance the discourse that is the foundation of our community.

Your options to contribute are varied. We encourage you to respond to any of the pieces in this and other issues of the *Municipal Lawyer*. The message from our Outgoing Chair Mark Davies and our new regular feature, the Ethics Quiz, specifically ask for questions or comments, including those expressing disagreement with the analyses.

In another regular feature, the Land Use Law Update, Sarah Adams-Schoen has provided a summary of land use and zoning opinions from New York courts from the first half of 2015, any of which could be fodder for a more lengthy and nuanced analysis. Or, if you're itching to write a Land Use Law Update yourself, just get in touch. She is happy to share the pen.

Of course, you could also write a more traditional article or an update on any topic relevant to municipal law practitioners. In this issue, Karen Richards helps us stay on our toes by contributing another thorough analysis of a shift in New York law—this time focusing on the December 2014 New York Court of Appeals decision in *Gammons v. City of New York,* in which the Court addressed the issue of whether Labor Law § 27-a(3)(a)(1) of the Public Employee Safety Health Act sets forth an objective clear legal duty that may serve as a predicate for a claim under the statutory exception to the firefighter's rule.

In her article, Natalie Behm analyzes another 2015 New York Court of Appeals decision. As she explains, in *People v. Diack* the Court resolved an issue that has generated significant litigation over restrictive local residency laws for registered sex offenders. Putting *Diack* into the context of New York's home rule, the doctrine of preemption, and New York's sex offender legislation, Behm's examines how the Court of Appeals applied preemption principles to declare the local law at issue in the case unconstitutional.

Lisa Cobb brings us up to date on the most recent chapter in the long and tortured saga of *Troy Sand & Gravel Co. v. Town of Nassau*, a case involving nine reported decisions, as well as unreported judicial determinations, each representing the Town's efforts to challenge the Department of Environmental Conservation's (DEC) findings as to the environmental impacts of a proposed commercial mining operation. As Cobb explains, the Third Department weighed in with a decision in February of this year, reaffirming that, as an interested agency, the Town was permitted to make its own findings under the State Environmental Quality Review Act; nonetheless the Town's environmental determination had to be based upon, and was constrained by, the record developed by DEC as lead agency.

Keeping us abreast of yet another recent shift in the law, Daniel M. Lehmann analyzes the significance of a Fourth Department decision that has created a split in the Appellate Division concerning the RPTL § 727(1) automatic three-year tax assessment freeze after reducing a tax assessment.

Thomas Schweitzer provides a thoughtful and detailed analysis of an important case involving the free speech rights of government employees—*Lane v. Franks*, which the U.S. Supreme Court decided near the end of its 2013-14 term. The Court ruled in *Lane* in favor of a public official who claimed that he had been fired in retaliation for testifying about corruption on the part of an employee in his community college program. As Schweitzer explains, the Court overruled the Eleventh Circuit's grant of summary judgment on the First Amendment claim, reasoning that it would be "antithetical to our jurisprudence" to hold that the speech necessary to prosecute corruption by public officials might never form the basis of a retaliation claim; to hold otherwise, the Court explained, would have the perverse effect of facilitating reprisals against "whistle blowers" while tending to shield public employee

wrongdoers from apprehension and punishment for their offenses.

Of course, the section's members also contribute to the discourse through presentations at programs sponsored by the section, as you can see from the summary (and photos) of the Annual Meeting, active involvement in committees, and many other forms of service—any of which could be the topic for an article or update.

To contribute to this impressive discourse, please contact us by email (sadams-schoen@tourolaw.edu and rcitron@tourolaw.edu). The submission deadlines for the upcoming issues are:

Fall 2015: Sept. 15

Winter 2016: Dec. 15

Spring 2016: Mar. 15

We look forward to hearing from you.

Sarah Adams-Schoen & Rodger D. Citron

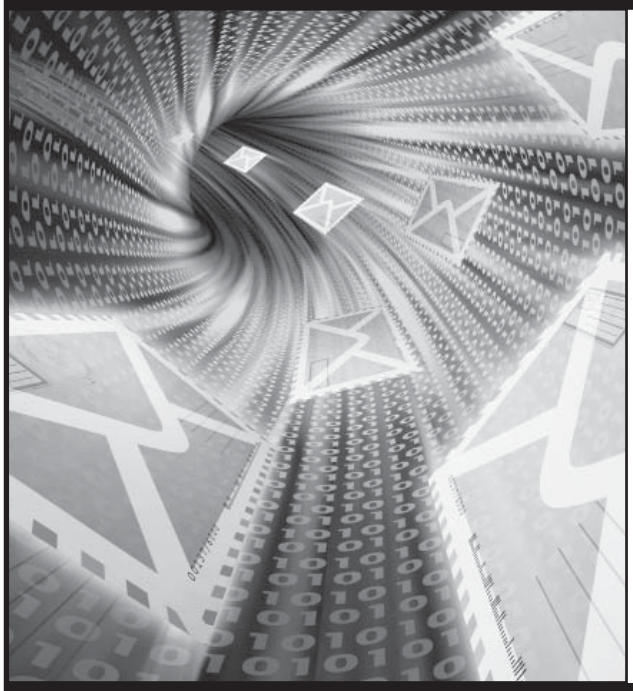
Government Ethics Quiz

Sponsored by the Section's Ethics and Professionalism Committee

Q A town board member and a local developer are longtime 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. Is the cost of the birthday celebration a prohibited gift to the town board member?

Answer and analysis on page 17

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of the *Municipal Lawyer* Co-Editors:

Prof. Rodger D. Citron
Touro Law Center
225 Eastview Dr., Room 413D
Central Islip, NY 11722-4539
(631) 761-7102
rcitron@tourolaw.edu

Prof. Sarah Adams-Schoen
Touro Law Center
225 Eastview Dr., Room 411D
Central Islip, NY 11722-4539
(631) 761-7137
sadams@tourolaw.edu

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

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Extinguishing the Firefighter's Rule

By Karen M. Richards

I. Introduction

The firefighter's rule, which bars firefighters and police officers from commencing a common-law negligence claim for injuries sustained on duty, has been extinguished by various legislative actions, such as sections 205-a and 205-e of the General Municipal Law. These statutes ameliorated the harsh effects of the firefighter's rule and created a statutory cause of action for firefighters and police officers who, while in the line of duty, are injured as a result of violations of statutes or regulations.

As a prerequisite to recovery under §§ 205-a and 205-e, a plaintiff "must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation" that "imposes clear duties."[1] In December 2014, in *Gammons v. City of New York,* the Court of Appeals addressed the issue of whether Labor Law § 27-a(3)(a)(1) of the Public Employee Safety Health Act sets forth an objective clear legal duty that may serve as a predicate for a claim under § 205-e of the General Municipal Law.[2]

This article provides a history of the firefighter's rule and summarizes *Gammons*.

II. Rationale for the Firefighter's Rule

Traditionally, "firefighters injured in the line of duty could not recover against the property owners or occupants whose negligence occasioned the fire emergency to which they were responding."[3] This longstanding common-law doctrine was premised on the idea that public firefighters, "as licensees entering upon the land, took the property as they found it."[4]

This initial premise was undermined when the Court of Appeals in *Basso v. Miller* abandoned the common-law distinctions between a trespasser, invitee, or licensee—distinctions which determined the duty of care the owner or occupier of land owed the plaintiff—and adopted a single standard of reasonable care.[5] After *Basso*, courts, when applying the firefighter's rule, relied on the doctrine of assumption of risk, which recognizes that persons who accepted employment as firefighters assumed the risks of fire-related injuries, including the risk that property owners and occupants may negligently maintain their premises.[6]

More recently, justification for the firefighter's rule is grounded on the public policy that firefighters are well-trained professionals hired specifically to confront dangerous situations often caused by someone's negligence:[7]

> [M]unicipalities employ firefighters precisely because special skills and expertise are required to confront certain hazards—usually of an emergency nature—that expose the public to danger, these hazards often arise from negligence, and as a matter of public policy firefighters trained and compensated to confront such dangers must be precluded from recovering damages for the very situations that create a need for their services.[8]

Today, the firefighter's rule provides that "police and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment."[9] Recovery is barred "when the performance of [the police officer's or firefighter's] duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury."[10] As explained in *Zanghi v. Niagara Frontier Transportation Commission*:

> [W]here some act taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury, he or she may not recover damages for common-law negligence. By contrast, a common-law negligence claim may proceed where an officer is injured in the line of duty merely because he or she happened to be present in a given location, but was not engaged in any specific duty that increased the risk of receiving that injury.[11]

III. Legislative Erosion of the Firefighter's Rule

General Municipal Law §§ 205-a and 205-e

In the past eight decades, the legislature "has been clear, consistent and undoubtedly in the direction of doing away with the firefighter's rule."[12] Beginning in 1935, it "opened a narrow passageway" around the firefighter's rule and mitigated its harsh effects by enacting General Municipal Law § 205-a, which created a

cause of action where none previously existed.[13] "That provision, in relevant part unchanged to this day, creates a cause of action for firefighters who, while in the line of duty, are injured as a result of violations or regulations."[14]

As indicated by its name, the rule applied only to firefighters, but in 1988, the rule was extended to police officers.[15] In *Santangelo v. State of New York*, the Court found that the public policy considerations barring firefighters injured in the line of duty from recovery were equally relevant to police officers injured in the line of duty.[16]

> Like firefighters, police are the experts engaged, trained and compensated by the public to deal on its behalf with emergencies and hazards often created by negligence, and like firefighters they generally cannot recover damages for negligence in the very situations that create the occasion for their services…. Nor are police officers left unprotected by such a rule. They receive both training that enables them to minimize the dangers their occupation requires them to face, and compensation and special benefits to help assure that the public will bear the costs of injuries suffered by its protectors in the line of duty.[17]

By extending the firefighter's rule to police officers, *Santangelo* brought to light the fact that firefighters had a statutory right to recover for injuries sustained in the line of duty, whereas police officers did not. As one senator commented:

> The absence of a law to protect the policemen is totally unfair where for the last fifty years the firefighters have had a statute to protect them.
>
> If a fireman and a policeman are in a burning building together and both are injured by a defect in violation of code, the fireman is able to recover for his damages while the policeman is not. This situation is not tolerable.[18]

The legislature acted swiftly to rectify the inequity between firefighters and police officers.[19] In 1989, it enacted § 205-e of the General Municipal Law, which brought "police officers into parity with firefighters" by affording them "the same limited exception to the common-law rule that had been made available to firefighters."[20]

Both statutes have been amended several times, primarily to abrogate restrictive judicial interpretations.[21] For example, in 1992, § 205-e was amended "in response to court decisions that restricted a police officer's cause of action under General Municipal Law § 205-e to situations where their injuries resulted from 'violations pertaining to the safe maintenance and control of premises.'"[22] The legislature concluded:

> [T]he duties of our state's police officers are performed in a variety of contexts and…the liability imposed pursuant to chapter 346 of the laws of 1989 should not be limited to violations pertaining to the safe maintenance and control of premises. Since our police officers are required to confront dangerous conditions under many and varied circumstances, there is a need to ensure that a right of action exists regardless of where the violation causing injury or death occurs.[23]

The 1992 amendment to § 205-e added the words "at any time or place" to clarify that a cause of action was not limited to premise-based liability.[24] However, because the 1992 amendment did not add similar language to § 205-a of the General Municipal Law, courts "inferred that the Legislature has decided to retain the traditional premises-base [sic] liability under the General Municipal Law § 205-a right of action for firefighters."[25] The legislature responded to this inference in 1996 by amending § 205-a to include "at any time or place," thus extending to firefighters the same protection police officers enjoyed.[26]

The 1996 amendment also added a new subdivision (3) to both §§ 205-a and 205-e to permit liability regardless of whether the injury or death is caused by the violation of a provision that codifies a common-law duty.[27] The addition of this subdivision "constituted another rejection of a judicial decision holding otherwise."[28] Specifically, this subdivision provides:

> This section shall be deemed to provide a right of action regardless of whether the injury or death is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury or death is caused by the violation of a provision prohibiting activities or conditions which increase the dangers already inherent in the work of any officer, member, agent or employee of any [fire department or police department].[29]

Notably, the legislature did not provide a categorical exemption in favor of municipalities in any of the amendments to §§ 205-a and 205-e. In *Gonzalez v. Iocovello*, the Court rejected the city's urging that General Municipal Law § 205-e precluded lawsuits derived from the conduct of fellow officers, stating

"had the Legislature chosen to insert a fellow officer lawsuit block, it had many opportunities to do so over the course of its virtual biennial amendments to the statute—all designed, notably, to benefit officers and to preserve their opportunities for redress in the courts."[30] Thus, police officers and firefighters can assert a tort claim against a public employer or fellow employee when bringing a cause of action under §§ 205-a or 205-e of the General Municipal Law.

General Obligations Law § 11-106

When the legislature amended §§ 205-a and 205-e of the General Municipal Law in 1996, it simultaneously created § 11-106 of the General Obligations Law.[31] "Courts regularly refer to General Obligations Law § 11-106(1) as the 'fireman's rule' and, as amended, General Obligations Law § 11-106(1) is applied only in actions against a police officer's or firefighter's employer or co-employee."[32]

This statute was enacted to provide an "umbrella of protection" to injured firefighters and police officers while, at the same time, protecting municipalities from liability.[33] While the statute largely abolishes the firefighter's rule by creating a distinct right of action for police officers and firefighters injured by the negligence or intentional conduct of any person, it contains an employer and co-employee block. Barring suits against employers and co-employees reflected a concern for the "fiscal consequences for municipalities" and "additional costs that would be imposed upon municipal employers through liability awards" against it or municipal co-employees.[34] It also reflected a concern that authorizing suits against fellow police officers and firefighters carried "the potential for impairing discipline and the teamwork values that are vital to effective firefighting and law enforcement."[35]

IV. Labor Law § 27-A Provides a Clear Legal Duty Expressed in a Well-Developed Body of Law and Regulation

A statutory predicate for a cause of action under §§ 205-a and 205-e of the General Municipal Law must "be found in a well-developed body of law and regulation that imposes clear duties."[36] In *Gammons v. City of New York*, Officer Allison Gammons claimed she was entitled to recover under Labor Law § 27-a(3)(a)(1) for injuries she sustained in the line of duty when she fell from an improperly equipped police flatbed truck.[37] The Court of Appeals, in a 4-2 decision, concluded that Labor Law § 27-a(3)(a)(1) of the Public Employee Safety Health Act (PESHA) "sets forth an objective clear legal duty that may serve as a proper predicate for a claim under General Municipal Law § 205-e."[38]

PESHA was enacted in 1980 by the legislature "to provide public employees with the same or greater workplace protections provided to private employees under the federal Occupational Safety and Health Act (OSHA)."[39] With respect to the enactment of Labor Law § 27-a, the Memorandum of the Assembly Rules Committee stated that working in an environment that is free from hazards and risks was a basic right of all employees.[40] "This right should not only be granted to private employees, but to public employees as well… Many of these public employees perform job functions comparable to those performed by workers in the private sector who are protected by the United States Occupational Safety and Health Act."[41]

"The provisions in PESHA are modeled on OSHA" and "[i]n fact, New York State has adopted OSHA's workplace safety standards. These regulations cover a broad spectrum of safety issues."[42] The majority in *Gammons* thus concluded that PESHA, like OSHA, has an established regulatory scheme.

Section 27-a(3)(a)(1) of the Labor Law requires employers to:

> furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees.[43]

Although acknowledging that § 27-a(3)(a)(1) is a general duty clause, the majority nevertheless found it is sufficiently clear to provide a basis for determining liability. To support its decision, the majority relied on prior Court decisions, *Gonzalez v. Iocovello* (where the Court held that Vehicle & Traffic Law § 1104(e) could serve as a predicate for liability because it did not absolve operators of emergency vehicles of liability for "reckless disregard for the safety of others") and *Cosgriff v. City of New York* (where the Court held that sections of the New York City Charter and Administrative Code of City of New York concerning repairs of defective sidewalks could serve as a predicate for GML § 205-e liability):

> Notably, as in *Gonzalez*, the standard is set forth in a statute, here in PESHA, in *Gonzalez*, in VTL § 1104. Also, the mandate that employers provide a workplace 'free from recognized hazards' sets a standard at least as sufficient to define the duty of care as the 'reckless disregard' duty of care incorporated into VTL § 1104, which we referenced approvingly in *Gonzalez*.[44]

According to the majority, its decision was also supported by *Williams v. City of New York*, where the

Court "left open the question of whether PESHA may serve as a statutory predicate to a GML § 205-e cause of action, deciding only that the *Williams* plaintiffs failed to establish a violation of Labor Law § 27-a because that provision 'does not cover the special risks faced by police officers because of the nature of police work.'"[45] The majority found Officer Gammons' claim that she suffered a line-of-duty injury involving an improperly equipped police truck was "strikingly similar to the claim in *Balsamo* [*v. City of New York*], not like the special risks faced by the police officers in *Williams*."[46]

In *Williams*, a prisoner was placed alone in the detective squad's locker room, which doubled as a detention area. Although he was handcuffed, the prisoner managed to remove a service revolver from one of the lockers and conceal it on himself, and while being transported to Rikers Island Correctional Facility, he shot and killed two detectives. In holding that Labor Law § 27-a(3)(a)(1) did not cover the special risks faced by police officers because of the nature of police work, the *Williams* Court stated it was "highly unlikely that the Legislature intended the general language of section 27-a to authorize Department of Labor inspectors enforcing PESHA to second-guess the decisions of police supervisors on" "how police officers should use and store their weapons and ammunition; how much security should be provided when prisoners are transported; and where and under which conditions prisoners should be detained."[47]

"As a point of clarity," the *Williams* Court contrasted *Williams* to *Balsamo,* where a police officer was injured in his patrol car when his left knee allegedly came into contact with a sharp protruding edge of an unpadded computer console mounted on the patrol car's floor.[48] In *Williams*, the Court stated:

> Arguably, under the facts in *Balsamo*, section 27-a applies because PESHA is designed to prevent the type of occupational injury that occurred when the officer was given an improperly equipped vehicle. The injury in *Balsamo* did not arise from risks unique to police work. By contrast, the 'occupational' injury the officers sustained here was death at the hands of a prisoner. Important as it is to prevent such tragedies, we rely on the judgment of those supervising the Police Department to do so—not on the regulation and oversight by the Commissioner of Labor.[49]

Thus, according to the majority, "*Williams* suggested that given the proper circumstances, PESHA could certainly serve as a predicate to a GML §205-e suit."[50]

Judge Pigott, writing for the dissent, disagreed with the majority's reliance on *Gonzalez* and *Cosgriff*, as the provisions in those cases "were plainly more specific and set forth legal duties that were more clear than section 27-a(3)(a)(1)'s requirement that employers provide a safe workplace."[51]

> In each of those cases, we were asked to examine laws or regulations that dealt with clear legal duties, whereas, in contrast, although the general duty clause here may impose some abstract 'duty' to provide a safe workplace, it could hardly be said that it is the type of 'clear legal duty' mentioned in *Williams*.
>
> That does not mean, however, that a police officer or firefighter could never utilize Labor Law § 27-a(3)(a)(1) as a predicate, only that in order to do so, they should be required to cite to a specific regulation that they claim was violated.[52]

In Judge Pigott's view, "the plaintiff should also be required to cite at least one of the hundreds of thousands of regulations either adopted or promulgated by the Commissioner of Labor." He noted that Officer Gammons' had done so by citing an OSHA provision, in addition to her claim under the Labor Law general duty clause.[53] Judge Pigott would have remanded the case to the Supreme Court to consider the applicability of this regulation to the plaintiff's cause of action under section 205-e of the General Municipal Law.

V. Conclusion

The majority's decision in *Gammons* casts aside any doubt as to whether the general duty clause of the Labor Law may serve as a predicate for a claim brought pursuant to the General Municipal Law. However, this decision opens the door to more claims being brought by firefighters and police officers under sections 205-a and 205-e of the General Municipal Law.

Judge Pigott's reasonable and practical approach of requiring injured firefighters and police officers to point to at least one of the hundreds of thousands of Labor Law regulations, which their public employers allegedly violated, would further the statutes' legislative goals of offering an umbrella of protection for police officers and firefighters. At the same time, it would not impose upon municipal employers the onerous duty of furnishing a workplace free of unspecified hazards.

Perhaps the legislature, rather than amending the statutes to abrogate restrictive judicial interpretations, as it has in the past, should pass an amendment to overrule *Gammons*' expansive interpretation.

Endnotes

1. *Galapo v. City of New York*, 95 N.Y.2d 568, 574, 721 N.Y.S.2d 857, 860 (2000) (citations omitted).
2. Courts have interpreted the two statutes interchangeably, and, therefore, it is likely that the same reasoning applies to General Municipal Law (GML) § 205-a. *See, e.g., Cusumano v. City of New York*, 15 N.Y.3d 319, 326, 910 N.Y.S.2d 410, 413 (2010); *Clark v. DeJohn*, 164 Misc. 2d 107, 109, 623 N.Y.S.2d 727, 728 (Sup. Ct., Cayuga Co. 1995); *Walters v. City of New York*, 2009 WL 1395829, at *5 n.1, 23 Misc. 3d 1127(A), 889 N.Y.S.2d 884 (Sup. Ct., N.Y. Co. 2009).
3. *Desmond v. City of New York*, 88 N.Y.2d 455, 462, 646 N.Y.S.2d 492, 495 (1996).
4. *Basso v. Miller*, 40 N.Y.2d 233, 239, 386 N.Y.S.2d 564, 567 (1976).
5. *Zanghi v. Niagara Frontier Transp. Comm'n*, 85 N.Y.2d 423, 439, 626 N.Y.S.2d 23, 47 (1995) (citation omitted).
6. *Id*.
7. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 76, 760 N.Y.S.2d 397, 400 (2003).
8. *Santangelo v. State of New York*, 71 N.Y.2d 393, 397, 526 N.Y.S.2d 812, 815 (1988) (citation omitted), *superseded by statute as stated in Gammons v. City of New York*, 24 N.Y.3d 562, 568, 2 N.Y.S.3d 45, 48-49 (2014).
9. *Zanghi*, 85 N.Y.2d at 436.
10. *Id*.
11. *Id*. at 439-440.
12. *Giuffrida*, 100 N.Y.2d at 76.
13. *Id*. at 77 (citing 1935 N.Y. Laws ch. 800, § 2).
14. *Id*. GML § 205-a(1), as amended, provides, in pertinent part:

    > In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place imposed by the fire commissioner, fire chief or other superior officer of the fire department….

15. *Santangelo v. State of New York*, 71 N.Y.2d 393, 397, 526 N.Y.S.2d 812, 815 (1988) (citation omitted), *superseded by statute as stated in Gammons v. City of New York*, 24 N.Y.3d 562, 568, 2 N.Y.S.3d 45, 48-49 (2014).
16. *Id.*
17. *Id*. at 397-98 (citations omitted).
18. *Weiner v. City of New York*, 84 A.D.3d 140, 144, 922 N.Y.S.2d 160, 163 (2d Dep't 2011), *aff'd*, 19 N.Y.3d 852 (2011) (quoting letter from Senator Skelos to the Governor's Counsel).
19. *Gammons v. City of New York*, 24 N.Y.3d 562, 2 N.Y.S.3d 45 (2014).
20. *Galapo v. City of New York*, 95 N.Y.2d 568, 573, 721 N.Y.S.2d 857, 859 (2000) (citations omitted); *see also Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 77, 760 N.Y.S.2d 397, 400 (2003) (recognizing extension of rule to police officers); Div. of Budget Report, Bill Jacket, 1989 N.Y. Laws ch. 346 (GML § 205-e "merely extends to on-duty police officers, a right already enjoyed by firemen and by the general public"). GML § 205-e(1), as amended, provides, in pertinent part:

    > In addition to any other right of action or recovery under any other provision of law, in the event of any accident, causing injury, death or disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any police department injured, or whose life may be lost while in the discharge or performance at any time or place of a duty imposed by the police commissioner, police chief or other superior officer of the police department….

21. *Gonzalez v. Iocovello*, 93 N.Y.2d 539, 548, 693 N.Y.S.2d 486, 494 (1999) (citations omitted).
22. *Giuffrida*, 100 N.Y.2d at 77 (quoting 1992 N.Y. Laws ch. 474, § 1 and citing *Sciarrotta v. Valenzuela*, 182 A.D.2d 443, 445, 581 N.Y.S.2d 351, 353 (1st Dep't 1992), and *Cooper v. City of New York*, 182 A.D.2d 350, 351, 582 N.Y.S.2d 394, 395 (1st Dep't 1992), *aff'd*, 81 N.Y.2d 584 (1993)).
23. 1992 N.Y. Laws ch. 474, § 1.
24. *Id*. § 2.
25. *Zanghi*, *v. Niagara Frontier Transp. Comm'n*, 85 N.Y.2d 423, 445, 626 N.Y.S.2d 23, 31 (1995); *see also Giuffrida,* 100 N.Y.2d at 78 ("[t]he practical effect of the 1992 legislation was to give police officers a broader cause of action than that available to firefighters"); 1992 N.Y. Laws ch. 583 (amending § 205-a but failing to add "at any time or place" or other similar language).
26. 1996 N.Y. Laws ch. 703, § 1 (adding "at any time or place" to § 205-a).
27. 1995 N.Y. Laws ch. 703, §§ 2, 4.
28. *Gammons v. City of New York*, 24 N.Y.3d 562, 569, 2 N.Y.S.3d 45 (2014) (citing *St. Jacques v. City of New York*, 215 A.D.2d 75 (1995), *aff'd*, 88 N.Y.2d 920 (1996) (holding that a statute which merely codified a common law duty could not form the basis for a GML § 205-e claim)).
29. GML § 205-a(3); GML § 205-e(3).
30. *Gonzalez v. Iocovello*, 93 N.Y.2d 539, 549, 693 N.Y.S.2d 486, 493 (1999).
31. 1996 N.Y. Laws ch. 703, § 5. GOL § 11-106 provides:

    > 1. In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.
    >
    > 2. Nothing in this section shall be deemed to expand or restrict the existing liability of an em-

ployer or co-employee at common-law or under sections two hundred five-a and two hundred five-e of the general municipal law for injuries or death sustained in the line-of-duty by any police officer or firefighter.

32. *Gammons*, 24 N.Y.3d at 562 n.1.
33. *Connery v. Cnty. of Albany*, 73 A.D.3d 198, 201, 898 N.Y.S.2d 298, 300 (3d Dep't 2010) (citation omitted).
34. *Grogan v. City of New York*, 259 A.D.2d 240, 243, 699 N.Y.S.2d 12, 15 (1st Dep't 1999); *see also Brinkerhoff v. Cnty. of St. Lawrence*, 24 Misc. 3d 426, 434 (Sup. Ct., St. Lawrence Co. 2009) (noting that the sponsor of the Senate bill stated, "section 11-106 would permit the injured party's employer to continue to assert the 'firefighter's rule' because of 'the current financial plight of the State's municipalities'" (citation omitted)), *aff'd*, 70 A.D.3d 1272 (2010); *Rodriguez v. County of Rockland*, 43 A.D.3d 1026 (2d Dep't 2007) (noting the legislature barred suits against a police officer's employer or co-employee for purpose of restricting the imposition of further financial burdens on municipalities); *Connery*, 73 A.D.3d at 202 (noting "the Governor had vetoed a prior version of the bill that would have completely abrogated the common-law firefighter's rule" (citation omitted)).
35. *Galapo v. City of New York*, 95 N.Y.2d 568, 573-74, 721 N.Y.S.2d 857, 860 (2000) (internal quotation marks and citations omitted).
36. *Id.*; *Williams v. City of New York*, 2 N.Y.3d 352, 364, 779 N.Y.S.2d 449, 454 (2004).
37. *Gammons*, 24 N.Y.3d at 562. The following provides a summary of the decisions of the Supreme Court, Kings County, and Appellate Division, Second Department, in *Gammons*. With respect to the common-law negligence claim, Officer Gammons claimed she was injured while loading wooden barriers onto a flatbed truck. She claimed the truck was unsafe for loading the barriers because it was too short, lacked a rear railing, and did not have room to safely hold two officers and the full length of the barriers. She contended that the City failed to provide her with one of its newer longer trucks that were equipped with tailgates. Gammons argued that the firefighter's rule did not bar her common-law negligence claim because the accident was caused by a mundane risk from performing work no different than work that would be performed by private and municipal workers and not the heightened risks associated with the particular dangers inherent in police work. The Supreme Court disagreed and granted the City's motion for summary judgment on the common-law negligence claim, finding Gammons was engaged in the specific police function of police barrier detail. *Gammons*, 30 Misc. 3d 1230(A), 924 N.Y.S.2d 309, Slip Op. 50286(U), at *3 (Sup. Ct., Kings Co. 2011). The Appellate Devision affirmed, stating, "[w]hile loading a flatbed truck may not be a task that is typically associated with police work, the alleged accident occurred while the plaintiff was on a police vehicle, loading police barriers, and while she was assigned to the barrier truck detail, a location and job detail to which she was exposed solely as a result of her duties as a police officer." *Gammons*, 109 A.D.3d 189, 195 (2d Dep't 2013) (citations omitted).

    With respect to Gammon's GML § 205-e claim, the Supreme Court denied the City's motion for summary judgment, rejecting the City's argument that Labor Law § 27-a was not a proper statutory predicate because it creates "solely an administratively enforceable standard and no private right of action." 924 N.Y.S.2d 309, at *4. The Appellate Division affirmed. While it agreed that Labor Law § 27-a(3)(a)(1) "imposed a general duty of care, that duty is nonetheless clear" and "[s]ince section 27-a provides an objective standard by which the actions or omissions of a public employer, such as the City, can be measured for purposes of liability, Labor Law § 27-a(3)(a)(1) can serve as a predicate for a section 205-e claim." 109 A.D.3d at 200.
38. *Gammons*, 24 N.Y.3d at 562. Judge Rivera wrote the majority's opinion with Chief Judge Lippman and Judges Smith and Abdus-Salaam concurring. Judge Pigott wrote the dissenting opinion with Judge Read concurring.
39. *Id*.
40. *Balsamo v. City of New York*, 287 A.D.2d 22, 26, 733 N.Y.S.2d 431, 435 (2d Dep't 2001) (citing 1980 N.Y. Legis. Ann., at 284-285).
41. *Id*. at 27 (citing N.Y. P.L. 91-596) (stating "Under Labor Law § 27-a (4) (a), the Commissioner of Labor is required to adopt all safety and health standards promulgated under OSHA. The language set forth in Labor Law § 27-a is not permissive, as it contains a specific mandate that public employers provide a safe workplace for its employees.").
42. *Id*.
43. *Gammons*, 109 A.D.3d 189, 199, 972 N.Y.S.2d 559, 570 (2d Dep't 2013) (citing Labor Law § 27-a(3)(a)1)).
44. *Gammons*, 24 N.Y.3d at 562 (discussing *Gonzalez v. Iocovello*, 93 N.Y.2d 539 (1999), and *Cosgriff v. City of New York*, 93 N.Y.2d 539 (1999)).
45. *Id.* at 573 (citing *Williams v. City of New York*, 2 N.Y.3d 352, 368 (2004)).
46. *Id.*
47. *Williams*, 2 N.Y.3d at 368.
48. *Id.* (citing *Balsamo v. City of New York*, 287 A.D.2d 22 (2d Dep't 2001) (finding a violation of Labor Law § 27-a constituted a sufficient predicate for a claim pursuant to General Municipal Law § 205-e)).
49. *Id.*
50. *Gammons*, 24 N.Y.3d at 572-73.
51. *Id.* at 572.
52. *Id.* at 576 (Pigott, J., dissenting). Judge Pigott would employ the same analysis to the claims made under the general duty clause that the Court employs when analyzing a Labor Law § 241(6) cause of action. In a section 241(6) cause of action, which is routinely brought by construction workers against contractors and owners, the workers are required to identify the specific rule or regulation promulgated by the Commissioner of Labor that the contractor or owner allegedly violated. The rule or regulation alleged to have been violated must be a "specific" and "positive command" rather than a mere reiteration of a common law standard of care that would do little more than incorporate "the ordinary tort duty of care into the Commissioner's regulations."
53. Officer Gammons asserted that the defendants violated OSHA provision 29 C.F.R. § 1910.23(c)(1), which provides:

    > Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
    >
    > (i) Persons can pass,
    >
    > (ii) There is moving machinery, or
    >
    > (iii) There is equipment with which falling materials could create a hazard.

Karen M. Richards is an Associate Counsel with the Office of General Counsel, State University of New York. The views expressed are her own and do not necessarily represent the views of the State University of New York or any other institution with which she is or has been affiliated.

Sex Offenders, Restrictive Local Residency Laws, and State Law Preemption: An Examination of the Court of Appeals' Recent Decision in *People v. Diack*

By Natalie Behm

In a recent decision, *People v. Diack*,[1] the New York Court of Appeals resolved an issue that has generated significant litigation over local residency laws for registered sex offenders. Municipalities from all over the state have enacted laws restricting sex offenders from living in close proximity to schools, parks, and various community areas where children are likely to gather. These local laws, known as restrictive local residency laws, have been frequently challenged due to the fact that they often impose stricter residency requirements on sex offenders than state laws. In many cases, New York courts have held that such restrictive local laws are in direct conflict with state regulation of sex offender residency, and are therefore preempted by state law.[2] This article will first provide a brief background on New York's home rule, the doctrine of preemption, and New York's sex offender legislation. Then, the article will discuss a local law at issue in *People v. Diack* and how the Court of Appeals applied preemption principles to declare the local law unconstitutional.

The Home Rule Law and the Doctrine of Preemption

The Municipal Home Rule Law grants to municipalities the power to legislate in a wide range of local matters.[3] While New York's constitutional home rule confers broad police power upon local governments relating to the welfare of its citizens, the preemption doctrine limits the exercise of that power by requiring local laws to be consistent with the state constitution and any general law.[4] In effect, the preemption doctrine operates as a "fundamental limitation" on a municipality's home rule powers by recognizing the state's ultimate primacy to legislate with respect to matters of state concern.[5]

There are two general types of preemption: conflict preemption and field preemption. Conflict preemption occurs when a local government enacts a law in direct conflict with a state law.[6] Field preemption, by contrast, occurs when a local government legislates in a field for which the state legislature has assumed full regulatory responsibility.[7] In cases of field preemption, any local law related to the same subject matter is considered to be inconsistent with state law, regardless of whether or not the local law actually conflicts with the statute.[8] As the Court of Appeals declared, "such local laws, were they permitted to operate in a field preempted by state law, would tend to inhibit the operation of the state's general law and thereby thwart the operation of the state's overriding policy concerns."[9] Field preemption need not be express. Intent to preempt the field may be implied from a history of state legislation pertaining to the particular subject matter, the need for statewide uniformity in a given area, or by the existence of a "comprehensive, detailed statutory scheme."[10]

New York State Sex Offender Legislation

In 1996, the New York State Legislature enacted a comprehensive sex offender management scheme—the Sex Offender Registration Act (SORA).[11] The purpose of SORA is to provide both law enforcement and citizens with information about sex offenders residing in their communities and to assess the likelihood of an offender's risk of recidivism.[12] These registration and community notification requirements are applicable statewide.[13] Pursuant to SORA, offenders are required to register as sex offenders within their communities and receive penalties for failure to register.[14] The individual is assigned a level of notification—level one, two, or three—each designation corresponding to a predicted likelihood of reoffending.[15] Level one sex offenders have been determined to be the least likely to reoffend.[16]

In 2000, the New York legislature enacted the Sex Assault Reform Act (SARA).[17] This Act amended New York Penal Law § 65.10 by prohibiting sex offenders on probation, conditional release or on parole from entering school grounds.[18] Subsequently, the legislature expanded the definition of "school grounds" to include, "[a]ny area accessible to the public located within one thousand feet of the real property boundary line comprising any such school."[19] This expansive definition makes it impossible for any sex offender on probation, conditional release or on parole to reside within one thousand feet of a school, thereby creating a state-imposed residency restriction.[20]

After the enactment of SARA, the legislature continued to amend and create new laws with respect to the management and monitoring of sex offenders in New York. For example, in 2007 the state enacted the

Sex Offender Management Treatment Act (SOMTA), which provides for either the confinement of sex offenders in treatment facilities or intensive supervision after release from incarceration.[21] Additionally, the legislature passed chapter 568 of the Laws of 2008, which directed the Division of Probation and Correctional Alternatives, the Division of Parole, and the Office of Temporary and Disability Assistance to investigate and approve the residences of sex offenders.[22] Further regulations were promulgated pursuant to Executive Law § 243(4), Correction Law § 203(1) and Social Services Law § 20(8)(a) and all concern housing resources for sex offenders.[23] These statutes and regulations acknowledge that the management and housing of convicted sex offenders has been, and continues to be, a matter that must be addressed by the state through the enactment of coordinated and detailed legislation.

People v. Diack

The defendant, Michael Diack, served twenty-two months in prison following a 2001 conviction for possession of child pornography.[24] Upon release, Diack was classified as a level-one sex offender under SORA.[25] After completing his probation in 2004, Diack moved to a home located within 500 feet of a Nassau County school.[26] Soon thereafter, Nassau County notified Diack that he had violated Nassau County Local Law No. 4-2006, which prohibited *any* registered sex offender—regardless of whether the offender has been labeled level one, two, or three—from living within 1000 feet of a school.[27] When Diack refused to relocate, he was charged with violating the local law.[28]

Diack challenged the charges in court, and the District Court of Nassau County dismissed them on the basis of preemption.[29] The court found that the local law was preempted by the state's "comprehensive statutory scheme to manage and monitor sex offenders."[30]

The Appellate Term reversed and reinstated the charges against Diack, finding no conflict between the local law and state residency restrictions.[31] It reasoned that New York Penal Law § 65.10 (4-a) only imposed residency restrictions upon level three sex offenders or upon convicted sex offenders by prohibiting them from residing within 1000 feet of a school as a condition to probation or conditional discharge.[32] Diack's classification as a level one sex offender carried no state-imposed residency restriction under SORA.[33] Further, Diack had completed probation and was under no supervision imposed by state law.[34] The Appellate Term concluded that, under this set of facts, SORA created an opening for local governments to enact laws restricting the residency of sex offenders, when as in the case of Diack, they are not on parole, probation, subject to conditional discharge or seeking public assistance.[35]

The Court of Appeals reversed, holding that the state's comprehensive statutory and regulatory framework concerning registered sex offenders demonstrates an intent to occupy the field, thus preempting the enactment of local laws concerning the same subject matter.[36] The court began its discussion by reiterating the principles of preemption. It then found SORA, SARA, SOMTA and various regulations to be compelling evidence of the state's intent to occupy the field of sex offender management.[37] According to the court, local laws like the law passed in Nassau County "encroach upon the State's occupation of the field" and "inhibit the operation of the State's general law and thereby thwart the operation of [this] State's overriding policy concerns."[38] Most importantly, local residency restriction laws "hinder statewide uniformity concerning sex offender placement" and frustrate the state policy that all communities must share in the burden of housing sex offenders.[39] Although none of the applicable statutes or regulations applied to Diack, this did not mean, as the Appellate Term had concluded, that the state delegated to local governments the duty of enacting additional or harsher residency restrictions. Rather, the Court of Appeals carefully reviewed SORA, SARA, chapter 568, and SOMTA, and concluded that "the state has been continuously active in this field, and as such, it is evident that the state has chosen to occupy it."

Conclusion

SORA, SARA, chapter 568, SOMTA, and the regulations promulgated pursuant to these statutes are all pieces of a "detailed and comprehensive regulatory scheme" designed by the state legislature to monitor and manage registered sex offenders. By passing such laws, the legislature has made its intent unmistakably clear: the management of sex offenders in New York lies within the exclusive province of the state. While municipalities generally may enact legislation pursuant to their delegated police powers, residency restriction laws such as Nassau County, N.Y. Local Law 4-2006 intrude upon the state's occupation of the field by inhibiting the operation of the state's general law. Practitioners should continue to be aware that certain local or municipal laws may indeed be preempted by state law, and that in order to determine whether a preemption issue exists, one must look to the purpose and scope of the state legislative scheme, the nature of the subject matter being regulated, and the need for statewide uniformity in a particular field.

Endnotes

1. 24 N.Y.3d 674, 3 N.Y.S.3d 296 (2015).
2. *See, e.g.*, *Terrance v. City of Geneva*, 799 F. Supp. 2d 250 (W.D.N.Y. 2011) ("[T]he New York State Legislature has enacted a comprehensive and detailed regulatory scheme regarding the registration and regulation of sex offenders, preempting local legislation on this subject.").
3. *See* N.Y. Mun. Home Rule § 10(1).

4. *See* N.Y. CONST. art. IX, § 2(c) ("In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution* or any general law.") (emphasis added).
5. *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629 (1989).
6. *Id.*
7. *See Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107 (1983); *see also People v. Kramer*, 45 Misc. 3d 458, 994 N.Y.S.2d 256 (2014).
8. *Albany Area Builders*, 74 N.Y.2d at 377.
9. *Id.*
10. *Id.*
11. *See* N.Y. CORRECT. LAW §§ 168-f, 168-j.
12. *Diack*, 24 N.Y.3d at 680.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Diack*, 24 N.Y.3d at 681.
18. *Id*; *see also* N.Y. PENAL LAW § 65.10.
19. N.Y. PENAL LAW § 220.00 (14)(a), (b).
20. *Diack*, 24 N.Y.3d at 682.
21. *Id.* at 685.
22. *Id.* at 682.
23. *Id.* at 683.
24. *Diack*, 24 N.Y.3d at 677-78.
25. *Id.* at 677-78.
26. *Id.* at 678.
27. *Id*; *see also* Nassau Cty. Admin. Code § 8-130.6 (a)(1), (2) ("[I] t shall be unlawful for any registered sex offender to establish a residence or domicile…within: (1) one thousand feet of the property line of a school; or (2) five hundred feet of the property line of a park." *Id.* The code defines a "registered sex offender" as "a person who has been classified as a Level 1, Level 2 or Level 3 sex offender and who is required to register with the New York state division of criminal justice services, or other agency having jurisdiction," pursuant to the Sex Offender Registration Act, regardless of whether the sex offender has actually registered. *Id.* at § 8-230.2.
28. *Diack*, 24 N.Y.3d at 678.
29. *Id.*
30. *Id.*
31. *People v. Diack*, 41 Misc.3d 36, 38, 974 N.Y.S.2d 235, 237 (2d Dep't 2013), *rev'd*, 24 N.Y.3d 674, 3 N.Y.S.3d 296 (2015).
32. *Diack*, 41 Misc.3d at 38.
33. *Id.*
34. *Id.*
35. *Id.* at 39.
36. *Diack*, 24 N.Y.3d at 680.
37. *Diack*, 24 N.Y.3d at 685.
38. *Id.* at 686.
39. *Id.*

Natalie Behm graduated from Touro Law Center in 2008 and has practiced primarily in the area of family law.

As an "Involved Agency," Independent SEQRA Findings Are Limited

By Lisa M. Cobb

In 2003, a long and tortured history began when Troy Sand & Gravel Company, Inc. ("Troy Sand & Gravel") applied for a mining permit from the Department of Environmental Conservation (DEC) to operate a quarry on a 214-acre parcel of land in the Town of Nassau, Rensselaer County, New York (the "Town").[1] The property was located in the Town's "rural residential" district, which permitted commercial mining by special use permit and subject to site plan review.[2] Troy Sand & Gravel first submitted its applications to the Town in 2004.[3] Now, more than ten years later, the Town still has not completed its review of these applications.

For the past decade, the legal and procedural analysis of the proposed quarry by the Town has focused largely on environmental issues, notwithstanding the fact that the DEC concluded its environmental review and granted the quarry's operators a permit in 2007. There are nine reported decisions in this matter, as well as unreported judicial determinations, each representing the Town's efforts to challenge the DEC's findings and assert greater environmental control over the proposed project within its borders.[4]

The most recent chapter of this saga was written by the Appellate Division, Third Department in February of this year when the court reaffirmed that, as an interested agency, the Town was permitted to make its own findings under the State Environmental Quality Review Act (SEQRA).[5] However, the court concluded that the Town's environmental determination had to be based upon, and was constrained by, the record developed by the DEC as lead agency.[6] Specifically, the court held that the Town must confine its analysis of the potential environmental impacts of the proposed mine to the facts contained in the final environmental impact statement (EIS).[7] To hold otherwise, the court wrote, "would vitiate the efficacy and coordination goals of SEQRA."[8]

Practitioners should be aware of the pitfalls in representing an agency other than the lead agency during the SEQRA process, some of which are highlighted by this litigious history. A brief review of the environmental regulations and the protracted history of these litigants is helpful to understanding the background and import of this decision.

The SEQRA Framework

As most practitioners know, in New York environmental concerns about a proposed land use are governed by SEQRA. The statutory authority for this review is found in the State Environmental Conservation Law.[9] The specific regulations that govern the review may be found in 6 N.Y.C.R.R., part 617.[10] Actions are classified as Type I, Type II or Unlisted based upon their potential environmental significance.[11] An EIS is required for all actions that may have a significant impact on the environment.[12]

When an agency receives a request for the approval of an action such as a new land use, the first step is to determine whether SEQRA applies to the proposed project. If it does, the SEQRA regulations provide that the agency that received the application must then determine whether the proposed action affects any other agencies.[13] Any agency that may make a discretionary decision regarding some aspect of the action is an "involved agency" in SEQRA terminology.[14] More precisely, an involved agency is defined as one that "has jurisdiction by law to fund, approve or directly undertake an action."[15] An agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action is referred to as an "interested agency."[16]

Typically, the first agency to receive the application for the project circulates a request to become the "lead agency"—the entity "principally responsible for undertaking, funding or approving the action."[17] The lead agency also is an "involved agency."[18]

The Application for the Mining Permit by Troy Sand & Gravel

The DEC determined that the proposed mining activity warranted SEQRA review and that the Town also was an interested agency.[19] (As noted earlier, pursuant to the Town's zoning regulations, Troy Sand & Gravel was required to obtain a special use permit and site plan approval from the Town.[20]) The DEC determined that a coordinated review was appropriate.[21] It subsequently became the lead agency.[22]

As lead agency for the SEQRA process, DEC issued a "positive declaration," which is "a determination by the lead agency that the proposed action may result in one or more significant environmental impacts."[23] This is commonly referred to by practitioners in shorthand manner as a "pos dec."[24] When a pos dec is issued, the

applicant is required to prepare an EIS "before any agency decisions may be made regarding the action."[25]

Troy Sand & Gravel submitted the draft EIS in 2006.[26] The Town actively participated in the SEQRA process as an involved agency.[27] After a public hearing and comment period, Troy Sand & Gravel prepared a final EIS in 2007, and the DEC issued its SEQRA findings approving the project and granting the mining permit, "with a number of specific conditions."[28]

The Legal Wrangling

In 2006, Troy Sand & Gravel challenged a moratorium sought to be imposed upon it by the Town and the Town's rejection of the special use permit and site plan applications pursuant to the moratorium. [29] That action was later amended to include a challenge to the local law which purportedly imposed the moratorium, and a separate action was commenced with different plaintiffs seeking the same relief.[30]

While those first companion actions were being litigated, three other things happened. The DEC concluded its environmental review and issued a permit to allow mining on the parcel.[31] The Town enacted a second moratorium that sought to preclude the submission and review of mining applications, and Troy Sand & Gravel undertook certain "activities" on the site, which the Town deemed to be prohibited clearcutting.[32]

The Supreme Court invalidated the local law, mooting the issue of the Town's rejection of the applications.[33] In light of that determination, Troy Sand & Gravel then sought to have the Town review its applications. The Town responded that the second moratorium prevented it from doing so.[34] The Town also sought an injunction by Order to Show Cause, seeking a determination that Troy Sand & Gravel's "activities" on the site were unlawful.[35] And it also issued a "stop work" order.[36]

In 2008, the Town passed extensive revisions to its zoning code that, among other things, permanently banned commercial excavation.[37] The Town Board also adopted a new comprehensive plan.[38] Once again, Troy Sand & Gravel challenged the Town's actions. In 2011, the Appellate Court affirmed the Supreme Court's decision annulling the new comprehensive plan and zoning regulations for failure to comply with SEQRA.[39]

Forced to review the pending applications for site plan approval and a special use permit, in 2011 the Town determined that it would hire a planning consultant to provide expert assistance in analyzing environmental issues as part of its review.[40] Shortly thereafter, perhaps because it would be forced to pay for the cost of the consultant, Troy Sand & Gravel went on the offensive and commenced an action seeking a declaratory judgment that the Town was bound by all determinations made in DEC's SEQRA review and that the Town was without authority to revisit any environmental issue addressed in the SEQRA findings.[41] As part of that determination, Troy Sand & Gravel also sought a declaration that the Town lacked authority to retain a professional consultant to review any environmental issue already determined in the SEQRA process or, alternately, that it was not required to reimburse the Town for any costs incurred in retaining such a consultant.[42]

The trial court granted Troy Sand & Gravel a preliminary injunction that precluded the Town from conducting its own review of the environmental impact of the proposed quarry as part of its zoning determination.[43] This determination was reversed by the appellate court in 2012.[44] The Third Department agreed with the trial court that the Town was barred from conducting its own, or a *de novo*, environmental review.[45] The SEQRA findings by the DEC, as lead agency, were binding on the Town.[46] However, the appellate court confirmed that local land use matters and zoning decisions, such as the approval of site plans and the consideration of special use permits, were within the exclusive purview of the Town.[47] The DEC's findings did not supplant the Town's review or mandate the granting of the requested special use permit.[48]

Armed with that decision from the Third Department, the Town Board rescinded its determination that the permit application was complete "in order to consider whether the SEQRA record was adequate to permit its own review under the environmental standards of its zoning law and whether any additional environmental information was needed to conduct its own jurisdictional review."[49]

In the next court battle in this series, Troy Sand & Gravel commenced an Article 78 proceeding seeking to annul the Town's rescission resolution.[50] It also sought summary judgment in the earlier declaratory judgment action, again seeking a declaration that the Town was required to base its environmental impact findings on the EIS record developed as part of the coordinated SEQRA process.[51] The Town cross-moved for summary judgment dismissing the complaint.[52]

The trial court granted the Town's cross motion, finding that, based upon its reading of the 2012 decision vacating the preliminary injunction, Troy Sand & Gravel was not entitled to a declaration limiting the Town to consideration of the SEQRA record in making its environmental impact findings as part of its own jurisdictional review.[53] The Third Department reversed.[54]

The appellate court reviewed the holding of its 2012 decision permitting the Town to make its own findings, but then wrote,

> [W]e did not say that the Town's independent review includes the ability to now gather additional environmental impact information beyond the full SEQRA record. Rather, in conducting its own jurisdictional review of the environmental impact of the project, the Town is required by the overall policy goals of SEQRA and the specific regulations governing findings made by "involved agencies" to rely on the fully developed SEQRA record in making the findings that will provide a rationale for its zoning determinations.[55]

In this case, the court observed that the full SEQRA record, covering thousands of pages, reflected the hard look at the proposed project's environmental impacts.[56] The review was conducted by DEC with the Town's extensive involvement.[57]

In reaching this conclusion, the Third Department cited the goals of the SEQRA process, one of which was that the review of environmental considerations be carried out "as efficiently as possible."[58] To allow the Town to independently gather information outside the SEQRA record would eviscerate this goal. The Town's zoning determinations must find their rationale within the four corners of the SEQRA findings.[59]

The final EIS "fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action."[60] The Town is constrained by, and "must rely upon the [final EIS] as the basis for [its] review of the environmental impacts that [it is] required to consider in connection with subsequent permit applications."[61] As this article went to press, that was the last word from a court on this protracted dispute between Troy Sand & Gravel and the Town.

Attorneys who represent involved agencies that are not lead agencies on a particular project should heed the warning implicit in this chain of decisions. Creating a thorough and accurate record, including all concerns of *all* involved agencies, is crucial. All environmental facts and findings, which may be necessary to whatever decision will be made by the involved agency, must be included in the final EIS. Otherwise, the involved agency may find itself lacking the foundation on which to successfully build its determination.

Endnotes

1. *Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1170 (3d Dep't 2015); *Troy Sand & Gravel Co. v. Town of Nassau*, 18 Misc. 3d 1130(A), 1130A, 859 N.Y.S.2d 899, 899 (N.Y. Sup. Ct. 2008).
2. *Troy Sand & Gravel Co.*, 18 Misc. 3d at 1130(A).
3. *Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1377, 918 N.Y.S.2d 667, 668-69 (3d Dep't 2011).
4. The Town's specific environmental objections to the proposed mine are not identified in any of the reported decisions.
5. *Troy Sand & Gravel Co.*, 125 A.D.3d 1170 at 1172.
6. *Id.*
7. *Id*. at 1173.
8. *Id*. (citing N.Y. Comp. Codes R. & Regs. tit. 6, § 617.6(b)(3)).
9. N.Y. Envtl. Conserv. Law §§ 3-0301(1)(B), 3-0301(2)(M), 8-0113.
10. 6 N.Y.C.R.R. §§ 617.1-.21.
11. 6 N.Y.C.R.R. § 617.2(ai)-(ak); *see also* §§ 617.4, 617.5 for listings of Type I and Type II actions. Type I actions are those "that are more likely to require the preparation of an EIS than Unlisted actions." 6 N.Y.C.R.R. § 617.4. Type II projects have been statutorily determined to raise few, if any, environmental concerns; therefore, they require no further SEQRA action. 6 N.Y.C.R.R. § 617.5. Unlisted actions are those projects not found in the lists of actions comprising Types I or II. 6 N.Y.C.R.R. § 617.2(ak).
12. *See* 6 N.Y.C.R.R. § 617.1("[S]EQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.").
13. 6 N.Y.C.R.R. § 617.3.
14. *See* N.Y.S. Dep't of Envtl. Conservation, Div. of Envtl Permits, The SEQR Handbook 65 (3d ed., 2010), *available at* <http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf>.
15. *See* 6 N.Y.C.R.R. § 617.2(s) ("[An agency] is an 'involved agency' notwithstanding the fact that it has not received an application for funding or approval at the time the SEQR process is commenced.").
16. *See* 6 N.Y.C.R.R. § 617.2(t) ("An 'interested agency' has the same ability to participate in the review process as a member of the public.").
17. 6 N.Y.C.R.R. § 617.2(u).
18. 6 N.Y.C.R.R. § 617.2(s).
19. *Troy Sand & Gravel Co. v. Town of Nassau*, 101 A.D.3d 1505, 1505, 957 N.Y.S.2d 444, 446 (3d Dep't 2012).
20. *Troy Sand & Gravel Co.*, 18 Misc. 3d at 1130(A).
21. *Troy Sand & Gravel Co.*, 125 A.D.3d at 1171. The designation of an action as a Type I action requires a coordinated review by all involved agencies. 6 N.Y.C.R.R. § 617.4(a)(2).
22. *Troy Sand & Gravel Co.*, 125 A.D.3d 1171.
23. NYSDEC, *Positive Declarations*, <http://www.dec.ny.gov/permits/47962.html> (last visited May 5, 2015).
24. *Id.*
25. *Id.*
26. *Troy Sand & Gravel Co.*, 125 A.D.3d at 1171.
27. *Troy Sand & Gravel Co.*, 101 A.D.3d at 1505.
28. *Id*. The conditions are not enumerated in any of the reported decisions. The Town unsuccessfully tried to have the DEC permit rescinded. *Troy Sand & Gravel Co.*, 125 A.D.3d 1170 at 1171.
29. *Troy Sand & Gravel Co.*, 18 Misc. 3d at 1130(A).
30. *Id.*
31. *Id.*
32. *Id.*

33. *Troy Sand & Gravel Co.*, 18 Misc. 3d at 1130(A).
34. *Id.*
35. *Id.*
36. *Id.* Troy Sand & Gravel sought to enjoin the enforcement of the "stop work" order, also by Order to Show Cause, arguing that the Town's actions were preempted by the Mined Land Reclamation Law. Following an analysis of the statute and the Town's law, the court concluded that the statute's supersession provision should be narrowly construed to preempt only local attempts to regulate the specifics of the mining or reclamation activity and, with one exception, was not applicable here. *Id.* Following a failed attempt to enjoin the "stop work" order, discovery proceeded. *Troy Sand & Gravel Co.*, 82 A.D.3d 1377 at 1378. The next decision addressed attempts to obtain discovery from third parties. *Id*.
37. *Id*.
38. *Id*.
39. *Id*. The Town sought to reargue that decision, and Troy Sand & Gravel argued that the Town's failure to act upon its applications was a default approval. The Appellate Court found both arguments unavailing. *Troy Sand & Gravel Co.*, 89 A.D.3d at 1179.
40. *Troy Sand & Gravel Co.*, 101 A.D.3d at 1506.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*. at 1510.
45. *Troy Sand & Gravel Co.*, 101 A.D.3d. at 1507.
46. *Id*.
47. *Id*.
48. *Id*. Troy Sand & Gravel sought leave to appeal to the Court of Appeals, but the request was denied because the order appealed from did not finally determine the action between the parties. *Troy Sand & Gravel Co. v. Town of Nassau*, 18 N.Y.3d 920, 920, 941 N.Y.S.2d 554, 554 (2012).
49. *Troy Sand & Gravel Co.*, 125 A.D.3d at 1171.
50. *Id*.
51. *Id*. at 1171-72.
52. *Id*. at 1172.
53. *Id*.
54. *Troy Sand & Gravel Co.*, 125 A.D.3d at 1172.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (quoting *Coca-Cola Bottling Co. v. Bd. of Estimate*, 72 N.Y.2d 674, 681, 536 N.Y.S.2d 33, 36 (1988)).
59. *Troy Sand & Gravel Co.*, 125 A.D.3d at 1172.
60. *Id*. (quoting *Coca-Cola Bottling Co.*, 72 N.Y.2d at 680).
61. *Id*. (quoting *Guido v. Ulster Town Bd.*, 74 A.D.3d 1536, 1537, 902 N.Y.S.2d 710 (3d Dep't 2010)).

Lisa M. Cobb, Esq. is a municipal attorney and litigator, of counsel to the law firm of Wallace & Wallace, LLP in Poughkeepsie, New York. Ms. Cobb regularly counsels Planning and Zoning Boards of Dutchess County municipalities and represents those municipalities in various litigations.

Answer to Government Ethics Quiz

(from page 4).

A No, the gift is not prohibited.

Analysis: Section 805-a(1)(a) provides that a municipal officer or employee shall not "directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part." Here, 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 § 805-a(1) would not prohibit the gift. But note two points. First, if the rule is violated, no penalty exists, apart from disciplinary action. Section 805-a(2) provides: "In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate this section may be fined, suspended or removed from office or employment in the manner provided by law." Second, finding the provisions of § 805-a(1)(a) too vague and confusing and the penalty for a violation inadequate, many municipalities have enacted a gifts provision in their own local ethics code, an approach the Committee strongly recommends. Acceptance of a gift permissible under the General Municipal Law may, therefore, nonetheless violate the local ethics law, which counsel must always consult on any municipal ethics issue.

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, at 22 (Summer 2014).

The Section's Government Ethics and Professionalism Committee invites comments from readers on this problem, especially by those who disagree with the Committee's analysis.

Tax Certiorari: Recent Appellate Division Split in Interpreting New York Real Property Tax Law § 727(1)

By Daniel M. Lehmann

I. Introduction

A recent Appellate Division, Fourth Department, Real Property Tax Law (RPTL) decision created a Division split concerning the automatic three-year tax assessment freeze under RPTL § 727(1) after reducing a tax assessment. The Fourth Department in *Torok Trust v. Town Board of Town of Alexandria* affirmed the trial court and held that a property owner who successfully reduced an assessment for a tax year did not have to bring subsequent reduction challenges for the next three tax years while the initial reduction challenge was pending.[1] The Third Department (and Second Department) held the opposite.[2] Both the Third and Fourth Departments support their conclusions with contrary interpretations of the legislative intent of RPTL § 727.[3]

II. RPTL § 727

RPTL § 727(1) provides that,

> [e]xcept as hereinafter provided,… where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgment. Where the assessor or other local official having custody and control of the assessment roll receives notice of the order or judgment subsequent to the filing of the next assessment roll, he or she is authorized and directed to correct the entry of assessed valuation on the assessment roll to conform to the provisions of this section.

III. The Third Department's Interpretation of RPTL § 727

In *Scellen v. Assessor for the City of Glen Falls*, the property owner brought a tax certiorari proceeding under RPTL Article 7 to reduce its 1998 tax year assessment.[4] The property owner reached a reduction agreement with the City in December 2000 but did not agree on whether RPTL § 727 required a reduction in the unchallenged 1999 through 2001 assessments based on the reduced 1998 assessment. The property owner moved to compel reduction of the 1999 through 2001 assessments. The trial court held that the property owner waived its right to reduction of the 1999 and 2000 assessments because the property owner failed to commence challenges to those assessments.

The Third Department affirmed, holding that, because the property owner failed to challenge the 1999 and 2000 assessments while her 1998 challenge was pending, she was not entitled to relief for those years. The court reasoned that the

> statutory scheme underlying RPTL article 7 evinces a clear legislative intent that a separate proceeding be timely commenced to challenge each tax assessment for which relief is sought, and the legislative history of RPTL 727 gives no indication that the Legislature intended to relieve petitioner of this requirement in the case of assessment rolls established during the pendency of a prior RPTL article 7 proceeding.[5]

The Third Department recently reaffirmed its *Scellen* holding.

In *Highbridge Broadway, LLC v. Assessor of the City of Schenectady*, the commercial property owner became eligible in 2005 for the 10 year business investment property tax exemption under RPTL § 485-b.[6] The property owner only applied for the exemption in 2008, at which time it was granted. In July 2008, the property owner brought an RPTL Article 7 challenge for an assessment reduction because the assessor undervalued the exemption. The School District was notified but did not appear. In 2011, the trial court found that the property owner was entitled to the exemption from 2008 through 2014. The property owner conceded that it waived the exemption for 2005 through 2007.

Thereafter, the City and County issued refunds to the property owner for previously paid tax years in accordance with the 2011 judgment. The District did not respond. The trial court held that the District did not have to refund for the 2008 tax year because it utilized the 2007 pre-exemption assessment roll but that it did have to refund for 2009 through 2011 because the property owner was not required to file an application every year to apply the exemption.

The Third Department stated that the issue was "whether [the property owner] was required to annually commence separate proceedings while its 2008 challenge was pending in order for the court's 2011 judgment increasing the RPTL 485–b exemption to be binding on the subsequent years."[7] The District had relied on *Scellen* in concluding that a separate annual challenge must be brought and the Third Department agreed. The court reasoned that "property owners must preserve their right to relief through annual challenges to the assessment pending a determination of the original assessment challenge. Since [the property owner] failed to do so here, [the] Supreme Court lacked jurisdiction to direct the District to refund payments made based on the 2009 through 2011 assessments."[8]

IV. The Second Department's Concurrence with the Third Department

It seems that the Second Department agrees with the Third Department.

In *Jonsher Realty Corp./Melba, Inc. v. Board of Assessors*, the property owner brought RPTL Article 7 proceedings challenging the assessments for tax years 1998 through 2006.[9] The trial court directed a reduction of the assessments and refund of overpayments. The Second Department affirmed in 2010.

The property owner then brought a Civil Practice Law and Rules (CPLR) Article 78 proceeding to force the assessor to calculate transition assessments under RPTL § 1805(3) for the 2007 tax year and to refund any overpayments triggered by the granted 2006 assessment reduction. The trial court granted the requested relief.

The Second Department reversed and held that the property owner was time-barred because it should have brought an RPTL Article 7 challenge right after the filing of the final assessment roll in 2007, which has a 30-day statute of limitations, and not the CPLR Article 78 challenge after appellate affirmance, which has a four month-statute of limitations.

The property owner argued that the four-month statute of limitations applied because recalculation of the 2007 assessment under RPTL § 1805 only became necessary after the trial court reduced the 2006 assessment and the Second Department affirmed in 2010.

The Second Department disagreed and, citing *Scellen*, stated that it found the Third Department's analysis to be persuasive. The court reasoned that because the property owner sought an assessment reduction for 2006, the property owner knew or should have known that if it was successful, it would be entitled to transition assessments in the following years and that judicial resolution could take several years. The property owner should have preserved its challenge to the 2007 assessment by exhausting its administrative remedies by filing timely, annual grievances with the assessing authorities, and, if it did not receive the requested relief, then timely bringing a separate RPTL Article 7 proceeding to challenge those assessments no later than 30 days after the filing of the final assessment roll. Because the property owner failed to do so, the property owner was not entitled to its requested relief.[10]

V. The Fourth Department's Interpretation of RPTL § 727

However, the Fourth Department reached the opposite conclusion.

In *Torok Trust v. Town Board of Town of Alexandria*, the property owner brought a tax certiorari proceeding in July 2007 pursuant to RPTL Article 7 to reduce the tax assessment on its property for the 2007 tax year.[11] The School District was served but did not intervene. The property owner reached an agreement with the Town in January 2009 to reduce the assessment for the 2007 tax year. The parties agreed that RPTL § 727 applied to the settlement and that, if the property owner had previously paid any taxes levied prior to the settlement order, the District would refund the excess based on the reduced assessment. The District issued a refund for the 2007 school tax year but not for the 2008 school tax year. The property owner moved to compel issuance of the 2008 refund and the District argued that the property owner never brought a tax certiorari proceeding for the 2008 tax year. The trial court held for the property owner.

The Fourth Department considered the plain language of the statute, which imposes a three-year assessment freeze where an "order or judgment" determines that the assessment is "unlawful, unequal, excessive or misclassified."[12] The court reasoned that the parties' reduction stipulation had the same effect as a judicial determination. Therefore, the freeze applied to the next three succeeding assessment rolls—the 2008 through 2010 tax years, which must have the same assessment as the tax year under review.

Further, the court noted that RPTL § 727(1) states that where the assessor received the order or judgment

after the next assessment roll has already been filed, the assessor must correct the assessed valuation and then the property owner may apply for a refund under RPTL § 726(1)(c). Therefore, there was an automatic assessment reduction for the 2008 tax year without the property owner bringing a separate reduction challenge.

The court supported its conclusion with the legislative history of RPTL § 727, which stated that the intent of RPTL § 727 was to "reduce the need for [annually] repeated litigation in challenging tax assessments."[13]

VI. A Wrinkle in the Third Department's Position?

The Third Department's interpretation of the legislative history and intent of RPTL § 727 in *Rosen v. Assessor of the City of Troy*[14] is seemingly at odds with the Third Department's interpretation in *Scellen*, and instead is in accord with the Fourth Department's interpretation in *Torok*.

In *Rosen*, the issue was whether RPTL § 727 included stipulations settling an RPTL Article 7 assessment challenge when there was no express trial court finding that the challenged assessment was "unlawful, unequal, excessive or misclassified."

The Third Department in *Rosen* held that the Legislature's intent included stipulations and was not "narrowly restricted to those instances in which an assessment is expressly and judicially determined to be 'unlawful, unequal, excessive or misclassified,' as this interpretation would eviscerate the statute's intent."[15]

The Third Department in *Rosen* explained that "[t]he legislative history of RPTL 727, enacted in 1995, indicates that its purpose was to prevent assessing units from increasing judicially reduced assessments in succeeding years, to prevent taxpayers from perpetually challenging their assessments and to spare all parties the time and expense of repeated court intervention."[16]

VII. Conclusion

Time will tell whether the First Department will join the RPTL § 727(1) fray. Time will also tell whether the Court of Appeals will resolve this split. Until this disparity is resolved, the cautious tax certiorari practitioner in the First, Second, Third, and even Fourth Department jurisdictions should timely file real property tax assessment reduction grievances and challenges every tax year, regardless of whether the property owner is in the process of achieving or has achieved assessment reductions for certain tax years by stipulation or judicial order. No one has ever lost a real property tax assessment reduction proceeding because of filing too often.

Endnotes

1. 128 A.D.3d 97, 7 N.Y.S.3d 748 (4th Dep't 2015).
2. *See Scellen v. Assessor for the City of Glen Falls*, 300 A.D.2d 979, 753 N.Y.S.2d 536 (3d Dep't 2002).
3. *See infra* Parts III and V.
4. 300 A.D.2d 979, 753 N.Y.S.2d 536 (3d Dep't 2002); *cf. Wagner & Stoll, LLC v. City of Schenectady*, 107 A.D.3d 1225, 1228-29, 967 N.Y.S.2d 238 (3d Dep't 2013) (holding that property owner was entitled to relief despite failing to commence RPTL Article 7 proceeding because stipulation between property owner and school district already provided for relief, making proceeding unnecessary).
5. 300 A.D.2d at 980 (citations omitted), citing RPTL §§ 702, 704, 706 and N.Y. Comp. Codes R. & Regs. Tit. 22, § 202.59(d)(2).
6. 124 A.D.3d 1193, 2 N.Y.S.3d 679 (3d Dep't 2015).
7. *Id.* at 1194.
8. *Id.* at 1195.
9. 118 A.D.3d 787, 988 N.Y.S.2d 203 (2d Dep't 2014); *see also MRE Realty Corp. v. Assessor of the Town of Greenburgh*, 8 Misc. 3d 1027(A) (Sup. Ct., Westchester Co. 2005), *aff'd*, 33 A.D.3d 802, 822 N.Y.S.2d 629 (2d Dep't 2006) (affirming Supreme Court ruling that under moratorium statute property owner was not entitled to reductions and refund of excess real property taxes).
10. 118 A.D.3d at 789-90. Although distinguishable on the facts, it is arguable whether the dictum in *ELT Harriman, LLC. v. Assessor of Town of Woodbury* is consistent with the Third or Fourth Department. 128 A.D.3d 201, 7 N.Y.S.3d 422 (2d Dep't 2015) (citing legislative history of RPTL § 727).
11. 128 A.D.3d 97, 7 N.Y.S.3d 748 (4th Dep't 2015).
12. *Id.* at *1, quoting RPTL § 727(1).
13. *Id.* at *2.
14. 261 A.D.2d 9, 12-13, 699 N.Y.S.2d 787 (3d Dep't 1999).
15. *Id.* at 12 (citations omitted).
16. *Id.* (citations and quotation marks omitted).

Daniel Lehmann practices Eminent Domain and Tax Certiorari Law and has authored articles in the *New York Law Journal* on Eminent Domain. He is a graduate of The George Washington University Law School. He can be reached at NYcondemnation@gmail.com.

Lane v. Franks: The Supreme Court Clarifies Public Employees' Free Speech Rights

By Thomas M. Schweitzer

Near the end of its 2013-14 term, the Supreme Court decided an important case involving the free speech rights of government employees.[1] It ruled in favor of a public official who credibly claimed that he had been fired in retaliation for testifying pursuant to a subpoena about corruption on the part of an employee in his community college program—corruption that led to her trial, conviction for various felonies, and imprisonment. Prior to the Supreme Court's decision, the Eleventh Circuit held that statements made by public officials in performing their official duties were, almost without exception, not entitled to First Amendment protection. If left unchallenged, this approach would have had the perverse result of facilitating reprisals against "whistleblowers" while tending to shield public employee wrongdoers from apprehension and punishment for their offenses.

The Facts of the Case

Plaintiff Edward Lane was the Director of the Community Intensive Training for Youth (CITY), a program for underprivileged youth at a public community college in Alabama.[2] Upon discovering that Alabama State Representative Suzanne Schmitz was on CITY's payroll in what amounted to a "no show" job, Lane confronted Schmitz and ordered her to report for work.[3] Schmitz refused.[4] Lane subsequently fired the recalcitrant Schmitz, despite having been warned by college president Steve Franks that this could have negative repercussions for both Lane and the college.[5]

After an FBI investigation, Lane testified before a federal grand jury about his reasons for firing Schmitz.[6] Schmitz was indicted and convicted on seven felony counts in a federal trial at which Lane testified pursuant to a subpoena.[7] Franks then fired Lane, who subsequently brought a 42 U.S.C. § 1983 action against him, claiming that Franks violated the First Amendment by firing Lane in retaliation for testifying against Schmitz.[8]

The federal district court granted summary judgment against Lane, ruling that defendant Franks was protected by qualified immunity and that the Eleventh Amendment barred claims against him in his official capacity.[9] The Eleventh Circuit affirmed on the grounds that Lane had acted as an employee pursuant to his official duties when he investigated and fired Schmitz, and thus, his statements—made in his testimony—were not protected by the First Amendment.[10]

The Supreme Court reversed in part, ruling unanimously that Lane's speech was entitled to First Amendment protection and that the Eleventh Circuit had erred in dismissing Lane's claim of retaliation on that basis.[11] However, it affirmed the lower court's holding that the claims against defendant Franks in his individual capacity should be dismissed because of qualified immunity.[12] It then remanded the case for further proceedings in Lane's action against Franks's successor as president of the community college.[13]

The Free Speech Rights of Federal Employees Prior to *Lane v. Franks*

The Supreme Court has long held that special rules apply to government employees' free speech rights.[14] While public employees do not forfeit their constitutional right of free speech when they take a government job, efficient operation of the government requires that it maintain a significant degree of control over its employees' words and actions in the exercise of their official duties.[15] Thus when a government employee's speech is at issue, courts must balance the interest of the employee as a citizen commenting on matters of public concern against the state's interest in the efficient provision of public services by its employees.[16] In describing the path of the law on this issue, it is helpful to begin with *Pickering v. Board of Education of Township High School District*.[17] In *Pickering*, a public high school teacher wrote a letter to a local newspaper in opposition to the Township Board of Education's policies.[18] Pickering criticized the Board's handling of proposed bond issues and tax increases and its allocation of funds to athletic rather than academic programs.[19] The Board dismissed him, finding that publication of his letter was detrimental to the efficient operation and administration of the school district.[20]

The Illinois Circuit Court and Supreme Court rejected Pickering's free speech arguments but the United States Supreme Court reversed.[21] While acknowledging that the state has greater interests in regulating the speech of its employees than that of the general citizenry, and conceding that some of Pickering's allegations were false, the Court emphasized that the school finance issues he raised were matters of public concern.[22] Teachers groups and the Superintendent of Schools had published a number of articles on these topics in the local newspaper, and the Court noted that the Board

of Education could have responded to Pickering and rebutted his misstatements of fact in a public forum rather than firing him.[23]

Furthermore, the Court stated, even statements by public officials on matters of public concern that criticize their superiors deserve First Amendment protection.[24] Evoking the high threshold for successful actions based on defamatory statements against public officials established in *New York Times Company v. Sullivan*,[25] the Court held that absent proof of knowingly or recklessly false statements, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[26]

Subsequently, the Supreme Court cut back on the free speech protection of public employees' statements in two leading cases: *Connick v. Myers*[27] and *Garcetti v. Ceballos*.[28] The plaintiff in *Connick*, an Assistant District Attorney named Myers, objected strongly when she was informed that she was being transferred to another section of the criminal court.[29] She reacted by distributing among her colleagues a questionnaire that asked office employees about their morale, their views regarding the need for a grievance committee, and whether they felt pressure to work in political campaigns.[30] District Attorney Connick terminated Myers for refusing to accept the transfer and told her that distributing the questionnaire was an act of insubordination.[31]

Myers sued, contending that her termination was due to her exercise of free speech.[32] The district court found that the questionnaire was the real reason she had been terminated and that it was a matter of public concern.[33] It ruled in her favor, and the Fifth Circuit affirmed without opinion.[34]

The Supreme Court reversed, 5-4, in an opinion by Justice Byron White. It held that, with the exception of whether employees had been pressured to work on political campaigns, Myers's questionnaire and grievances involved matters only of personal interest rather than of public concern.[35] Accordingly, a federal court was not the appropriate forum in which to review the wisdom of a personnel action because the District Attorney could reasonably believe that the questionnaire could undermine his authority and disrupt close working relationships within the office.[36] The Court explained that the subject matter of the questionnaire was primarily of interest to Myers rather than society as a whole, and that it was distributed to her colleagues during the workday and thus could interfere with the efficient running of the office.[37] Since the questionnaire touched on matters of public concern in only the most limited way, the Court stated that plaintiff's "attempt to constitutionalize" her grievance must fail and held that there was no violation of her free speech rights.[38]

Garcetti v. Ceballos, another 5-4 decision, involved a similar claim by a deputy district attorney that he was subjected to adverse employment actions in retaliation for statements he had made, in violation of his First Amendment rights.[39] The facts of *Garcetti* resemble the fact pattern in *Lane v. Franks* more closely than the facts of *Connick*; in both cases, the plaintiff was addressing alleged wrongdoing by another government employee. (On the other hand, it must be acknowledged that the retaliatory action alleged by the plaintiff Ceballos was less severe than termination.).[40]

As calendar deputy, Ceballos exercised supervisory responsibilities over other prosecutors in his office.[41] Defense counsel in a criminal case alleged that an affidavit used to obtain a critical search warrant contained inaccuracies and asked Ceballos to review the matter because he was preparing a motion to traverse, or challenge, the warrant.[42] After reviewing the warrant's allegations and finding some of them not credible, Ceballos discussed the warrant by telephone with the affiant, a deputy sheriff, but he did not receive a satisfactory explanation.[43] He prepared a memorandum summarizing his conclusions, which he submitted to two supervisors.[44] After meeting with Ceballos and employees of the Sheriff's Department, the supervisors decided to proceed with the prosecution.[45] Ceballos was called by the defense at a hearing on the motion and recounted his observations about the affidavit, but the trial court nontheless rejected the challenge to the warrant.[46] Ceballos claimed that as a result, his supervisors subjected him to retaliatory actions.[47]

The district court found that Ceballos had written his memorandum in the course of his employment duties and held that he was not entitled to First Amendment protection for its contents.[48] It therefore granted summary judgment to defendants and against Ceballos.[49] The Ninth Circuit, however, reversed on the grounds that Ceballos's memorandum, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern."[50] Proceeding to balance Ceballos's interest in his speech against his supervisors' interest in responding to it, the court noted that defendants had not suggested any disruption or inefficiency in the office as a result of the memorandum and struck the requisite balance in Ceballos's favor.[51]

Justice Kennedy's 5-4 opinion reversing the Ninth Circuit reviewed *Pickering* and *Connick*, and emphasized that a citizen entering government service does not forfeit her freedom of speech rights but "must accept certain limitations on his or her freedom."[52] While some statements made by public employees in the workplace might be entitled to First Amendment protection, this was not true of Ceballos's memorandum. The Court asserted that "the controlling factor" in *Garcetti* was that his expressions "were made pursuant to his duties as a calendar deputy."[53] Because Ceballos

did not dispute the fact that he wrote his memorandum as part of his regular duties as a prosecutor, he was not protected from being disciplined.[54] The Court stated, "[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[55] To hold otherwise, as the Ninth Circuit had, would displace the managerial discretion that supervisors require in order to do their job and replace it with intrusive judicial supervision that would disrupt official business. Because Ceballos's memorandum was produced pursuant to his official responsibilities, it was not shielded by the First Amendment from managerial discipline and thus his claim of unconstitutional retaliation had to be rejected.

Application of the foregoing principles is not straightforward. Courts must determine whether the employee spoke on a subject of public concern. If not, the employee has no First Amendment cause of action based on his employer's reaction to the speech.[56] If the subject matter of the speech is of public concern, the possibility of a First Amendment claim arises, and the court must ascertain whether the government entity was justified in treating the employee differently from a member of the general public.[57] Whether government defendants are entitled to absolute or qualified immunity under the Eleventh Amendment in either their personal or official capacities raises an additional complicated issue. As a result, correctly analyzing such cases is not a simple task.[58]

The Lower Court Decisions In *Lane v. Franks*

Federal District Judge Karen Owen Bowdre of the Northern District of Alabama presided over the trial of Lane's action challenging his termination on First Amendment grounds. She first addressed the question of whether Lane was speaking as a citizen on a matter of public concern.[59] The Court in *Garcetti* had identified two factors in answering this question: whether it occurred in the workplace and whether it was made pursuant to the public employee's job duties.[60] While Lane's testimony against Schmitz at the grand jury and at trial did not occur in the workplace, he had learned of her criminal activities while serving in his official capacity as Director at CITY.[61] Thus, the district court found that "the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern, as the Eleventh Circuit has ruled in similar cases."[62] Relying on these cases, the district court in *Lane* concluded that they were not "clear and binding precedent so well-established that Dr. Franks should have known that he was violating Mr. Lane's Constitutional rights by terminating him."[63]

On appeal, the Eleventh Circuit affirmed the district court.[64] Lane had testified about Schmitz's criminal conduct before a grand jury and, pursuant to a subpoena, in a deposition.[65] In holding that Lane's testimony was not entitled to First Amendment protection[66] the court of appeals held that Lane's statements were made in the course of his official duties as CITY's Director and not as a citizen on a matter of public concern, and consequently, defendant Franks was entitled to summary judgment.[67]

The Supreme Court Decision in *Lane v. Franks*

The Eleventh Circuit's decision in *Lane* candidly acknowledged that "[o]ther circuits seem to have decided this issue differently."[68] The Supreme Court took notice. Evoking *Pickering* and its protection of the First Amendment rights of public employees speaking as citizens, it stated, "[t]oday, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does."[69] Citing to the Eleventh Circuit's decision in *Lane* and the Third Circuit's decision in *Reilly v. Atlantic City*,[70] the Court stated, "[w]e granted certiorari…to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities."[71]

The Court emphasized at the outset that "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment."[72] It declared that public employees do not renounce their citizenship when they accept government employment, which may not be conditioned on their relinquishment of constitutional rights.[73] Moreover, their speech can be of special value and should be encouraged rather than inhibited, for "[g]overnment employees are often in the best position to know what ails the agencies for which they work."[74]

The Court next acknowledged the "government's countervailing interest in controlling the operation of its workplaces," which courts must balance against the citizen's freedom of expression.[75] As the Court had held in *Garcetti*, a two-step inquiry was necessary to determine whether an employee's speech was entitled to protection: first, it must involve "a matter of public concern," or else it does not merit protection.[76] If it is on a matter of public concern, then a possible First Amendment claim arises, and the court must determine whether there was an "adequate justification for treating the employee differently from other members of the general public."[77]

The Court turned next to the question presented: "whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities."[78] It announced, "[w]e hold that

it does."[79] The Court found that Lane's testimony at Schmitz's trials constituted "speech as a citizen on a matter of public concern."[80] Contradicting the lower court, it categorically held that sworn testimony pursuant to a subpoena was protected speech.[81] Writing for the Court, Justice Sotomayor stated: "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes…even when the testimony relates to his public employment or concerns information learned during that employment."[82] While a public employee who is subpoenaed clearly has various obligations to his employer, he also has a separate, independent obligation as a citizen to speak the truth.[83] Consequently, the Court observed, "[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly."[84]

The Court noted the obvious contrast between Lane's vital sworn testimony and the less significant internal memorandum in *Garcetti*, in which the plaintiff had recommended dismissal of a particular prosecution.[85] The Court in *Garcetti* had held that Ceballos's memorandum was written pursuant to his official responsibilities.[86] But that did not mean that the content of information acquired in one's public employment could not be expressed as citizen speech.[87] Moreover, as the Court had observed in *San Diego v. Roe*,[88] public employees "are uniquely qualified to comment on matters concerning government policies that are of interest to the public at large."[89] Finally, public employee speech is especially important in the context of a public corruption scandal, since there are more than 1,000 prosecutions for federal corruption offenses annually and they often require testimony from other government employees.[90] It would be "antithetical to our jurisprudence," the Court commented, to hold that the speech necessary to prosecute corruption by public officials, discovered by other government employees on the job, might never form the basis of a retaliation claim.[91] To hold otherwise would subject such public employees to the harsh dilemma of whether to testify truthfully when that might lead to retaliation and loss of their jobs.[92] The Court held that "Lane's sworn testimony is speech as a citizen."[93]

The Court also concluded that Lane's speech concerning corruption in a public program and misuse of state funds "obviously involves a matter of significant public concern,"[94] and it held that Lane's truthful sworn testimony at Schmitz's criminal trials "is speech as a citizen on a matter of public concern."[95] Of course, it had to be asked whether the government had an adequate justification for treating Lane's speech differently from speech by any other member of the public.[96] While effective and efficient discharge of official duties and maintaining proper discipline in public service were legitimate government interests, the government in this instance was unable to mention anything that would counter-balance First Amendment protection of Lane's speech on "the *Pickering* scale."[97] Accordingly, the Court stated, "[i]n these circumstances, we conclude that Lane's speech is entitled to protection under the First Amendment. The Eleventh Circuit erred in holding otherwise and dismissing Lane's claim of retaliation on that basis."[98]

Lastly, the Court affirmed the Eleventh Circuit's holding on the issue of qualified immunity.[99] The doctrine of qualified immunity insulates a government official from personal liability based upon "reasonable but mistaken judgments about open legal questions" and precludes a court from awarding damages against the government official unless the "official violated a statutory or constitutional right" that was "clearly established at the time of the challenged conduct."[100] For purposes of determining the question of whether Franks was insulated by the doctrine of qualified immunity, the Court explained that the relevant question was whether Franks could have reasonably believed that his actions were constitutional at the time that Lane was fired.[101] The Court found that, based upon conflicting Eleventh Circuit precedent, Franks could have reasonably held that belief.[102] Although the Eleventh Circuit in both *Martinez* and *Tindal v. Montgomery City Commission*[103] held that the employees' speech was protected by the First Amendment, its decision in *Morris* held otherwise. In other words, while *Martinez* and *Tindal* would have put Franks on notice that his conduct violated the First Amendment, Franks was entitled to rely on *Morris* as controlling precedent when he made the decision to fire Lane.[104] The Court concluded that, in light of the conflicting holdings in cases such as *Martinez*, *Tindal*, and *Morris*, Eleventh Circuit precedent did not provide "clear notice" sufficient to defeat Franks' defense of qualified immunity.[105]

Conclusion

It seems clear that the Eleventh Circuit took a literal, doctrinaire view of *Garcetti* which led to an outrageous result in *Lane*. The Supreme Court may share some of the blame for this state of affairs. It left itself open to the extreme holdings of the Eleventh Circuit in *Morris* and other cases that relied on Justice Kennedy's statement in *Garcetti*: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[106]

Taken literally, there is no question that this categorical statement is susceptible of the extreme interpretation placed on it by the Eleventh Circuit. After *Lane*, the above statement can no longer be taken literally. The Supreme Court has apparently overruled the Eleventh Circuit by implication, although it would have been more candid if the Court had done so explicitly.

In any event, the jurisprudence of *Garcetti* and *Connick*, both decided by bare majorities, has imposed on federal courts the challenging and unnecessarily complex task of determining whether a particular public employee's utterances were made as part of her official duties or otherwise. Justice Stevens anticipated such difficulties in his dissent in *Garcetti*. As he stated there, "[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[107] He continued,

> [I]t is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors. While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in Justice Souter's dissenting opinion it is surely "misguided."[108]

Justice Souter's dissent in *Garcetti* also disagreed with the majority's "categorical [denial] of *Pickering* protection to any speech uttered "pursuant to…official duties."[109] He noted that *Pickering* had recognized that "[p]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[110]

Justice Souter continued in a similar vein, which seems prophetic in light of the near miscarriage of justice which later transpired in *Lane v. Franks*. He emphasized that

> [T]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it. This is not a whit less true when an employee's job duties require him to speak about such things: when for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect.[111]

And while an auditor may discover such embezzlement in the course of his official duties, the public interest in publicizing it is no less implicated when an official like Lane accidentally stumbles on it while performing an administrative role. If the majority in *Garcetti* had paid heed to this caution by Justice Souter rather than categorically denying *Pickering* protection to speech by public employees performing their official duties, the misapprehension by the Eleventh Circuit of the legal principle involved and the entire litigation of *Lane v. Frank* might have been avoided.

Endnotes

1. *Lane v. Franks*, 134 S.Ct. 2369 (2014).
2. *Lane*, 134 S.Ct. at 2375.
3. *Id.*
4. *Id.*
5. After her firing, Schmitz told a fellow employee "that she intended to 'get [Lane] back' for firing her." *Id.* at 2370.
6. *Id.* at 2375.
7. The jury in the first trial failed to reach a verdict. *Id.* At a second trial, Schmitz was convicted of "three counts of mail fraud and four counts of theft concerning a program receiving federal funds." *Id.* The District Court sentenced her to thirty months in prison and ordered her to pay over $177,000 in restitution and forfeiture. *Id.*
8. *Id.* at 2376.
9. *Id.*
10. *Id.*
11. *Lane*, 134 S.Ct. at 2381.
12. *Id.*
13. *Id.* at 2383.
14. *Id.* at 2377.
15. *Id.*
16. *Id.*
17. 391 U.S. 563 (1968).
18. *Pickering*, 391 U.S. at 564.
19. *Id.*
20. *Id.* at 564-65.
21. *Id.* at 565.
22. *Id.* at 571.
23. *Pickering*, 391 U.S. at 572.
24. *Id.* at 574.
25. 376 U.S. 254 (1964).
26. *Pickering*, 391 U.S. at 574.
27. 461 U.S. 138 (1983).
28. 547 U.S. 410 (2006).
29. *Connick*, 461 U.S. at 140.
30. *Id.* at 141.
31. *Id.*
32. *Id.*
33. *Id.* at 142.
34. *Id.*
35. *Id.* at 146.
36. *Id.* at 154.
37. *Id.*
38. *Id.*
39. *Garcetti*, 547 U.S. at 415.

40. Plaintiff Ceballos, a "calendar deputy" in the Pomona office of the Los Angeles Country District Attorney's Office, complained that his dispute with his superiors led to his reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. *Id.* Ceballos plainly regarded these actions as a demotion. *Id.*
41. *Id.*
42. *Id.* at 413-14.
43. *Garcetti*, 547 U.S. at 414.
44. *Id.*
45. *Id.*
46. *Id.* at 414-15.
47. *Id.* at 415. Defendants denied that any retaliatory actions were taken against Ceballos. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 416.
51. *Id.*
52. *Id.* at 418.
53. *Garcetti*, 547 U.S. at 421.
54. *Id.*
55. *Id.*
56. *Id.* at 418.
57. *Id.*
58. This caused the district judge in *Lane v. Central Alabama Community College* to throw up her hands in frustration: "The fact intensive nature of First Amendment retaliation cases creates a maze of case law so discrete in its application and wavering in its precedential force that very rarely will the plaintiff be able to prove that 'case law, in factual terms, has… staked out a bright line.'" *Lane v. Cent. Alabama Cmty. Coll.*, No. CV-11-BE-0883-M, 2012 WL 5289412, *12 (N.D. Ala., Oct. 18, 2012) (citing *Chesser v. Sparks*, 248 F.3d 1117,1123 (2001)).
59. *Id.* at *10.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Lane*, 2012 WL 5289412 at *11.
64. *Lane v. Cent. Alabama Cmty. Coll.*, 523 Fed.Appx. 709 (11th Cir. 2013).
65. *Lane*, 523 Fed.Appx. at 710.
66. *Id.* at 712.
67. *Id.*
68. *Lane*, 523 Fed.Appx. at 712, n.3 (citing *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007); *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)). The panel may have been suggesting some doubts on the soundness of the *Morris* holding when it concluded, "But *Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings." *Id.*
69. *Lane*, 134 S.Ct. at 2374-75. The Court's use of the phrase "outside the course of his ordinary job responsibilities" contrasts with the Eleventh Circuit's characterization that Lane was acting pursuant to his official duties.
70. 532 F.3d 216 (3d Cir. 2008).
71. *Id.* at 2377 (citation omitted).
72. *Id.*
73. *Id.*
74. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 674 (1994)). The Court later added, "[O]ur precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Lane*, 134 S.Ct. at 2379.
75. *Lane*, 134 S.Ct. at 2377.
76. *Id.* at 2378.
77. *Id.* (citation omitted).
78. *Id.*
79. *Id.*
80. *Lane*, 134 S.Ct. at 2378.
81. *Id.*
82. *Id.* ("Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.") (citation omitted); *see also* 18 U.S.C. § 1623 (criminalizing false statements under oath in judicial proceedings).
83. *Lane*, 134 S.Ct. at 2377.
84. *Id.*
85. *Id.* at 2379.
86. *Id.*
87. *Id.*
88. 543 U.S. 77 (2004).
89. *Roe*, 543 U.S. at 80.
90. *Lane*, 134 S.Ct. at 2380.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 2381.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. 32 F.3d 1535 (11th Cir. 1994).
104. *Lane*, 134 S.Ct. at 2382.
105. *Id.* at 2382-83.
106. *Garcetti*, 547 U.S. at 421.
107. *Id.* at 426 (Stevens, J., dissenting).
108. *Id.*
109. 547 U.S. at 430 (quoting *Garcetti*, 547 U.S. at 421).
110. *Id.* at 433.
111. *Id.* (citation omitted).

Thomas A. Schweitzer is a Professor of Law at Touro Law Center. A similar version of this article was published previously in *The Touro Law Review*.

Land Use Law Update: The 2015 Mid-Year Roundup

By Sarah J. Adams-Schoen

This update summarizes New York cases related to land use and zoning that were decided in the first half of 2015.[1] The courts (and the litigants) sure have been busy.

Accessory Structures

In ***Sacher v. Village of Old Brookville***,[2] the Second Department upheld the zoning board of appeals (ZBA) denial of variances for an accessory structure. Following the denial by the ZBA of the Village of Old Brookville of an application for setback and area variances for a second-story addition to an accessory building, and an affirmance by the trial court, the appellate court affirmed the trial court's judgment that the finding of the zoning board that the detriment to the community outweighed the benefit of granting the requested variances had a rational basis in the record and was not arbitrary and capricious.

The court reiterated that the statutory test requires a ZBA, in determining whether to grant an area variance, to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted. In balancing the interests, the ZBA must consider

> 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.[3]

Further, the ZBA may consider personal observations of members of the ZBA and the ZBA is "entitled to consider the effect its decision would have as a precedent."[4]

Conditional Uses

In ***Robert E. Havell Revocable Trust v. Zoning Board of Appeals of Village of Monroe***,[5] the Second Department reversed the lower court, and affirmed the ZBA, holding that the ZBA's determination that the applicant's use of the property for tire sales and related services was a conditional use, rather than a use permitted as right, was not illegal, arbitrary and capricious, or an abuse of discretion.

The court ruled that the Supreme Court erred when it disregarded the full administrative record submitted by the ZBA on the ground that it was uncertified and granted the petition. The court explained that "[s]ince there was no allegation or indication that a substantial right of the petitioner was prejudiced by the lack of a certification, the Supreme Court should have disregarded the defect, and decided the matter on the merits."[6]

The court went on to address the merits, concluding that the ZBA's determination was consistent with the applicable zoning code notwithstanding an ambiguity in the code. The code specifically listed "repair service, including automotive" as uses permitted as of right and "tire sales and service" as conditional uses. The code provided, however, that "in the event of conflict in the terminology of any section or part thereof of this chapter, the more restrictive provisions shall control."[7] Thus, the court confirmed the ZBA's determination that the proposed use of the properties for tire sales was a conditional use.

Nonconforming Use

In ***TAC Peek Equities, Ltd. v. Town of Putnam Zoning Board of Appeals***,[8] the Second Department ruled that a property did not lose its nonconforming-use status due to inactivity. The petitioners had appealed the denial of a permit to operate an automotive repair shop on their property. The court began by explaining that the trial court had erred in transferring the proceeding to the appellate court pursuant to CPLR § 7804(g), because the determination to be reviewed was not made after a trial-type hearing at which evidence was taken and was therefore not subject to substantial evidence review. The court went on to consider the merits, however, for the sake of judicial economy.

The court then ruled that the ZBA determination that the petitioner's property had lost its nonconforming-use status as an automotive repair shop did not have a rational basis. The relevant zoning code provides that a nonconforming-use status is lost when such non-

conforming use "is inactive or ceases…for a continuous period of more than two years."[9] The court found that contrary to the ZBA's contention, the minimal extent of the nonconforming use in this case did not constitute either inactivity or cessation for the requisite time period, because there had been some automotive repair activity during that time. The court granted the petition as against the ZBA without costs, annulled the ZBA determination, and remitted the matter to the building inspector to issue the requested permit.

Open Meetings

In ***Ballard v. New York Safety Track, LLC***,[10] the Third Department affirmed the Supreme Court ruling that the Town committed violations of the Open Meetings Law when the Planning Board went into executive session on several occasions leading up to the execution of the 2013 agreement discussed above. The court explained that

> "While a governing body may enter into an executive session, it may do so only for certain purposes, including, as is relevant here, the consideration of an appointment or to engage in private discussions relating to proposed or pending litigation. However, the body must "identify the subject matter to be discussed…with some degree of particularity."[11]

The court rejected the Town's claim that any discussion of the 2013 agreement was protected by the attorney-client privilege, because, the court noted, "the Planning Board's inclusion of additional persons into the session necessarily eliminated any reasonable expectation of confidentiality, effectively waiving any privilege attendant to such conversations."[12]

The court also found that the Town's insistence that it was not obliged to make the proposed 2013 agreement available to petitioners before it was put to a vote "denied petitioners 'any meaningful participation' in the process leading to the final adoption of the controversial 2013 agreement, in clear contravention of Public Officers Law § 103(e)."[13] Additionally, the court found that the Town Clerk's failure to make the minutes from a March 2013 Planning Board meeting available within "two weeks from the date" of the meeting was a violation of Public Officers Law § 106(3). On these bases, the court affirmed the Supreme Court's award of counsel fees and costs to the petitioners.[14]

Rebuilding and Equal Protection

In ***Witt v. Village of Mamaroneck***,[15] the U.S. District Court for the Southern District of New York dismissed the plaintiffs' equal protection claim arising out of rebuilding efforts following Hurricane Irene. Plaintiff homeowners brought an action against the Village of Mamaroneck and Building Inspector Robert Melillo pursuant to 42 U.S.C. § 1983. The action arose from the legal requirements defendants imposed on the plaintiffs in connection with their efforts to repair their home in the aftermath of Hurricane Irene. The plaintiffs maintained that similarly situated homeowners were not subjected to the same treatment, which therefore constituted a violation of their equal protection and substantive due process rights under the Fourteenth Amendment. The plaintiffs also alleged a *Monell* claim against the Village. The court dismissed these claims and gave the plaintiffs leave to amend the complaint. The Amended Complaint raised equal protection, substantive due process, and procedural due process claims, along with a *Monell* claim against the Village as well as various claims for relief under state law.

The court granted the defendants' motion to dismiss. First, as for the equal protection and selective enforcement claims, the court found that the plaintiffs failed to allege differential treatment from similarly situated individuals. Second, as for the due process claims, the court found that even if the plaintiffs had carried their burden of establishing the deprivation of a cognizable property interest, it was "doubtful" that the defendants' acts were arbitrary, conscience-shocking, or oppressive in the constitutional sense, and not merely incorrect or ill-advised. Finally, the court found that, because a *Monell* claim cannot be made absent an underlying constitutional violation, the plaintiffs *Monell* claim against the Village must also fail because a § 1983 claim can only be brought against a municipality if the action that is alleged to be unconstitutional was the result of an official policy or custom, which was not the case here.

RLUIPA

On March 27, 2015, the U.S. District Court for the Southern District of New York ruled in ***Bernstein v. Wesley Hills***[16] that four villages' litigation of a town's SEQRA review was not actionable under the Religious Land Use and Institutionalized Persons Act (RLUIPA), granting summary judgment in favor of all defendants in the consolidated action. The plaintiffs in this case (religious corporations and individuals affiliated with the Chofetz Chaim sect of Orthodox Judaism) alleged that the four villages within the Town of Ramapo discriminated against them by attempting to stop development of a proposed religious educational center and multi-family housing development and by colluding to bring a separate 2004 action (the "Chestnut Ridge Action"). The Villages prevailed on their SEQRA claims in the separate Chestnut Ridge Action at the trial court level, but lost at the Appellate Division.

In a grueling 76-page opinion, the court in ***Bernstein*** found that, because the plaintiffs' claim rested primarily on the Villages' alleged collusion to bring the Chestnut Ridge Action, the plaintiffs' claims depended

on whether there was an equal protections violation. The court began by dismissing the plaintiffs' contention that the Second Circuit's decision in *Fortress Bible Church v. Feiner*[17] eliminated the requirement that plaintiffs provide evidence of a similarly situated comparator because the defendants allegedly inappropriately employed SEQRA. Rejecting this claim, the court observed that *Fortress Bible* involved the question of when SEQRA review constitutes the implementation of a land use regulation under RLUIPA, not the question of whether municipal defendants have qualified immunity when pursuing First Amendment protected activity, such as the filing of a lawsuit.[18]

The court then found that the plaintiffs' equal protection claims failed because the plaintiffs had not presented any evidence of a comparator development "similarly situated in all respects."[19] The court also noted that the plaintiffs failed to raise an issue of material fact with respect to the Villages' discriminatory intent, although the court did not question the sincerity of plaintiffs' allegations.[20]

The court then considered the plaintiffs' substantial burden and nondiscrimination RLUIPA claims, explaining that the applicability of these claims hinged on two questions: (1) in filing the Chestnut Ridge Action, did the defendants "impose or implement" a land use regulation, and (2) if not, did the defendants take a "government action" in violation of RLUIPA? The answer to each was "no."

With respect to whether the Villages' initiation of a lawsuit challenging the Town's SEQRA determination constituted a imposition or implementation of a land use regulation, the court explained,

> There is a difference between imposing or implementing a land use regulation, and filing a lawsuit to ensure that another municipality imposes or implements its own land use regulation.… [A] reading of RLUIPA [that implicates the latter circumstances] would expand its scope far beyond its intended targeting of the "widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes," to include governing any action a local government may take that could result in the enforcement of a land use regulation.[21]

Additionally, because the Town was the "involved agency" under SEQRA that implemented and controlled the SEQRA review of the development, the Town was the only entity that could have "implemented" the regulation.[22]

Section 1983

In ***Sherman v. Town of Chester***,[23] the U.S. District Court for Southern District of New York denied in part and granted in part the Town's motion to dismiss the plaintiff real estate developer's retaliation claim, which was based on evidence that the plaintiff was singled out and "being suffocated with red tape," but dismissed the plaintiff's § 1983 claims. Pending before the federal district court in this case was the Town's renewed motion to dismiss following the Second Circuit's reversal of the court's determination that the plaintiff's federal takings claim was unripe.

As a preliminary matter, the court noted that the plaintiff incorrectly relied on the Second Circuit's conclusion that his takings claim constituted a continuing violation when he asserted that each of his federal constitutional claims constituted a continuing violation. Relatedly, the plaintiff argued that the tolling provision of 28 U.S.C. § 1367(d) applied to his other federal claims because the prior litigation was voluntarily dismissed pursuant to FRCP 41. Although acknowledging an ambiguity in § 1367(d), the court nevertheless held that the tolling provision applies only to pendent claims dismissed pursuant to one of the four circumstances described in § 1367(c) and not, as plaintiff argued, to pendent claims dismissed for any other reason.

As to the retaliation claim, the court held the plaintiff showed the requisite requirements for his claim to survive the Town's motion to dismiss. For retaliation claims made under the First Amendment, the Second Circuit requires that plaintiffs show only that the plaintiff's conduct is protected under the First Amendment and that the defendant's conduct was motivated by or substantially caused by the plaintiff's exercise of speech. The court concluded that the trial court's opinion that the Town "singled out Sherman's development, suffocating him with red tape" over the course of a decade to "make sure he could never succeed in developing MareBrook" was sufficient to show that the defendants' conduct was motivated by or substantially caused by the plaintiff's exercise of speech, and evidence that the Town repeatedly refused the plaintiffs' requests to enforce zoning codes over a nine-year period was sufficient to constitute a continuing violation.

However, the plaintiff's due process claims did not survive the motion to dismiss. They did not constitute a continuing violation because they were based on discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. Finally, with respect to the state law claims, because the claims concerned the exercise of discretionary acts, the Town was entitled to immunity.

SEQRA

On February 19, 2015, the Third Department ruled in ***Troy Sand & Gravel Co. Inc. v. Town of Nassau***[24]

that, as an interested party, a town challenging a lead agency SEQRA determination is permitted to make its own findings under SEQRA, but the town's environmental determination has to be based upon, and is constrained by, the record developed by the lead agency. This case involved the Town of Nassau's efforts to challenge the Department of Environmental Conservation's (DEC) findings as to the environmental impacts of a proposed commercial mining operation. For a thorough analysis of this case, see Lisa Cobb's article, *As an 'Involved Agency,' Independent SEQRA Findings Are Limited*, *supra* at page 14.

Citizens for St. Patrick's v. City of Watervliet,[25] discussed below under Standing and Other Jurisdictional Hurdles, involved challenges by individuals who opposed a development to the City's SEQRA and rezoning determinations. In 2012, defendant PCP Watervliet, LLC, a subsidiary of defendant Nigro Companies, purchased a parcel of property containing a church, school and rectory that were no longer in use in the City of Watervliet. Nigro petitioned the City Council to rezone the parcel from residential to commercial, and, following public hearings, the City issued a negative declaration and amended its zoning map as requested. Individuals then brought a challenge alleging that the City failed to comply with SEQRA, engaged in illegal spot zoning and violated the Open Meetings Law.

The Third Department held that the plaintiffs' challenges to the SEQRA determination were moot because the plaintiffs did not seek any injunctive relief from the Court during the pendency of the appeal, and the church buildings had been demolished and a grocery store was fully constructed and operational on the property.

Sign Ordinances

In ***Beck v. Town of Groton***,[26] the U.S. District Court for the Northern District of New York found that a Town's selective application of its sign ordinance was unconstitutional. Article 3 section 316.7 of the Town Code permitted a maximum of two signs of up to fifty square feet in size on property zoned Rural–Agricultural ("RA"). In early 2009, the plaintiff began erecting large signs on his property, which was zoned RA and included approximately eight-tenths of a mile of frontage along Route 222 in Groton, New York.

When the Code Enforcement Officer of the Town contacted the plaintiff and requested that he remove the signage in violation of § 316.7, the plaintiff refused. The Officer responded with a "Notice of Violation" and, because the signage made mention of the Officer by name accompanied with swastikas, a criminal mischief complaint.

The court held that the plaintiff established by a preponderance of the evidence that the Town selectively enforced the Town Code in violation of the plaintiff's right to equal protection of the laws and in such a way as to interfere with his right to free speech, and awarded him compensatory damages. The court first found that § 316.7 of the Town Code was content-neutral on its face because it regulated the size and number of signs permitted on certain property, and its application was not dependent on the content of the sign. But, the court found that the plaintiff presented sufficient credible evidence to show he was treated differently than his neighbor. The Town consistently and repeatedly enforced § 316.7 against plaintiff and did not bring any enforcement action against his neighbor despite two large signs posted on the neighbor's property. The court found the totality of the circumstances suggested the officer acted with ill will and bad faith towards the plaintiff when he contacted the Sheriff's Department.

Between the drafting of this update and the publication of this issue, the U.S. Supreme Court is bound to issue its decision in ***Reed v. Town of Gilbert***.[27] Depending on how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. For a detailed summary of the issues facing the Court, see *Land Use Law Update: Will* Reed v. Town of Gilbert *Require Municipalities Throughout the Country to Rewrite Their Sign Codes?*[28]

Special Exceptions

In ***Nathan v. Board of Appeals of Town of Hempstead***,[29] the Appellate Division, Second Department, held that where the property the petitioners wished to use for a three-family residence did not meet the applicable lot-size requirements, the Board of Appeals correctly denied the petitioners' application for a special exception permit. The court explained that a special exception granted by a zoning board gives permission to use property in a way that is consistent with the zoning regulation, although not necessarily allowed as of right. Thus, if, as here, the applicant failed to comply with any of the conditions set forth in the zoning ordinance, the zoning authority may deny the application.

Takings

The following two cases, although not New York cases from 2015, highlight a tension many New York municipalities are feeling as they examine whether to provide greater protections of their coastal, riverine and estuarine areas in order to decrease flood risk—i.e., will the imposition of such protections constitute a taking, or will the failure to impose such protections constitute a taking?

In ***New Creek Bluebelt, Phase 4 v. City of New York***,[30] the imposition of such protections was a regulatory taking. There, the Second Department found a rea-

sonable probability that the city's wetlands designation was a regulatory taking under *Penn Central*. Although the claimants proved only an 82% diminution of value ("a diminution which, standing alone, is within the range generally found to be insufficient to constitute a regulatory taking"),

> the parties agree[d] that, because of the wetlands regulations, it is highly improbable that the New York State Department of Environmental Conservation would issue a permit to develop the property in accordance with the applicable R3-1 zoning, which allows for attached and semi-attached one- and two- family dwellings, and that, accordingly, the highest and best use of the property is to leave it undeveloped and vacant. Thus, although the purpose of the wetlands regulations benefits the public good by providing flood prevention and mitigation, the wetlands regulations effectively prevent any economically beneficial use of the property.

Thus, the court agreed with the trial court that the 82% property value diminution together with the effective prohibition on development of any part of the property was sufficient to establish a reasonable probability that the imposition of the wetlands regulations constituted a regulatory taking of the property.

But, in the possibly anomalous case of ***St. Bernard Parish Government v. United States***,[31] a municipality's failure to adequately prevent flooding constituted a temporary taking under *Arkansas Game & Fish Commission v. United States*.[32] In *St. Bernard Parish*, the court ruled that the U.S. Army Corps of Engineers' failure to properly maintain the Mississippi River–Gulf Outlet (MR-GO), a seventy-six mile long navigational channel constructed, expanded and operated by the Corps, resulted in a taking of private property without just compensation in violation of the Takings Clause. The court found that the Corps' negligent design and failure to maintain the MR-GO exacerbated flood damage from Hurricane Katrina and several subsequent storms, and, although temporary, wrongfully deprived landowners of the use of their property.

According to the court, to prove a temporary taking, a plaintiff must show: (1) a protectable property interest under state law; (2) the character of the property and the owners' "reasonable-investment backed expectations"; (3) foreseeability; (4) causation; and (5) substantiality.[33]

The Fifth Circuit previously rejected tort theories of liability in the Katrina litigation as violative of governmental immunity.[34] But, in *St. Bernard's Parish*, by basing liability in large part on the Corps' negligent expansion and failure to maintain MR-GO, the court essentially expanded the Takings Clause to include negligent damage of private property by government failure to act. Because the case involved negligent design and maintenance, it leaves open the question of whether a government entity could be liable for failure to act in the face of foreseeable risks.

Standing and Other Jurisdictional Hurdles

In ***LaRocca v. Department of Planning, Environment, and Development of Town of Brookhaven***,[35] the Second Department affirmed the lower court ruling that dismissed the applicant's claim for failure to exhaust administrative remedies. The applicant had commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules (CPLR) seeking review of the denial of his application for a building permit by the Building Department. However, the applicant had failed to appeal to the ZBA prior to seeking judicial intervention and failed to establish that an exception to the exhaustion doctrine was applicable. As a result, he failed to exhaust available administrative remedies. Accordingly, the court found that the lower court properly granted the respondents' motion to dismiss the petition.

In a March 2015 decision of the U.S. District Court for the Eastern District of New York, ***Safe Harbor Retreat, LLC v. Town of East Hampton***,[36] the court dismissed the plaintiff's Fair Housing Act and Americans with Disabilities Act claims as unripe because the plaintiff failed to apply for a required permit and instead appealed the determination that a permit was required.

Plaintiff Safe Harbor Retreat, LLC had proposed an "executive retreat" for persons suffering from alcoholism and other forms of substance addiction. The town's senior building inspector determined that Safe Harbor met the criteria of "functioning as a family unit" and therefore permitted in a residential zone without site plan approval. As a result, Safe Harbor claims that it expended significant funds and effort to establish the community residence. After a period in which public officials and others visited and praised the community residence, a competitor complained about it and local opposition groups formed. The building inspector then reversed his position, informing Safe Harbor that it was operating an unauthorized "Semi–Public Facility, in a residential district," and that, pursuant to the town code, a special permit was required. However, rather than seeking a special permit from the town's planning board, Safe Harbor filed an application with the ZBA to appeal the determination.[37] The ZBA held a hearing on the application and entered an order affirming the building inspector's determination that Safe Harbor was operating a semi-public facility in a residential district and therefore a special use permit was required.

The court found that because of Safe Harbor's failure to seek a special permit, the Town had not rendered a final decision regarding Safe Harbor's use of its premises. For the same reason, the Town had not had the opportunity to make an accommodation through the Town's "established procedures used to adjust the neutral policy in question."[38] Quoting *Sunrise Detox*, the court noted that "[a] federal lawsuit at this stage would inhibit the kind of give-and-take negotiation that often resolves land use problems, and would in that way impair or truncate a process that must be allowed to run its course."[39] Accordingly, the court found that the action was not ripe and dismissed it without prejudice.

The U.S. District Court for the Eastern District of New York dismissed another Fair Housing Act claim in another March 2015 decision, ***Amityville Mobile Home Civic Association v. Town of Babylon***.[40] The court dismissed the complaint with prejudice for lack of subject matter jurisdiction and granted Rule 11 sanctions against plaintiffs' counsel.

Plaintiffs are Amityville Mobile Home Civic Association (AMHCA) and the residents of Frontier Park, a mobile home park. Defendant Frontier, a private developer, filed an application with the Town, which the Town approved, to rezone the property from Multiple Residential to accommodate a mixed-use multi-residential development. The Town then adopted a relocation plan, which provided relocation assistance funds ($20,000). The plaintiffs' complaint alleged that defendants violated numerous federal laws including the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment.

Frontier contended and the court agreed that the case should be dismissed for lack of subject matter jurisdiction because the plaintiffs' claims were based on the incorrect premise that the relocation plan required the residents to sign a release giving up their "rights" to the one-hundred affordable/workforce units in the new development. The complaint contained no allegations that any plaintiffs executed the documents associated with the Plan; nor did it allege that plaintiffs applied for the affordable/workforce housing units or were denied the units based upon their agreement to the Plan. The court found that the plaintiffs could not plausibly allege that execution of the Plan documents foreclosed any "right" to the affordable housing because the Plan contained no such provision.[41]

On May 8, 2015, the U.S. District Court for the Eastern District of New York dismissed ***545 Halsey Lane Properties, LLC v. Town of Southampton***[42] on ripeness grounds. This case involves challenges of two decisions by the Planning Board regarding conditional approvals of the plaintiff's applications for a building permit for the construction of a barn or barns on its property. The plaintiff 545 Halsey Lane Properties, LLC commenced the federal action pursuant to 42 U.S.C. § 1983 against defendants Town of Southhampton, Town of Southhampton Planning Board, and the members of the Planning Board. The plaintiff also commenced two related state court proceedings pursuant to CPLR Article 78 to challenge the decisions of the Planning Board.

On April 8, 2015, the court had ruled that members of the Planning Board were entitled to qualified immunity and dismissed the complaint as against those individuals in their individual capacities. The court found the members of the Planning Board could not be deemed to have violated "clearly established law" under the Town Code. Furthermore, even if they could be deemed to have violated "clearly established law," the court determined that their actions were objectively reasonable under the circumstances. In the same order, the court rejected the Defendants' ripeness argument, finding that the resolutions issued by the Planning Board, which were not appealable to the Town's ZBA, constituted "final, definitive positions as to how it could use its property" sufficient to establish the ripeness of its Equal Protection claim.

Subsequently, the defendants moved for and the court granted reconsideration of the April 8 order. The defendants argued on reconsideration that the court misapprehended their ripeness argument and, alternatively, that the court's qualified immunity ruling was erroneous. The court agreed that the claims were not ripe and therefore did not address the defendants' arguments on reconsideration regarding qualified immunity.

With respect to ripeness, the defendants had argued that an earlier order remitting one of the Article 78 proceedings to the Planning Board for factual determinations had rendered the action unripe. In more than one prior order, the court had rejected this argument, reasoning, in part, that because it has "held that the Article 78 proceedings do not render the present action [un]ripe, it follows that the specter of additional Article 78 proceedings does not render an otherwise ripe claim unripe."[43] Upon reconsideration, the court agreed with the defendants that "it is not future Article 78 proceedings that call this Court's subject matter jurisdiction over this action into question. Rather, it is the future proceedings before the Planning Board, the administrative agency with authority to resolve the Plaintiff's site plan applications, that does so."[44]

In holding that the claims were unripe, the court rejected the plaintiffs' argument that further efforts to obtain approval from the Planning Board were futile. The court noted that, in the land use context, the futility exception applies when the agency "lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied."[45] The court also noted, however, that "courts in [the Second] Circuit have recognized that mere allegations of open hostility [are] not sufficient to invoke the futility exception."[46]

The court found that the futility exception did not apply because, although the town attorney has taken a position on the issue, no commentary suggests the Planning Board has an entrenched position, the Planning Board had discretion to make the final determination, and any delay by the administrative body was not sufficiently extreme to justify application of the futility exception.[47]

The Third Department affirmed dismissal on mootness grounds and noted that the Town violated the open meetings law in ***Ballard v. New York Safety Track, LLC***.[48] The case involved an agreement between the Town and owners of a motorcycle safety training facility to permit the owners to host certain events at the facility in 2013 that were allegedly not among the uses authorized by the site plan. The agreement expired by its own terms in 2013. The court observed that where the passage of time or a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy, the claim must be dismissed. Thus, because the agreement pertained solely to land uses during 2013 and expired at the end of that year, the court ruled that the cause of action became moot when the agreement expired.

Ballard's ruling on the open meeting law violation is summarized above.

The Third Department also affirmed dismissal on mootness grounds in ***Citizens for St. Patrick's v. City of Watervliet***.[49] This case involved challenges by individuals who opposed a development to the City's SEQRA and rezoning determinations. In 2012, defendant PCP Watervliet, LLC, a subsidiary of defendant Nigro Companies, purchased a parcel of property containing a church, school and rectory that were no longer in use in the City of Watervliet. Nigro petitioned the City Council to rezone the parcel from residential to commercial, and, following public hearings, the City issued a negative declaration and amended its zoning map as requested. Individuals then brought a challenge alleging that the City failed to comply with SEQRA, engaged in illegal spot zoning and violated the Open Meetings Law. The trial court granted the defendants' motions for summary judgment.

As a preliminary matter, the court found that plaintiffs Carol Falaro and Patrick Falaro presumptively established their standing to challenge the City's determinations because their residence is located across the street from Nigro's parcel and they will suffer direct harm different from the general public, even without allegations of individual harm.

But, the Court held that the plaintiffs' challenges to the SEQRA and rezoning determinations were moot because they did not seek any injunctive relief from the Court during the pendency of the appeal, and the church buildings had been demolished and a grocery store was fully constructed and operational on the property. The rezoning determination had also been superseded by the City's adoption of a new zoning code in 2013, under which Nigro's use of the parcel is permitted as of right, and the plaintiffs did not raise any challenge to the new code.

For another disposition based on a lack of standing, see the discussion of ***Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals***[50] under Variances below.

Variances

In ***Mimassi v. Town of Whitestown Zoning Bd. of Appeals***[51] the Appellate Division, Fourth Department, reversed the lower court's denial of a petition to annul the ZBA's denial of an application for an area variance and remitted the application to the ZBA for a de novo determination. The court began by rejecting the petitioner's argument that the determination of the ZBA was arbitrary and capricious because the Town failed to adhere to its precedent, finding instead that the petitioner failed to establish that a previous decision by the Town on another case was based on essentially the same facts as petitioner's claim. However, the court held that the lower court's denial of the petition was nevertheless error because the ZBA did not "weigh the benefit to [petitioner] of granting the variance[] against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law § 267-b(3)(b)"[52]; rather, the ZBA based its determination on the no-longer-followed "practical difficulty" test.

In ***John Hatgis, LLC v. DeChance***[53] the Appellate Division, Second Department, affirmed the trial court's dismissal of petitioner's claims, holding that the ZBA of the Town of Brookhaven properly engaged in the balancing test prescribed by Town Law § 267–b(3)(b) when denying the petitioner's application for an area variance to maintain an accessory apartment on the subject premises. Rejecting the petitioner's argument that the ZBA failed to satisfactorily address all five statutory factors, the court reasoned that "no single statutory factor is determinative, but merely one consideration in a broader balancing test. Moreover, the ZBA is entitled to consider the effect its decision would have as precedent."[54]

The court also held that the ZBA's conclusions in support of its determination were not arbitrary or capricious. Specifically, the ZBA's conclusion that the grant of the variance would produce an undesirable change in the character of the neighborhood and a detriment to nearby properties was based on the testimony of the attendees at the public hearing and the ZBA's own familiarity with local conditions; the hardship alleged by the petitioner was self-created, as the petitioner acquired the property subject to the restric-

tion; and, the ZBA's conclusion that a feasible alternative to the variance existed was supported by the fact that the petitioner could have easily reduced the size of the accessory apartment. The court also noted without explanation that the ZBA's determination that the requested variance was substantial was not arbitrary or capricious.

In another case involving area variances (and standing), ***Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals***,[55] the Appellate Division, Third Department affirmed the ZBA's determination that the petitioner, an engineering firm with no discernible connection to the project at issue, lacked standing to challenge the ZBA's granting of area variances to a residential property owner, and found that the ZBA had a rational basis for granting the area variances. In order to facilitate the construction of a residence on the subject property, respondents applied to the ZBA for area variances requesting relief from requirements regarding removal of vegetation and setbacks for stormwater infiltration devices. The ZBA granted the variances. The petitioner, a professional engineer who claimed to be representing a number of neighbors opposed to the project, requested and received determinations from the Town's zoning administrator on a number of issues, and appealed to the ZBA, which dismissed the appeal for lack of standing.

Since neither the petitioner nor his firm (which was listed on the notice of appeal as appellant) exhibited any specialized harm and did not own property near the subject property, and the petitioner failed to identify the neighbors he claimed to represent, the court found that the petitioner did not have standing in his individual capacity or as an agent for his firm. The court based its holding on its interpretation of a Town Code provision that permits appeals by "any person aggrieved" by, among other things, the zoning administrator's decisions. The court found that this language appears to have been taken from Town Law § 267–a(4), which "has been consistently interpreted to mean a person who has sustained special damage, different in kind and degree from the community generally," which can be shown "if he or she falls within the statute's zone of interests and his or her property is sufficiently proximate to the property at issue."[56]

Despite the petitioner's lack of standing, the court went on to consider the merits, noting that, although the ZBA's resolution failed to set forth specific factual findings, the ZBA's decision to grant the area variances had a rational basis because the resolution and hearing minutes show that the ZBA engaged in the statutorily prescribed balancing test. The court reasoned that

> [W]e need not annul the determination or remit the matter if the record, including the ZBA's formal return in the CPLR article 78 proceeding, demonstrates that the ZBA did make specific factual findings supporting its determination.… Although the evidence as to the statutory factors seems somewhat evenly split, courts do not engage in their own balancing of the factors, but must yield to the ZBA's discretion and weighing of the evidence.[57]

In ***People, Inc. v City of Tonawanda Zoning Bd. of Appeals***,[58] the Appellate Division, Fourth Department reversed the trial court, which had granted the developer petitioner's CPLR article 78 petition. The court held that substantial evidence in the record supported the ZBA's conclusion that granting two requested area variances would cause increased population density from the presence of an apartment building in a neighborhood comprised of single-family homes, that the variances necessary to accommodate an apartment building would be substantial, and that the petitioners' difficulty was self-created because they were aware of the property's zoning classification when they purchased the property. Because the board reviewed the prescribed statutory factors in making its determination, and rendered its determination after properly weighing the benefit to petitioners against the detriment to the health, safety and welfare of the neighborhood or community if the variances were granted, the court concluded that the action taken by the Board was not illegal, arbitrary or capricious, or an abuse of discretion.

In April 2015, the Appellate Division, Third Department, in ***Nemeth v. Village of Hancock Zoning Board of Appeals***,[59] overruled the lower court, ruling that the ZBA should not have granted a use variance where the respondent's proof consisted of bare conclusory statements that their business would fail without a use variance. Petitioners in the case owned property adjacent to the property owned by the respondents, on which the respondents operated an industrial manufacturing business as a nonconforming use. The respondent property owners had applied for and received a use variance from respondent Village of Hancock ZBA, allowing the continued use of an addition in the manufacturing process made in 2001 after a zoning code was enacted prohibiting manufacturing in the zone where the property was located. The lower court dismissed the petitioner's claim.

The court first discussed that an applicant for a use variance bears the burden of demonstrating, among other things, that the property cannot yield a reasonable return if used for any of the purposes permitted as it is currently zoned. Such an inability to yield a reasonable return must be established through the submission of "dollars and cents" proof with respect to each permitted use. In this case, however, respondent's proof consisted of conclusory statements that an additional "10 to 20 percent" of revenue would be needed to find a simi-

larly sized location to house the equipment and that "we would go out of business" without the addition. Because there was insufficient proof, the court held that the ZBA should not have granted the variance.

Judge Lynch wrote a dissenting opinion, noting that "[j]udicial review of a zoning board determination is limited to an examination of whether it has a rational basis and is supported by substantial evidence,"[60] and arguing that the determination here met this standard.

> In an instance, as here, where a use variance is required to expand a nonconforming use the applicant must demonstrate that the land cannot yield a reasonable return if used *as it then exists* or for any other use allowed in the zone. As such,…[t]he core question remains whether respondents established that the property could not yield a reasonable rate of return without utilizing the addition in the manufacturing process, or otherwise utilizing the entire parcel for residential purposes.… In considering the property as it then exists,…we must account for the fact that the addition had been utilized in the manufacturing process since 2001, until precluded by this Court's decision in 2012. Respondent [ZBA]…concluded that the cost of converting the addition to a residential use, relocating the facility and/or shutting down manufacturing in the addition demonstrated that respondents could not realize a reasonable return on the property without a use variance for the addition. The ZBA relied upon documented proof…that a renovation of the addition for residential use… would cost over $160,000, resulting in a net monthly loss of $333. In addition, the Delaware County Department of Economic Development estimated the cost of relocating the manufacturing facility at between $1.5 and $2.2 million. [Respondent] Perry Kuehn testified that, without the addition, respondents would have to conduct part of the manufacturing process in a separate location off site, resulting in an estimated 10% to 20% extra cost that would put them out of business. Moreover, as a practical matter, given the prohibitive cost of relocating the manufacturing facility, a conversion of the entire property to a residential use would effect a closure of the business, which employs approximately 12 people. As such, it is manifest that a residential conversion would not yield a reasonable rate of return, such that specific dollars and cents proof for a residential option is simply unnecessary.[61]

Judge Lynch also noted that the ZBA could have rationally concluded that the property was unique and the proposed use would not alter the character of the neighborhood, because the property contained a long-standing, nonconforming industrial use that had included the addition since 2001, and that the hardship was not self-imposed because the Kuehns purchased the property before the Village enacted its zoning code.

In ***Traendly v. Zoning Bd. of Appeals of Town of Southold***,[62] the Appellate Division, Second Department held that the denial by the ZBA of the petitioners' application for area and lot-width variances to build a single-family dwelling had a rational basis and was supported by evidence in the record. The court overruled the trial court, which had granted the applicant's Article 78 petition, annulled the ZBA's determination, and directed the ZBA to grant the application.

Without discussion of the record evidence, the court found that the granting of the variances would have resulted in the creation of "the most nonconforming lot in a unique neighborhood,"[63] the requested variances were substantial, and the petitioners' hardship was self-created. The court also found that the ZBA's granting of a particular prior application for an area variance did not constitute a precedent from which the ZBA was required to explain a departure, because the petitioners had failed to establish that the prior application bore sufficient factual similarity to the subject application.

Vested Rights

In ***Cobleskill Stone Products, Inc. v. Town of Schoharie***,[64] the Appellate Division, Third Department, held that the failure to obtain a special permit does not preclude the ability to establish a vested right to mine on property. The petitioner in this case operated a quarry in the Town of Schoharie, which had been in operation since the 1890s. Pursuant to respondent Town of Schoharie's 1975 zoning ordinance, "commercial excavation or mining" was a permitted use upon receipt of a special permit from the Town. Petitioner purchased an additional parcel of real property to the south of the areas that it actively mined, and then commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking a judgment declaring that it had a vested right to quarry as a preexisting nonconforming use under Local Law No. 2 and any subsequently enacted prohibitory zoning amendment.

On appeal from the Supreme Court's order granting the petitioner's motion for partial summary judgment, the Third Department reasoned that, although a special permit was required for mining operations between 1975 and 2005, petitioner's failure to obtain one did not, as a matter of law, preclude it from establishing that it had a vested right to mine on its property notwithstanding a current or future prohibitive zoning ordinance. Because of this, the court found the Supreme Court erred in granting partial summary judgment to respondents dismissing the vested right cause of action based on petitioner's failure to obtain a special permit pursuant to the 1975 zoning ordinance. Additionally, the court found that the Supreme Court's judgment, partially granting the petition and annulling Local Law No. 2, did not render the appeal moot, because, if a new zoning ordinance with the same prohibition against mining were to be enacted, a declaration that petitioner had a vested right as against the earlier law would affect the rights of the parties. Accordingly, the court dismissed the order of the Supreme Court.

Wireless Broadband

Patricia Salkin's *Law of the Land* blog[65] provided an excellent summary of a January 2015 U.S. Supreme Court opinion on the Telecommunications Act's "in writing" requirement for land use decisions relating to the siting of cell towers, as follows:

> ***T-Mobile South, LLC v. City of Roswell***[66] was a case brought by a "personal wireless service provider" under the Telecommunications Act of 1996 (TCA) which, among other things, supported rapid deployment of personal communications devices (e.g., cell phones) by requiring that land use decisions on matters relating to such things as cell towers be "in writing" and supported by substantial evidence from a written record. In this case defendant City denied plaintiff's cell tower application by letter, informing plaintiff that it could find the reasons for the denial in the City Council minutes. There was a 30-day appeal period under the TCA; however, the City's draft minutes were not approved until four days before the appeal period ran. Nevertheless, plaintiff challenged the denial in federal court on the "in writing" requirement and also alleged the denial was not supported by substantial evidence. The trial court found for the plaintiff but the Eleventh Circuit, following a majority of circuits, found the letter and reference to the minutes to be sufficient. The Supreme Court granted certiorari.
>
> Justice Sotomayor wrote for the Court and interpreted the "in writing" and "substantial evidence" requirements to require reasons to be given for judicial review purposes. … [The Court explained that [t]he use of "substantial evidence" in the TCA was a "term of art," describing how an administrative record was to be reviewed by a court under the TCA. The Court inferred that Congress required findings to be derived from the administrative process, rejecting the City's contention that this requirement would deprive it of its local zoning authority [and] finding that Congress meant to interfere with local zoning processes to this extent, but stressing that the reasons need not be elaborate—just sufficiently clear to enable judicial review.
>
> Moreover, the Court determined that the TCA did not require that the reasons be found in the decision or be in any particular form, as the TCA stated it did not otherwise affect the authority of a local zoning authority…. However, the Court did [find that the TCA's text and structure] require that the reasons be given either in the decision or essentially contemporaneous with the same. By waiting until 26 days after its decision to issue detailed approved minutes, the City failed its statutory obligations and the decision of the Eleventh Circuit was reversed.
>
> Justice Alito concurred, adding that it would be sufficient for the City to state simply that the proposal was "esthetically incompatible with the surrounding area," [and] that plaintiff was not injured by the City's delay in providing the final version of the minutes (which he viewed as harmless error)….
>
> Chief Justice Roberts authored a dissent, in which Justices Ginsburg and Thomas joined, stating that, while findings or reasons for the decision were required, they need not be issued "essentially contemporaneously" with the decision, as such a requirement was not in the TCA, noting that Congress has in other legislation, such as the Administrative Procedures Act and other sections of the TCA itself, made

> such a specific requirement. Moreover, the dissent observed that the "sole issue" before the court was the "in writing" requirement and not the timing of the findings, an issue not raised below. While agreeing that findings were implicitly required by the use of the "substantial evidence" standard, if they were not given or [were] inadequate, remand would be justified, rejecting the contention that plaintiff needed to see the reasons in order to decide whether to appeal[.]
>
> Finally, the dissent suggests that impacts of this case on local governments will be "small"—they need only hold back the final decision until the minutes [are] transcribed or reasons given.
>
> It appears the entire Court would conclude that the TCA requires reasons for a land use decision involving cell towers; however, the justices disagree on the required timing of those reasons. This result may come as a surprise for some local governments.

In ***Orange County-Poughkeepsie Limited Partnership v. Town of Fishkill***,[67] the U.S. District Court for the Southern District of New York found that the plaintiffs Orange County–Poughkeepsie Limited Partnership d/b/a Verizon Wireless and Homeland Towers, LLC satisfied their obligation to make an effort to evaluate alternative locations for a communications tower, the Board's denial of the plaintiffs' application for a special permit left the plaintiffs with no feasible means of filling the gap in wireless coverage, and the Board's denial of the application on grounds that the proposed 150-foot tall monopole wireless facility would decrease property values was not supported by substantial evidence.

In this case, Verizon had sought to construct a new wireless telecommunications facility within an R-1 Residential Zoning District. Under the Town of East Fishkill's Zoning Code, a special permit was required for the construction of a wireless communication facility within the residential zoning district and the maximum height of a freestanding tower in a residential area was 110 feet. The plaintiffs submitted a joint application for a special permit with requests for a 40-foot height variance. The Board retained a wireless consultant, which advised the Board that "the proposed site only provides approximately 20% new coverage (un-duplicated) and nearly 80% overlaps with existing coverage," and denied the application.

The court began by granting summary judgment on the plaintiffs' effective prohibition claim. Under the TCA, local governments retain authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities," but may not "prohibit or have the effect of prohibiting the provision of personal wireless services."[68] The first prong of the *Willoth* effective prohibition test, which requires a plaintiff to establish that a significant gap in wireless coverage exists, was satisfied by the defendants' concession of that fact. The second prong of the test recognizes that a local government may deny an applicant's proposal if an applicant may "select a less sensitive site,… reduce the tower height,…use a preexisting structure or…camouflage the tower and/or antennae."[69] The court found that the second prong was also satisfied because the record demonstrated that the plaintiffs evaluated alternative locations and the Board's denial of the plaintiffs' application left the plaintiffs with no feasible means of filling the gap in wireless coverage.

The court then found that the Board's denial of the application on the grounds that the proposed tower would lower property values was not supported by substantial evidence and ordered the Board to grant the application. The record showed that the proposed site was near four large ham radio towers in the neighborhood and the neighbors opposing the application acknowledged that the towers existed at the time they purchased their homes.

Written Requests (Town Law)

In another case involving a failed attempt to rely on board minutes as a writing, ***Smith v. Stephens Media Group-Watertown, LLC***,[70] the Appellate Division, Fourth Department held that the written record of an oral request in the minutes of a town board meeting was not sufficient to satisfy the written request requirement set forth in Town Law § 268(2). The plaintiff landowners commenced this action seeking enforcement of the Town of Rutland Code § 130–48(E)(1)(g), which requires that "the minimum setback distance of a communications tower from all property lines shall be equal to 100% of the height of the communications tower." The plaintiffs alleged that the size of the parcel owned by the defendant was insufficient to permit its 370–foot radio transmission tower to meet the minimum setback distance. The plaintiffs sought injunctive relief enjoining the alleged violation.

The appellate court found that the court below erred in denying the part of the defendant's motion seeking summary judgment dismissing the plaintiffs' claim pursuant to Town Law § 268(2), which provides "upon the failure or refusal of the proper local officer, board or body of the town to institute [any appropriate action or proceedings to prevent or restrain the violation of its zoning laws] for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town who are jointly or severally aggrieved by such violation, may

institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do." The court explained that, because the written record of their oral request in the minutes of the town board meeting did not satisfy the requirement of a written request and the plaintiffs failed to show that they made any other written request contemplated by the statute, they "failed to satisfy a condition precedent to maintaining their claim pursuant to the statute."[71] The plaintiff's appeal was therefore dismissed, and the defendant's motion to dismiss was granted.

Zoning Interpretation

In ***Boni Enterprises, LLC v. Zoning Bd. of Appeals of Town of Clifton Park***,[72] the Appellate Division, Third Department held the ZBA erred in finding that the Town Code prohibited petitioners Boni Enterprises, LLC and Country Club Acres, Inc. from constructing 74 one-family dwellings. Petitioners, who owned contiguous parcels of property in the Town of Clifton Park, submitted a revised application for site plan review to the planning board, outlining a plan to build 74 dwellings and 15 commercial buildings. The Planning Board contended that it was unable to consider the application because the Town's Zoning Enforcement Officer concluded that there were zoning issues with petitioners' site plan and the ZBA agreed that the town code prohibited construction of multiple single-family dwellings on the Boni Enterprises parcel. Petitioners responded with a combined CPLR article 78 proceeding and action for declaratory judgment.

The court first noted that the lower court erred in granting deference to the ZBA because no deference is allowed if the issue is one of pure legal interpretation of the zoning law. The court then found that, pursuant to the town code's definitions of "dwelling" and "building," the word "buildings" in the code provision that allows "[m]ultiple buildings on a lot" includes one-family dwellings. The court noted,

> [T]he words building and dwelling are not synonymous and cannot be used interchangeably, because a dwelling is a subset of the broader term building. Stated another way, not every building is a dwelling, but every dwelling is a building. We agree with respondents that respondent Town of Clifton Park probably never envisioned a landowner being able to build 74 one-family dwellings on a single, unsubdivided parcel in a business district. Nevertheless, the plain language of the Town Code, strictly construed against the municipality, must be interpreted as permitting multiple buildings—including one-family dwellings—on a single lot as long as they do not exceed the density limitations.[73]

The court also considered and rejected arguments that the Town had provided inadequate notice of proposed Local Law No. 8 (which amended the zoning ordinance to create a business district covering an area that contains the Country Club Acres parcel) and that the failure of the town to update its zoning map, which is unofficial and available merely as a reference tool, invalidated the local law. The court therefore reversed the dismissal of the petitioner Boni Enterprises' claims and declared that the Town Code does not prohibit Boni Enterprises from constructing multiple one-family dwellings on a single lot in the B–1 district, Local Law No. 8 was properly enacted, and petitioner Country Club Acres' parcel is located in the zoning districts as set forth by Local Law No. 8.

Endnotes

1. This land use law update borrows heavily (with permission) from Touro Law Center Dean Patricia Salkin's blog Law of the Land, which provides updates on state and federal land use decisions throughout the United States. *See* LAW OF THE LAND, https://lawoftheland.wordpress.com (last visited May 20, 2015).
2. 124 A.D.3d 902, 3 N.Y.S.3d 69 (2d Dep't 2015).
3. *Id.* at 903 (internal quotation marks and citations omitted).
4. *Id.* at 904 (internal quotation marks and citation omitted).
5. 127 A.D.3d 1095, 8 N.Y.S.3d 355 (2d Dep't 2015).
6. *Id.* at 1096.
7. *Id.* at 1098 (internal quotation marks and citations omitted), quoting and citing zoning code.
8. 127 A.D.3d 1216, 8 N.Y.S.3d 365 (2d Dep't Apr. 29, 2015).
9. *Id.* at *1217.
10. 126 A.D.3d 1073, 5 N.Y.S.3d 542 (3d Dep't 2015).
11. *Id.* at 1077.
12. *Id.*
13. *Id.*
14. *Id.*
15. No. 12–CV–8778 (ER), 2015 WL 1427206 (S.D.N.Y. Mar. 27, 2015).
16. Nos. 08-CV-156, 12-CV-8856 (KMK), 2015 WL 139993 (S.D.N.Y. Mar. 27, 2015). For a thorough summary of the case, see *Suit by "Interested," Neighboring Municipalities to Enforce SEQRA Requirements Does Not "Impose or Implement" a Land Use Regulation or Constitute a "Government Practice" and does not Violate RLUIPA*, RLUIPA DEFENSE BLOG, Apr. 15, 2015, http://www.rluipa-defense.com/2015/04/suit-by-interested-neighboring-municipalities-to-enforce-seqra-requirements-does-not-impose-or-implement-a-land-use-regulation-or-constitute-a-government/.
17. 694 F. 3d 208 (2d Cir. 2012). [Eds.: This case is too new to have pincites. We'll be able to fill in the missing pincites at the galley stage.]
18. *Id.* at 218.
19. *Id.* at 221.
20. *Id.* at 227.
21. *Id.* (citation omitted), *quoting* 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

22. *Id.* at 228.
23. No. 12 Civ. 647(ER), 2015 WL 1473430 (S.D.N.Y. Mar. 31, 2015).
24. *Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1170, 4 N.Y.S.3d 613 (3d Dep't 2015).
25. 126 A.D.3d 1159, 5 N.Y.S.3d 582 (3d Dep't 2015).
26. No. 5:11–CV–420, 2015 WL 1499506 (N.D.N.Y. Apr. 1, 2015). *See also* Joel Stashenko, *Upstate Town Faulted for Violating Man's Free Speech Rights*, N.Y.L.J., Apr. 10, 2015, http://www.newyorklawjournal.com/id=1202723075219/Upstate-Town-Faulted-for-Violating-Mans-Free-Speech-Rights.
27. *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).
28. 29 Municipal Lawyer 16 (Winter 2015).
29. 125 A.D.3d 866, 5 N.Y.S.3d 127 (2d Dep't 2015).
30. 122 A.D.3d 859, 997 N.Y.S.2d 447 (2d Dep't 2014). For more on this opinion, check out the Inverse Condemnation Blog post by Robert H. Thomas, Esq., and the Bulldozers at Your Doorstep blog by counsel for the prevailing property owners.
31. No. 05-1119L, 2015 WL 2058969 (Fed. Cl. May 1, 2015).
32. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012) (holding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability"). Prior to *Arkansas Game*, federal courts had generally understood Takings Clause liability as limited to permanent or inevitably recurring flood events. *See Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cl. 2011), *rev'd by* 133 S. Ct. 511 (2012); *but see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987) (holding that invalidation of ordinance, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").
33. 2015 WL 2058969, at *26.
34. *In re Katrina Canal Breaches Litigation*, 696 F. 3d 436, 444 (5th Cir. 2012) (immunity under Flood Control Act extends to claims stemming from levee breaches caused by dredging of canal); *id.* at 449-52 (discretionary function exception to Federal Tort Claims Act extends to remaining claims).
35. 125 A.D.3d 659, 3 N.Y.S. 3d 98 (2d Dep't 2015).
36. No. CV 14–2017(LDW)(GRB), 2015 WL 918771 (E.D.N.Y. Mar. 2, 2015).
37. *Id.* at *3.
38. *Id.* at *6, *quoting Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 124 (2d Cir. 2014).
39. *Id.* at *6, *quoting Sunrise Detox*, 769 F.3d at 124.
40. No. 14–cv–2369 (SJF), 2015 WL 1412655 (E.D.N.Y. Mar. 26, 2015).
41. With respect to the Rule 11 sanctions, the court held that the complaint contained allegations unsupported by the record and that plaintiffs had misrepresented and omitted relevant evidence. The court also noted that plaintiff AMHCA had initiated five lawsuits in state court since 2012 to delay or stop the development and all of those lawsuits had been dismissed. *Id.* at *7. In addition to imposing sanctions, the court warned AMHCA and the plaintiffs' attorney "that if they continue to pursue these matters and engage in vexatious and harassing litigation, they will be subject to a filing injunction." *Id.* at *9.
42. No. 14–cv–800, 2015 WL 2213320 (E.D.N.Y. May 8, 2015), on reconsideration of 2015 WL 1565487 (Apr. 8, 2015).
43. 2015 WL 2213320, at *5 (internal quotation marks and citation omitted).
44. *Id.*
45. *Id.* (internal quotation marks and citation omitted).
46. *Id.* (internal quotation marks and citation omitted; bracketed text in original).
47. *Id.* at *7-8.
48. 126 A.D.3d 1073, 5 N.Y.S.3d 542 (3d Dep't 2015).
49. 126 A.D.3d 1159, 5 N.Y.S.3d 582 (3d Dep't 2015).
50. 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep't 2015).
51. 124 A.D.3d 1329, 997 N.Y.S.2d 888 (4th Dep't 2015).
52. *Id.* at 1330, *quoting In re Conway v. Town of Irondequoit Zoning Bd. of Appeals*, 38 A.D.3d 1279, 1279–1280, 831 N.Y.S.2d 818, 819 (2007).
53. 126 A.D.3d 702, 5 N.Y.S.3d 236 (2d Dep't 2015).
54. *Id.* at 703-04 (citations and internal quotation marks omitted).
55. 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep't 2015).
56. *Id.* at 1153 (citations and internal quotation marks omitted).
57. *Id.* at 1154-55 (citations and internal quotation marks omitted).
58. 126 A.D.3d 1334, 6 N.Y.S.3d 817 (4th Dep't 2015).
59. 127 A.D.3d 1360, 7 N.Y.S.3d 626 (3d Dep't 2015). [Eds.: This case is too new to have pincites. We'll be able to fill in the missing pincites at the galley stage.]
60. *Id.* at 1363 (Lynch, J., dissenting).
61. *Id.* at 1363-64 (citations and internal quotation marks omitted).
62. 127 A.D.3d 1218, 7 N.Y.S.3d 544 (2d Dep't 2015).
63. *Id.* at 1219.
64. 126 A.D.3d 1094, 6 N.Y.S.3d 305 (3d Dep't 2015).
65. Patricia Salkin, *US Supreme Court Gives Life to the "In Writing" Requirement of the TCA*, Law of the Land: a Blog on Land Use Law and Zoning, Jan. 18, 2015, https://lawoftheland.wordpress.com/2015/01/18/us-supreme-court-gives-life-to-the-in-writing-requirement-of-the-tca/.
66. 135 S. Ct. 808 (2015).
67. Case No. 13–CV–4791(KMK), 2015 WL 409260 (S.D.N.Y. Jan. 30, 2015).
68. 47 U.S.C. § 332(c)(7)(A).
69. 2015 WL 409260, at *22, *quoting Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (citations omitted).
70. 125 A.D.3d 1370, 3 N.Y.S.3d 515 (4th Dep't 2015).
71. *Id.* at 1372.
72. 124 A.D.3d 1052, 2 N.Y.S.3d 631 (3d Dep't 2015).
73. *Id.* at 1054 (citations omitted).

Sarah J. Adams-Schoen is a Professor at Touro Law Center and Director of Touro Law's Land Use & Sustainable Development Law Institute. She is the author of the blog Touro Law Land Use (http:// tourolawlanduse.wordpress.com), which aims to foster greater understanding of local land use law, environmental law, and public policy. At Touro Law Center, she teaches Property Law, Environmental Law and Environmental Criminal Law. She thanks Municipal Law Fellow Brian Walsh (Touro Law 2016) for his assistance on this case law update.

2015 Municipal Law Section Annual Meeting

Section Chair Mark Davies, Esq., Steven G. Leventhal, Esq., Presenters, and Program Co-Chair Carol L. Van Scoyoc, Esq.

The Municipal Law Section of the New York State Bar Association held its Annual Meeting program at the New York Hilton Midtown on Thursday, January 29, 2015, covering a wide range of topics of interest to Section members. Program Co-Chair Carol L. Van Scoyoc, Chief Deputy Corporation Counsel for the City of White Plains, opened the morning session by providing an in-depth roundup of last term's blockbuster decisions of the U.S. Supreme Court, including *Burwell v. Hobby Lobby Stores, Riley v. California*, and *Town of Greece v. Galloway,* and a number of lesser known decisions, as well as a preview of some of the key cases to be decided this term that matter for state and local governments, touching upon such issues as religion and prisoners' rights, disparate impact under the Fair Housing Act, the First Amendment and sign ordinances, employment law, and criminal law. Hawkins Delafield & Wood LLP partners Daniel G. Birmingham, William J. Jackson and Robert P. Smith offered an insightful analysis of some of the hot topics in municipal finance concerning the SEC and municipal bond disclosures, audits of municipal bonds and high profile bankruptcy proceedings. Patricia E. Salkin, Dean and Professor at Touro Law Center, concluded the morning's program with an entertaining and comprehensive update of recent New York land use and zoning cases covering topics from accessory uses to zoning boards of appeal.

Section Executive Committee Member and Program Attendee Thomas B. Wassel, Esq

Presenter Leslie J. Snyder, Esq. of Snyder & Snyder, LLP

The afternoon session opened with a spirited and lively presentation by Leslie Snyder, partner of the law firm of Snyder & Snyder, LLP, on recent developments in telecommunications law, including with respect to the deployment of wireless facilities. Section Chair Mark Davies, Executive Director of the New York City Conflicts of Interest Board, and Steven G. Leventhal, partner of the law firm of Leventhal, Cursio, Mullaney & Sliney, LLP, and former Chair of the Nassau County Board of Ethics, closed the program with a pragmatic and enlightening two hour segment on State and local ethics laws and dazzled the audience with hypotheticals, engendering an animated question and answer period.

Section Executive Committee Member and Program Attendee Bernis Nelson, Esq.

The program co-chairs were Carol L. Van Scoyoc and Jeannette Koster, Town Attorney for Yorktown.

Section Committees and Chairs

The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on page 43) or Committee Chairs for information.

Employment Relations
Chris G. Trapp
Greco Trapp, PLLC
1700 Rand Building
14 Lafayette Square
Buffalo, NY 14203
cgtrapp@grecolawyers.com

Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Steven G. Leventhal
Leventhal, Cursio, Mullaney & Sliney, LLP
15 Remsen Avenue
Roslyn, NY 11576-2102
sleventhal@lcmslaw.com

Mark Davies
N.Y.C. Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
mldavies@aol.com

Finance
Carol L. Van Scoyoc
White Plains Corp. Counsels Office
Municipal Office Building
255 Main Street
White Plains, NY 10601
cvanscoyoc@whiteplainsny.gov

Land Use, Green Development and Environmental
Lisa M. Cobb
Wallace & Wallace, LLP
85 Civic Center Plaza, Suite LL3
Poughkeepsie, NY 12601
lcobb@wallacelaw.net

Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
dspitzer@hodgsonruss.com

Law Student
Amber Marie Gonzalez
2 Lafayette Street, Suite #1010
New York, NY 10013
Gonzalez@coib.nyc.gov

Legislation
Marisa Franchini
NYCOM
119 Washington Ave.
Albany, NY 12210
marisa@nycom.org

A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

Liability and Insurance
A. Kevin Crawford
New York Municipal Insurance Reciprocal
119 Washington Avenue, Suite 103
Albany, NY 12210-2204
kcrawford@kcnymir.org

Michael E. Kenneally Jr.
New York State Municipal Workers' Compensation Alliance
150 State Street, Suite 203
Albany, NY 12207
mkenneally@nycompalliance.org

Membership and Diversity
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Hina Sherwani
City of Mount Vernon
1 Roosevelt Square East
Mount Vernon, NY 10550-2021
hinasherwani@yahoo.com

Municipal Counsel
E. Thomas Jones
Town of Amherst
5583 Main Street
Williamsville, NY 14221
etjlaw@roadrunner.com

Jeannette Arlin Koster
Town of Yorktown
Town Hall
363 Underhill Avenue
Yorktown, NY 10598
jkoster@yorktownny.org

Carol L. Van Scoyoc
White Plains Corp. Counsel's Office
Municipal Office Building
255 Main Street
White Plains, NY 10601
cvanscoyoc@whiteplainsny.gov

State and Federal Constitutional Law
Adam L. Wekstein
Hocherman Tortorella & Wekstein, LLP
One North Broadway
White Plains, NY 10601
a.wekstein@htwlegal.com

Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Taxation, Finance and Economic Development
Kenneth W. Bond
Squire Patton Boggs LLP
30 Rockefeller Plaza, 30th Floor
New York, NY 10112
kenneth.bond@squiresanders.com

Lauren M. Trialonas
Squire Patton Boggs LLP
30 Rockefeller Plaza
New York, NY 10112-0015
lauren.trialonas@squirepb.com

Kathleen N. Hodgdon
Association of Towns
of the State of New York
150 State Street
Albany, NY 12207
katie.hodgdon@gmail.com

Message from the Outgoing Chair

(Continued from page 2)

who has the interest—the filer, the spouse, or a family member—is irrelevant and should not be public.

What about most financial disclosure forms in New York State? How do they measure up to these principles? Most forms, including New York State's, New York City's, and many municipal forms, stink. In fact, New York City's ethics board actually obtained an amendment of state law that would permit the City to reduce the scope of the City's form to tailor it to the City's ethics law (Chapter 68 of the New York City Charter), but elected officials failed to act on the Board's proposed legislation in the face of opposition by good government groups who trumpet that old shibboleth "the public's right to know." The public's right to know? Nonsense.

Yes, the public has a right to know information that might rise to the level of a conflict of interest under the applicable ethics law. For example, the fact that I own stock in a company that contracts with my municipality should be disclosed where my municipal ethics law prohibits me from taking any action to benefit that company. But where, for example, the ethics law permits me to take an action that benefits a company in which I own less than $10,000 in stock, I should not have to disclose any stock holdings under $10,000. Yet, many annual disclosure laws require disclosure of stock worth more than $1,000,[6] even though stock holdings under $10,000 cannot violate the law. That is simply wrong, and most annual disclosure laws are chock full of such blunders. The public has *no* right to know financial disclosure information unrelated to the ethics law because these laws are not intended to catch crooks and will not stop crooks. We can pass all the ethics laws we want, we can enact a hundred-page annual disclosure form, but none of that will stop bribes and kickbacks and other illegal conduct by corrupt public servants. Sheldon Silver, you'll recall, did not disclose his allegedly illegal income on his annual disclosure form. He may have been stupid, but he wasn't an idiot. You want to have a secret financial disclosure form filed with a criminal justice agency that helps it investigate and prosecute criminals, knock yourself out; but that is *not* public annual disclosure.

"The public's right to know." The fact is: Who elected officials are sleeping with is far more relevant to ethics compliance than whether they own stock that cannot result in a conflict of interest violation—yet no one suggests requiring disclosure of paramours. At least, not yet. Maybe that's still to come: "Question 113. List the names and addresses of everyone with whom you slept during the reporting year and whether he or she had any business dealings with the City of New York." Yep.

As I wrote in 1994, financial disclosure forms are like zucchini: more and bigger is not necessarily better, and too much sunshine causes cancer. The time has come to toss out these oversized zucchinis, get a bit less sun, and put on a little more sunscreen.

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

This is my last column as Chair. On June 1, 2015, Carol L. Van Scoyoc, Chief Deputy Corporation Counsel for the City of White Plans, became Chair of our Section. I look forward to Carol's able guidance of our Section for the next two years. Please join us at our Fall Joint Meeting with the Labor and Employment Law Section, September 25-27 in Saratoga Springs.

Endnotes

1. The views expressed herein are solely those of the author and do not necessarily represent those of the New York City Conflicts of Interest Board or the New York State Bar Association.
2. *See* Tim McMahon, *Historical Consumer Price Index (CPI-U) Data*, InflationData.com, Apr. 17, 2015, http://inflationdata.com/inflation/consumer_price_index/historicalcpi.aspx?reloaded=true.
3. Ethics in Government Act of 1978, Pub. Law 95-521 (Oct. 26, 1978).
4. Ethics in Government Act, 1987 N.Y. Laws ch. 813.
5. *See* former N.Y. Gen. Mun. Law § 813(18)(a)(1); N.Y. Pub. Off. Law § 87(2).
6. *See, e.g.,* Pub. Off. Law § 73-a(3)(16); N.Y. Gen. Mun. Law § 812(5)(16); N.Y.C. Ad. Code § 12-110(d)(1)(l).

Mark Davies

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Persons interested in writing for the *Municipal Lawyer* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Municipal Lawyer* are appreciated.

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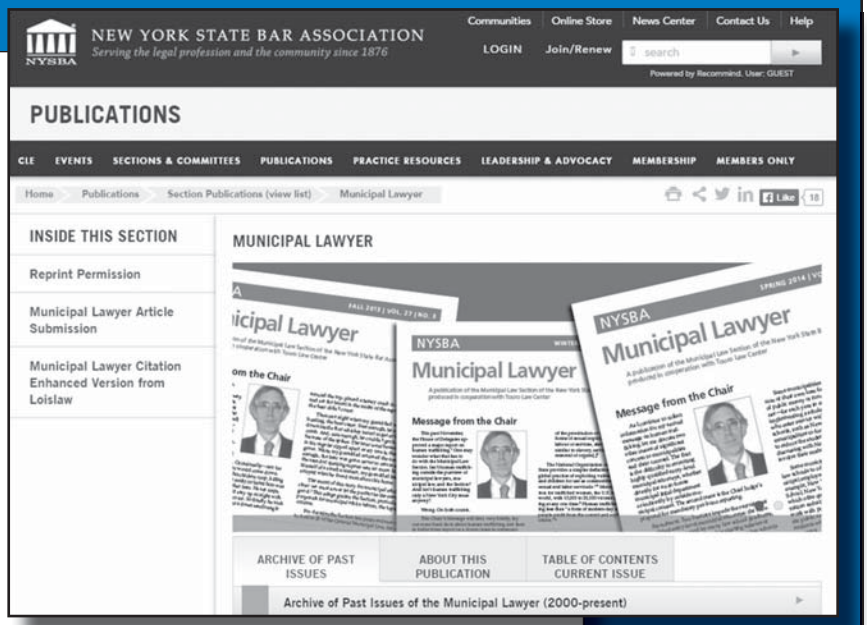

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