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Municipal Lawyer

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www.nysba.org/LocalandStateGovernment

Message from the Chair

Richard K. Zuckerman

Happy end of Summer (is there such a thing?)/start of Fall and welcome to the newest edition of the *Municipal Lawyer*. Many things, most of them good, have occurred within our Section since I last wrote to you.

For example, our 2018 Annual Meeting at the New York Hilton was a smashing success, with a record 112 attendees, thanks in large part to Co-Chairs **A. Joseph Scott** and **Martha Krisel**. Topics, and their presenters, included *Blurred Lines—Zoning Limited to Regulation of Use Rather Than User* **(Adam Wekstein)**; *Navigating the Approval Process: The Interplay Between Municipal Land Use Boards* **(Kathleen Deegan Dickson)**; *Update on New York State's "Zombie Law"* **(Wade Beltramo)**; *Takings After* Murr v. Wisconsin **(Charles Malcomb)**; *Sign Codes in the Wake of* Reed v. Town of Gilbert **(Mindy Zoghlin)**; *Social Media as a First Amendment Protected Forum* **(Jessica Copeland)**; and *Ethical Issues: Conflict of Interest Update on New York State Conflict of Interest Law* **(Steve Leventhal)**.

Our April 27, 2018 Spring Government Law Forum, held at the Bar Center in Albany and across the State via webcast, was attended/viewed by approximately 88 attorneys. Presentations included *Minority and Woman-Owned Business Enterprise (MWBE) Purchasing in New York* **(Martha Mann Alfaro** and **Noreen VanDoren)**; *New York State Response to Changes in Federal Tax Law* **(Danshera Cords** and **Kathleen Hodgdon)**; and *State and Local Government Financial Disclosure Requirements* **(Seth Agata** and **Steve Leventhal)**. Special thanks go to Program Co-Chairs **Sharon Berlin, Spencer Fisher, Mike Kenneally** and **Alyse Terhune**, and NYSBA Section Liaisons **Beth Gould** and **Sydney Joy** (see below), for ensuring that it all came together.

Although it has taken longer than we would have liked to get it to you, this issue of the *Municipal Lawyer* showcases several of the many talented members of our Section, and I would like to take a moment to acknowledge them and our other authors: *Government Ethics Quiz* **(former Section Chair Mark Davies** and **Steve Leventhal)**; *U.S. Supreme Court Delivers a Big Victory for State and Local Governments in* Murr v. State of Wisconsin **(John Echeverria)**; *Notice of Claim Requirements: A Survey of Recent Court of Appeals Decisions* **(Jim Bilik)**; *Lexjac, LLC v. Inc. Village of Muttontown: Second Circuit Clarifies Key Elements of N.Y. Gen. Mun. Law Art. 18* **(Steve Leventhal)**; *Ancient Streets: Creation of the Implied Easement* **(Kristen Motel)**; *New Legislation on Sexual Harassment Will Significantly Affect the Handling of These Cases for Municipalities* **(Kristin Klein Wheaton)**;

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Sponsored by the Section's Ethics and Professionalism Committee

Q ***Hypothetical 1:*** A licensed engineer serves as a member of the town zoning board. At a public meeting, an application for a variance is presented. When the matter is called to be heard, the engineer discloses that he is the applicant's paid consultant, and assisted in reviewing the plans that are a part of the application. The architect recuses himself, and refrains from participating in the discussions, deliberations, or vote. Was the engineer's conflict of interest cured by his recusal?

Hypothetical 2: A village building department employs two architects as plan examiners, each of whom practices in the village. From time to time, their paying clients submit applications to the building department, including plans that they have prepared. Each of them recuses herself in connection with their respective clients' applications. Each of them reviews the applications submitted by clients of the other. Were the architects' conflicts of interest cured by their recusals?

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Save the Date!

January 17, 2019 (NYSBA Annual Meeting)
The Local and State Government Law Section Meeting
Held at New York Hilton Midtown, NYC

For registration and more information on the above event,
please visit www.nysba.org/StateandLocalGoverment

and *Book Review: Why Commercial Litigation in New York State Courts, 4th Edition, Belongs in Your Library* **(former Section Chair Linda S. Kingsley)**.

By the time you read this, it will almost be time to attend our Fall 2018 Meeting, which is being held in the Westin in Buffalo on September 28 and 29, 2018. The Program features a wide variety of interesting topics and entertaining speakers, including *NYS Freedom of Information Law (FOIL) Basics***,** presented by **Chris Trapp***; Notice of Claim Basics***,** presented by **John Campolieto***; Ethical Issues for New Public Sector Attorneys—Reliance on a Supervisor's Resolution of a Question of Professional Duty*, presented by **Jim Bilik***; Update from the State's 2018 Legislative Session,* presented by **Charles Malcomb***; Recent Federal Tax Law Changes and Federal Tax Hot Topics for Municipalities and State Government, Including Remedial NYS Legislation*, presented by **Marla Waiss***; SEQRA –2018 Amendments*, presented by **Lawrence. Weintraub** and **Thomas King***; A Half Century of Home Rule in New York,* presented by **Rick Su**; *Latest Developments on Sexual Harassment and Discrimination in the Public Workplace and the Effects of the #MeToo Movement*, presented by **Kristin Klein Wheaton** and **Lindy Korn,** and moderated by **Lise Gelernter**; *Janus and Beyond: The Demise of Agency Fees*, presented by **John Corcoran** and **Judith Crelin Mayle**; and *Ethical Issues for Public Sector Attorneys in NYS, Including the Limitations on Attorney-Client Privilege for State and Local Government Lawyers,* presented by **James Milles**. We hope that you will be able to attend!

Our Section is co-sponsoring NYSBA's Administrative Agency Practice CLE program, scheduled for November 1, 2018 in New York City and November 8, 2018 in Albany. Topics and their presenters include, *Hearings Under the New York State Administrative Procedure Act Articles 3-5 and State Administrative Law Judges' Model Code of Conduct* **(**the **Hon. James F. Horan** in New York City and the **Hon. James T. McClymonds** in Albany)*; Proceedings Before the New York State Division of Tax Appeals/Tax Appeals Tribunal,* presented by the **Hon. James Connolly**; *Proceedings Before the New York City Office of Administrative Trials and Hearings (OATH) (NYC),* presented by the **Hon. Raymond E. Kramer***; Hearings Before Special Education Impartial Hearing Officers in New York,* presented by **Doug Libby**; *Hearings Before the New York State Workers' Compensation Board, Including Administration of the Paid Family Leave (PFL) Law,* presented by **David Wertheim***; Hearings Before the New York State Department of Environmental Conservation,* presented by the **Hon. James T. McClymonds**; *Hearings Before the New York State Department of Health and the State Board for Professional Medical Conduct,* presented by the **Hon. James F. Horan** in New York City and Albany, and the **Hon. Natalie Bordeaux** in New York City and the **Hon. Dawn MacKillop-Soller** in Albany.

Our Section's 2019 Annual Meeting will be held a week early this year, on January 17, 2019, once again at the New York Hilton. Program Co-Chairs former NYSBA and Section Chair **A. Thomas Levin**, **Bernis Nelson** and **Adam Wekstein** are busy planning this all-day program, and welcome your suggestions for topics and speakers.

Our Section's Officers (First Vice-Chair **Sharon Berlin**, Second Vice-Chair **Mike Kenneally** and Secretary **Lisa Cobb**) and Executive Committee Members continue to diligently work to try to provide you with a valuable bang for your Section dues buck. The Executive Committee meets monthly by conference call and the minutes, once approved, are posted and made available at *communities.nysba.org*. Typical meeting agendas address approximately 20 items (in under an hour, by the way) including, for example, our efforts (thank you to in particular to **A. Thomas Levin**) to update and submit our Section's *Model Pro Bono Policy for Attorney-Employees of Local Governments and Local Government Agencies* to NYSBA's House of Delegates as a companion and supplement to the NYSBA's previously adopted *Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies*.

Section Committees continue to provide members with information about latest developments and speaking and writing opportunities. Shoutouts are in order for some of our more active committees, such as (but certainly not limited to) the Committee on Attorneys in Public Services (**Spencer Fisher** and **Michelle Kelson**, Co-Chairs), the Employment Relations Committee (**Jim Bilik** and **Chris Trapp,** Co-Chairs), the Administrative Law Judges Committee (chaired by the **Hon. James T. McClymonds**) and our Long-Range Planning Committee, chaired by **Alyse Terhune** and which, with the Executive Committee's approval, has planned our 2019 Fall Meeting for October 25-26 in Saratoga Springs, and our 2020 75th Anniversary Fall Meeting for Philadelphia, tentatively scheduled for October 23-25, 2020. An extra special thank you also goes to our Section Committee Coordinator, **Chris Trapp**, for his ongoing efforts at pushing our committees to do even more.

On a bittersweet note, long-time Section liaison and friend **Beth Gould** left NYSBA this Spring and moved on to greener pastures with the Girl Scouts of America. I'm sure her position will soon be filled by very capable hands. Still, we miss you, Beth!

As you can see, there is much to look forward to for the rest of this year, though my beloved New York Mets do not seem to fit within that category. Still, it's almost hockey season and then 2019. Let's Go Rangers!

On behalf of all of us in the Section's leadership, thank you for your continued membership and support!

Richard K. Zuckerman

Letter from the Co-Editors

Rodger Citron

Michael Lewyn

Michael Spinelli

As we write our letter to you about this issue of *Municipal Lawyer*, the weather is warm and the prospect of summer is inviting. We have a fine array of articles for you to read—whether you're lounging on the beach, camping out in the woods, or—heaven forbid—marking time at the office.

We begin with the Question from the Ethics Quiz, written by Mark Davies and Steve Leventhal. Their Answer to the Question appears later in the issue.

Our first article, by Professor John Echevarria, gives an excellent account of the U.S. Supreme Court's decision in *Murr v. State of Wisconsin* in 2017. In *Murr*, the Court affirmed the judgment of the Wisconsin Court of Appeals that enforcement of a "lot merger" provision in a county zoning ordinance did not result in a compensable taking under the Fifth Amendment. While seemingly narrow and technical, *Murr* represents the most significant takings decision from the Supreme Court in at least a decade. Perhaps, Echevarria suggests, the Court may no longer be committed to its view that a land use regulation is a compensable taking if it deprives a landowner of all economically beneficial use.

The next article, by James Bilik, addresses the requirements in General Municipal Law § 50-e(5) for filing a late notice of claim. As Bilik explains, the New York Court of Appeals recently decided three cases involving litigation over a motion to file a notice of claim. Not surprisingly, because § 50-e(5) enumerates various factors for courts to consider and also affords courts discretion when deciding such a motion, the Court of Appeals' decisions are quite fact-intensive. Bilik also discusses another Court of Appeals decision involving the application of General Municipal Law § 50-e(1)(b).

Steven Leventhal provides a thoughtful discussion of the United States Court of Appeals for the Second Circuit's decision in *Lexjac, LLC v. Beckerman*. The case is significant, Leventhal explains, because more than half a century after the enactment of the statewide code of ethics for local municipalities, Article 18 of the General Municipal Law, the Second Circuit has finally clarified several of its key provisions. (Look for *Lexjac*-inspired Ethics Quiz questions in future issues!)

Are you familiar with the ancient streets doctrine? We are not ashamed to admit that we weren't until we received Kristen Motel's submission. She provides a brief primer on this seldom-cited legal principle. And yet, as Motel explains, the ancient streets doctrine has relevance in modern property law—most commonly in scenarios involving land situated in an incomplete subdivision or abutting a private road or abandoned public right-of-way.

Our final article is especially topical. The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have prompted new legislation affecting all employers, including public employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget, signed in April 2018, contains provisions and new guidelines that were negotiated into the budget and that affect sexual harassment prevention policies, training and settlements of sexual harassment cases immediately. The same month, the New York City Council passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act." These bills were signed into law by Mayor Bill de Blasio last month. As Kristin Klein Wheaton explains, these pieces of legislation will significantly impact the handling of sexual harassment cases by municipalities.

We are delighted to be publishing all of these articles. Two last items, quickly. First, we must correct an error from our last issue: The cover of that issue incorrectly identified Dorian Simmons as the author of an article, "A Primer on Area Variances." The author of the article was Noelle C. Wolfson. We apologize for the error. Second, we are delighted to announce that Michael Spinelli, a recent Touro Law Center graduate, will be joining *Municipal Lawyer* as an editor. Michael did outstanding work on the *Municipal Lawyer* as a law student; we are lucky to have him on the team.

Linda Kingsley has written a review of the 4th and newest edition of *Commercial Litigation in New York State Courts*. Rather than merely describe this book, she lists ten reasons why it belongs in your library. For example, she notes that even people who own an earlier version of this treatise can benefit from the newest version, because there are 22 new chapters in the Fourth Edition, including chapters on mediation and arbitration.

Finally, as always, we encourage you to write for *Municipal Lawyer*. Please send your submissions and suggestions to Professor Michael Lewyn at Mlewyn@tourolaw.edu.

Rodger Citron, Michael Lewyn, and Michael Spinelli
Editors

Answer to Government Ethics Quiz

A The answer to both questions is no.

Article 18 of the New York General Municipal Law establishes minimum standards of conduct for the officers and employees of all municipalities within the State of New York, other than New York City.[1] All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.[2]

New York General Municipal Law § 805-a-1(c) prohibits a village officer or employee from receiving, or agreeing to receive, compensation for services to be rendered in relation to any matter before any municipal agency of which he or she is an officer, member or employee or over which he or she has the power to appoint.[3] A violation of New York General Municipal Law § 805-a may be the basis for a fine, suspension or removal from office or employment.[4]

The engineer member of the zoning board, and the architect plan examiners have all violated New York General Municipal Law § 805-a-1(c), notwithstanding their recusals, because they have agreed to receive, and have received, compensation for services to be rendered in connection with matter pending before their own agencies.

Furthermore, ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.[5]

Mark Davies

Steve Leventhal

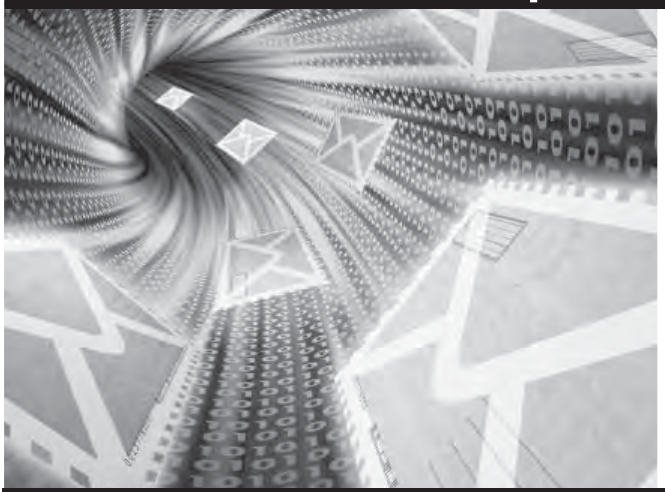
Here, when municipal officers or employees provide compensated services to applicants before their own agencies, members of the public may reasonably be led to conclude that those applicants will have an advantage of other members of the public in the consideration and determination of their applications. Such circumstances could seriously undermine public confidence in village government by creating an appearance of impropriety.

Mark Davies and Steve Leventhal

Endnotes

1. N.Y. Gen. Mun. Law § 800(4) (McKinney 1980).
2. N.Y. Gen. Mun. Law § 800(5) (McKinney 1980) (Volunteer firefighters and civil defense volunteers, other than fire chiefs and assistant fire chiefs, are not "officers" or "employees" within the meaning of General Municipal Law Article 18).
3. N.Y. Gen. Mun. Law § 805-a-1(c) (McKinney 1987).
4. N.Y. Gen. Mun. Law § 805-a-2 (McKinney 1987).
5. *See, e.g.*, *Zagoreos v. Conklin*, 109 A.D.2d 281, 287 (2d Dept. 1985); *Tuxedo Conservation & Taxpayer Assn. v. Town. Board of Town of Tuxedo*, 69 A.D.2d 320 (324-325) (2d Dept. 1979).

Request for Articles



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

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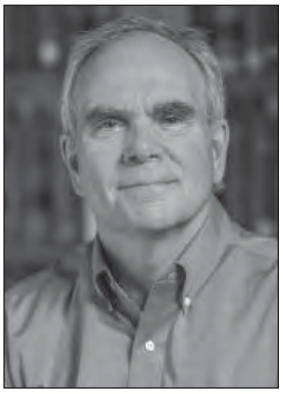
U.S. Supreme Court Delivers a Big Victory for State and Local Governments in *Murr v. State of Wisconsin*

By John Echeverria

On June 23, 2017, the U.S. Supreme Court issued its decision in *Murr v. State of Wisconsin*, affirming the judgment of the Wisconsin Court of Appeals that enforcement of a "lot merger" provision in a county zoning ordinance did not result in a compensable taking under the Fifth Amendment.[1] While seemingly narrow and technical, *Murr* represents the most significant takings decision from the Supreme Court in at least a decade. The Court's opinion has particularly important implications for future takings litigation involving land use and environmental regulations. Here are the basic takeaways from *Murr*.



John Echeverria

The Background

The facts of the case are straightforward. Four adult siblings in the Murr family jointly owned two adjacent building lots on the Lower St. Croix River, one with a cabin on it (Lot F), and one vacant (Lot E), both of which the Murrs had acquired from their parents in a series of transactions in the 1990s.[2] Under the county zoning regulations, both of the lots were substandard in size.[3] Furthermore, because the Murrs held both lots in common ownership, they were "merged"—effectively treated as one lot—under the zoning's merger provision.[4] When the Murrs approached county officials about developing Lot E, they were told the lots had merged and they were barred from building a house on Lot E (or selling Lot E to someone else).[5] Disappointed by this regulatory obstacle, they brought suit under the Takings Clause.[6]

The issue before the Supreme Court was whether the "relevant parcel" for the purpose of assessing the economic impact of the restriction was Lot E or Lots E and F combined.[7] The Murrs, represented by the Pacific Legal Foundation, argued for Lot E alone[8] while the government argued for combining the lots.[9] Defining the relevant parcel as Lot E made the adverse economic impact of the restriction appear relatively severe, increasing plaintiffs' chances of establishing a taking.[10] Defining the relevant parcel as both lots combined reduced the apparent economic impact (especially because the plaintiffs already had one cabin on the combined lots), virtually precluding a finding of a taking.[11]

The Murrs argued that Lot E was the appropriate parcel because Lot E had been lawfully created under Wisconsin subdivision rules and state property rules should govern definition of the relevant parcel.[12] The Court rejected this theory and instead ruled that the relevant parcel for takings purposes turns on "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel."[13] More specifically, the Court said this inquiry should be guided by, among other things, how land is bounded and divided under state and local law,[14] the physical characteristics of the property in question,[15] and the potentially positive impact of a restriction on one of a claimant's holdings on the value of an adjacent holding.[16] Applying this multifactor analysis, the Court ruled that combined Lots E and F represented the relevant parcel, taking into account that the lots had merged under the county's lot merger provision, the Murrs were aware that their lots bordered a national wild and scenic river and might be subject to stringent regulation, and the fact that the restrictions on Lot E contributed to the economic value of the development rights on Lot F.[17]

Justice Kennedy wrote the opinion for the Court for himself and four other justices.[18] Chief Justice Roberts wrote a dissenting opinion, joined by Justices Alito and Thomas.[19] Roberts contended that lot lines established under local law "should, in all but the most exceptional circumstances, determine the parcel at issue," meaning that in his view Lot E alone should have been regarded as the relevant parcel.[20] Justice Thomas wrote a separate dissent arguing, in typically iconoclastic fashion, that the Court has "never purported to ground" its takings precedents "in the Constitution as it was originally understood," and suggesting that the Court should take a "fresh look" at takings doctrine.[21] Justice Gorsuch did not participate in the case.[22] Bottom line, the Court split 5 to 3 on the important "parcel issue" presented by the case.

The Major Takeaways

The Parcel Status Quo Maintained. *Murr* basically reaffirms the traditional "parcel as a whole rule" in takings litigation. *Murr* breaks new ground by firmly grounding the "parcel as a whole" concept in a claimant's "reasonable expectations about property owner-

ship" and by enumerating three apparently nonexclusive factors for gauging a claimant's expectations relevant to the parcel issue: the treatment of the land under state and local law, the physical characteristics of the land, and the effect of restricting use of one landholding on the value of an adjacent landholding.[23]

In practice, these guidelines should generally lead courts to adopt parcel definitions in line with the traditional approach to the parcel issue prior to the *Murr* decision. State and local law can support either a narrow or, as in *Murr*, a broader definition of the relevant parcel. Consideration of the physical characteristics of the land and the economic interactions between adjacent landholdings will often support unified treatment of adjacent holdings.[24] Ultimately, it appears likely that the courts, under the *Murr* "reasonable expectations" approach, will typically treat a contiguous or otherwise connected set of landholdings as a single parcel for takings purposes so long as they are part of a single development project or investment venture.

Thus, it appears that the Court effectively endorsed the parcel approach it previously applied in *Palazzolo,* where the Court treated a property that had been subdivided into dozens of separate building lots as a single parcel for the purpose of takings analysis.[25] This approach also is consistent with how the overwhelming majority of lower federal and state courts have resolved the parcel issue in takings challenges to land use and environmental regulations.[26] In short, the Court in *Murr* offered a mainstream answer to the parcel question that is consistent with longstanding practice.

By contrast, if the Court had adopted the Pacific Legal Foundation's position, and defined each lawfully subdivided lot as the relevant parcel (or at least as the presumptively relevant parcel),[27] it would have generated a substantial increase in takings liability for government at all levels. Happily, the Court declined to make a radical change in this feature of takings law.

Economic Pros and Cons of Regulation Recognized. The *Murr* decision breaks new ground by recognizing more explicitly than the Court ever has before that land use regulations produce a complex mix of positive as well as negative effects on private property values. A land use regulation may depress property values by limiting what an owner can do with her land.[28] But it also can increase property values by protecting the amenities that make a community an attractive place to live and work and by restricting available development opportunities and making them scarcer and hence more valuable.[29]

The Court recognized that the mix of negative and positive economic impacts of regulation will support a broad definition of the relevant parcel in many cases. The Court explained:

> [C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty … [I]f the landowner's other property is adjacent to the [owner's] lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.[30]

In addition, once the relevant parcel has been determined, the Court's economic insights in *Murr* also should inform the courts' analysis of whether a "taking" has occurred, in particular the assessment of the economic impact of a regulatory restriction. A regulatory restriction typically applies not only to part of a claimant's land but also to many other property owners in the community.[31] For the reasons the Court has explained in *Murr*, enforcement of a regulation against others in the community may well benefit the claimant.[32] *Murr* strongly suggests that these economic benefits of regulations received by takings claimants should be factored into the analysis of whether the application of regulations to them results in a "taking" of their property.[33]

Parcel Rule Is a Federal Law Rule. *Murr* makes clear that federal law, not state or local law, ultimately determines the proper definition of the relevant parcel for the purpose of takings analysis. The Court rejected both the Murrs' and the State of Wisconsin's efforts to tie the parcel definition to state and local property rules.[34] The Court said that allowing state law rules to define the relevant parcel would give states or their localities too much authority to define the relevant parcel either too narrowly or too broadly, undermining the Supreme Court's authority to define the scope of what is, after all, a federal constitutional protection.[35]

Instead, the Court articulated a multifactor test which evidently derives from the Takings Clause itself.[36] Under this test, state and local property rules are relevant, but they are not determinative of the parcel question.[37] It is not entirely clear from *Murr* whether the parcel issue is part of the analysis of whether a government action amounts to a "taking," or whether instead it is part of the threshold question of how to define the claimant's "property." In any event, regardless of how the result is rationalized in doctrinal terms, *Murr* makes clear that the parcel issue is ultimately governed by federal law.[38] Chief Justice Roberts, in dissent, took a different position, arguing that the definition of the relevant parcel should be governed by state law.[39]

Lot Merger Provisions Upheld. The *Murr* case offers a ringing endorsement of the constitutionality of lot merger provisions. It is especially noteworthy that, even as the Court split on the proper approach to the parcel issue, the justices agreed unanimously that there was no taking in this case. That common sense conclusion is hardly surprising. Prior to *Murr*, no lower federal or state court had ever ruled that a lot merger provision results in a compensable taking, and it would have been surprising indeed if the Supreme Court had been the first court to do so. As explained in the effective *amicus* brief filed by the State and Local Legal Center, lot merger provisions in local zoning ordinances are very widespread and have been around almost since the advent of zoning.[40]

And, setting doctrinal complexities to one side, lot merger provisions are eminently "fair and just," satisfying the Supreme Court's ultimate test under the Takings Clause.[41] When a community adopts zoning (and the Supreme Court has left no doubt that zoning itself is constitutional[42]), there almost always will be some pre-existing lots that are too small to conform with new minimum lot-size requirements. Regulators could simply bar use of these lots, imposing heavy economic losses on the owners, or allow the owners to develop the lots even though they are not consistent with the zoning plan. Faced with this choice, local governments commonly permit the development of so-called "non-conforming" lots. This decision is arguably fair, although it allows the owners of these lots to ignore the zoning rules that apply to their neighbors while simultaneously reaping the benefit of their neighbors' compliance with the same rules. The calculus is different, however, if citizens acquire adjacent substandard lots that together constitute conforming lots. In that situation, it is more fair to treat owners of adjacent substandard lots as owners of conforming lots and subject them to the same rules that apply to everyone else, rather than allow them to reap double the special benefits otherwise conferred on owners of substandard lots. Small wonder that no Justice in *Murr* was inclined to assert that sensible, time-tested lot merger provisions result in a taking.

RIBE's Defense Strengthened. The *Murr* decision expands the significance of the claimant's reasonable investment-backed expectations (RIBEs) in takings analysis, enhancing the ability of government defendants to point to the regulations in place when the claimant purchased the property as a basis for rejecting a takings claim.[43] In *Palazzolo*, the Court (in an opinion by Justice Kennedy) famously rejected the so-called "notice rule," the idea that a landowner is barred from suing for a taking based on a regulation already in place when she purchased the property.[44] The opinion for the Court left uncertain whether, even if a pre-existing regulation is not a complete bar to a takings claim, it should be a factor potentially weighing against a takings claim.

Justice Scalia wrote a concurring opinion insisting that the fact that a rule was already in place at the time of purchase should be irrelevant in a regulatory takings case.[45] Justice O'Conner filed a separate concurrence taking the opposite tack, asserting that notice of pre-existing regulations should be a relevant consideration.[46] Because four dissenters in *Palazzolo* embraced Justice O'Connor's viewpoint, most lower courts accepted Justice O'Connor's position as probably representative of a majority of the Court. But, until now, the Court had never squarely addressed the issue in a majority opinion.

In *Murr*, Justice Kennedy, speaking for the Court, stated that "[a] reasonable restriction that predates a landowner's acquisition…can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property."[47] Furthermore, the Court specifically relied on this consideration in resolving the *Murr* case, pointing out that plaintiffs' "land was subject to this regulatory burden…only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted."[48] So, following *Murr*, there is no question that an owner's knowledge of regulatory restrictions in place when she purchased the property will weigh against the owner's subsequent takings claim based on that restriction.

Importance of Environment Recognized. The *Murr* decision recognizes the significance of the government's goal of protecting ecologically fragile parts of the landscape, both for the purpose of defining the relevant parcel and in deciding whether a taking has occurred. As discussed, the Court said one relevant factor in defining the relevant parcel is "the physical

characteristics of the landowner's property."[49] The Court continued: "These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or is likely to become subject to, environmental or other regulations."[50]

Under this standard, the likelihood that a portion of a claimant's landholding might be strictly regulated due to environmental constraints supports treating the remainder of the owner's holding as a unified parcel. Thus, in *Murr* the Court said that the "rough terrain" encompassed by the *Murr* lots, and their location on a designated wild and scenic river, both supported defining the relevant parcel as Lots E and F combined.[51]

The Court also said that the government's environmental protection objectives are relevant as part of the takings analysis, observing that, in assessing the "character" of the county zoning under the *Penn Central* analysis, it was noteworthy that "the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land."[52]

Time to Revisit Lucas? *Murr* raises a serious question about whether the Court may be prepared to revisit the apparently strict doctrine laid down 25 years ago in *Lucas v. South Carolina Coastal Council*. In that case, in an opinion by Justice Scalia, the Court said that a regulation that denies an owner "all economically viable use" of his property should be regarded as a "categorical" taking, unless the government is responding to an emergency or the restriction parallels "background principles" of nuisance or property law.[53] Based on this test, the U.S. Supreme Court overturned a ruling by the South Carolina Supreme Court that a state setback line barring developing along the ocean shore did not result in a taking.[54] Justice Kennedy concurred in the judgment in *Lucas* but expressed various reservations about the narrowness of Justice Scalia's *per se* rule.[55]

In his opinion for the Court in *Murr* Kennedy quoted twice from his concurring opinion in *Lucas*. First, in explaining that a claimant's reasonable expectations about property ownership should be the guide in defining the relevant parcel, he quoted his statement in *Lucas* that "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."[56] Second, in explaining why the physical characteristics, including the environmental sensitivities, of land should be relevant in defining the relevant parcel, he quoted the following: "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[57]

Of course, these are only brief snippets in a lengthy opinion. In addition, Justice Kennedy has new retired from the Supreme Court and his replacement could change the balance on the Court on takings either way. But they do appear in an opinion for the Court and should be considered authoritative. At a minimum, *Murr* appears to open the door to reconsideration of the *Lucas* precedent and raise the question whether the Court, if presented with the *Lucas* case today, would be more likely to issue a decision tracking the thinking of Justice Kennedy or the views of the late Justice Scalia.

Endnotes

1. *Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1950 (2017).
2. *Id.* at 1936-1937.
3. *Id.* at 1940.
4. *Id* at 1941.
5. *Id.*
6. *Id.*
7. *Id.* at 1941-1942.
8. *Id.* at 1941.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1947.
13. *Id.* at 1945.
14. *Id.*
15. *Id.*
16. *Id.* at 1946.
17. *Id.* at 1948-1949.
18. *Id.* at 1939.
19. *Id.* at 1950.
20. *Id.* at 1953.
21. *Id.* at 1957.
22. *Id.* at 1950.
23. *Id.* at 1945-1946.
24. *Id.* at 1946.
25. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631-32 (2017).
26. Robert Meltz, *Takings Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 348 (2007) ("In practice, the pattern has been to include contiguous plaintiff-owned land in the relevant parcel unless there is good reason to exclude it.").
27. *Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1947 (2017).
28. *Id.* at 1946.
29. *Id.*
30. *Id.*
31. *Id.* at 1947.

32. *Id.* at 1938.
33. *Id.* at 1948-1949.
34. *Id.* at 1946-1948.
35. *Id.* at 1946-1947.
36. *Id.* at 1944-1947.
37. *Id.* at 1945.
38. *Id.* at 1948.
39. *Id.* at 1953.
40. *Brief of Amici Curiae National Association of Counties, Council of State Governments, National League of Cities, U.S. Conference of Mayors, International City / County Management Association, and International Municipal Lawyers Association in Support of Respondents at 5, Joseph P. Murr et al. v. State of Wisconsin and St. Croix County, Murr v. State of Wisconsin*, 137 S.Ct. 1933 (2017) (No. 15-214) 2016 WL 3383223 at 5.
41. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333-35 (2002).
42. Tina R. Axelrad and Kenneth B. Bley, The Search for Constitutionally Protected "Property" In Land Use Law, 29 Urb. Law. 251, 254 (1997) ("…Euclid established the general legitimacy of zoning…").
43. *Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1945 (2017).
44. *Palazzolo*, 533 U.S. 606, 627 (2001) *quoted in Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1945 (2017).
45. *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001).
46. *Id.* at 634-637.
47. *Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1945 (2017).
48. *Id.* at 1948.
49. *Id.* at 1945.
50. *Id.* at 1945-1946.
51. *Id.* at 1948.
52. *Id.* at 1949-1950.
53. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992).
54. *Id.* at 1032.
55. *Id.* at 1032-36..
56. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) *quoted in Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1945 (2017).
57. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) *quoted in Murr v. State of Wisconsin*, 137 S.Ct. 1933, 1946 (2017).

John Echeverria is a Professor of Law at Vermont Law School. Professor Echeverria filed an *amicus* brief in *Murr* on behalf of a group of land economists urging the Court to embrace a more rigorous analysis of how land values are affected by regulation. This article originally appeared on Takings Litigation, a blog about takings law (see https://takingslitigation.com/2017/06/26/big-victory-for-state-and-local-governments-in-murr/).

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Notice of Claim Requirements: A Survey of Recent Court of Appeals Decisions

By James D. Bilik

Introduction

Pursuant to N.Y. General Municipal Law (GML) § 50-i, service of a notice of claim is a condition precedent to the commencement and maintenance of most actions for damages against a city, county, town, village, fire district or school district.[1] GML § 50-e requires that the notice of claim be served within 90 days after the claim arises.[2]

Depending on one's point of view, the notice of claim provisions in the GML, which only apply to suits against public corporations,[3] are either a highly inequitable hindrance to the pursuit of justice or a necessary protection of the public purse against stale claims.[4] What is certain is that the consequence of failure to serve a timely notice of claim where required, unless a court grants leave to serve a late notice, is severe: preclusion of the action or proceeding.

Not surprisingly, much litigation has resulted from the 90-day notice requirement, and numerous cases involve GML § 50-e(5), which creates a right to seek leave to serve a "late" notice of claim, i.e., after the 90-day period has elapsed.[5] Whether to grant such a motion is a matter of judicial discretion, but the court must consider certain factors, such as whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter.[6]

The statute also requires the court to consider "all other relevant facts and circumstances" including, among others, infancy, disability, whether there was justifiable reliance upon settlement representations made, and whether the delay beyond 90 days in serving the notice of claim substantially prejudices the defendant in maintaining its defense on the merits.[7]

The list of the factors in § 50-e(5) that are to be considered when a court entertains a motion for leave to serve a late notice of claim is not exhaustive. For example, courts have denied such motions, thus precluding the action, where the plaintiff's claim is shown to be "patently meritless," a factor not listed in § 50-e(5).[8] Also, although the statute does not expressly state it, some courts have required claimants to show that they have a reasonable excuse for the delay.[9] Others treat the reasonableness of the excuse as merely one of the relevant facts and circumstances to be considered by the court rather than as dispositive.[10]

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Three cases recently decided by the Court of Appeals ("Court") involved motions to serve a late notice of claim.[11] A fourth decision of the Court[12] involves GML § 50-e(1)(b); this section provides that in an action commenced against an officer, appointee or employee of a public corporation, a notice of claim still must be served upon the public corporation even where the public corporation is not a named defendant, if the public corporation has a statutory obligation to indemnify the named defendant with regard to the claim.[13] The rest of this article discusses each of these four cases.

1. *Newcomb v. Middle Country Central School District*

In the first case, *Newcomb v. Middle Country Central School District*,[14] the Court resolved inconsistencies among decisions of the Appellate Division regarding the proper allocation of the burden of proof between the claimant and the public corporation, on the issue of whether the public corporation has been substantially prejudiced by the delay in presenting a claim, a factor to be considered by the court on a motion for leave to serve a late notice.[15]

In *Newcomb*, a 16-year-old high school student was seriously injured by a hit-and-run driver.[16] Notices of claim were served within 90 days of the accident upon the state, town and county, as entities alleged to have responsibility over the conditions at the intersection where the accident occurred.[17] Also within 90 days of the accident, claimant—the infant student's father—notified the school district of the accident, its location, and the student's injuries, apparently in connection with the student's absence and educational needs.[18] Claimant had no reason to believe, at that time, that any actions of the school district contributed to the accident, and no notice of claim was served on the school district within 90 days.[19]

Claimant requested police records about the accident, but the records, including photographs taken at the scene, were not provided to the claimant until six

months after the accident, well after the 90-day period had elapsed.[20] The photographs showed that there was a large sign advertising a school play, displayed at the corner of the intersection where the student was struck.[21] Based on the photographs, claimant served a notice of claim upon the school district eight months after the accident, asserting that the sign, for which the district was responsible, was distracting to drivers and obstructed their view of the corner and pedestrians, thereby creating a dangerous condition.[22]

On a motion for leave to serve a late notice of claim on the school district, claimant made several arguments: (1) the district had actual knowledge of the claim because claimant notified the district about the accident, including its location and the student's injuries, within 90 days after the accident, and the district removed the sign; (2) the police department's delay in providing claimant with the photographs showing the placement of the sign constituted a reasonable excuse for claimant's delay; and (3) the school district was not substantially prejudiced by the late notice of claim because the district knew about the accident and the sign well within 90 days, and because the delay would not hamper the district's ability to defend the case on the merits, as the accident scene was virtually unchanged and the district would have access to the police reports and photographs.[23]

The Supreme Court denied claimant's motion for leave to serve a late notice of claim, and the Appellate Division, Second Department, affirmed.[24] The lower courts found that the school district did not have actual knowledge of the claim within 90 days or a reasonable time thereafter, because the district did not know until later that there was any connection alleged between the accident and the sign publicizing a play.[25]

The Court agreed with the lower courts that the school district had no actual knowledge of the claim within 90 days but remitted the case on the issue of substantial prejudice.[26] Specifically, the Supreme Court's decision, adopted by the Appellate Division, placed the burden on claimant to prove that the delay in notifying the school district of the claim did not substantially prejudice the district.[27] Further, the Supreme Court held that prejudice could be inferred from the mere passage of time because memories fade, students graduate, and school district personnel change.[28] This inference was made notwithstanding the lack of any evidence in the record about these factors or about their effect upon the district's ability to prepare a defense.[29]

The Court noted a lack of consistency in decisions of the Appellate Division on the burden of proof, with many placing the burden on the claimant, some placing it on the public corporation, and others shifting the burden to the public corporation after the claimant makes an initial showing of lack of prejudice.[30] The *Newcomb* Court adopted the third formulation—holding that "mere inferences cannot support a finding of substantial prejudice."[31] The Court described the correct approach as requiring a claimant "to make an initial showing that the public corporation will not be substantially prejudiced, and then requiring the public corporation to rebut that showing with particularized evidence" of prejudice.[32] The initial showing of the claimant "need not be extensive" but must include "some evidence or plausible argument that supports a finding of no substantial prejudice."[33] In support of its holding, the Court cited the settled principle that a party should have the burden of proving facts that are within its knowledge.[34]

The case was remitted to the Supreme Court for reconsideration of the substantial prejudice issue using the proper allocation of the burden of proof.[35] The Court held open the possibility that leave to serve a late notice of claim might still be properly denied if there is evidence that factors such as changes in personnel and the fading memories of witnesses actually prejudiced the school district in defending against the case.[36]

2. *Diegelman v. City of Buffalo*

In *Diegelman v. City of Buffalo*,[37] the Court reversed a decision of the Appellate Division, Fourth Department denying a motion for leave to serve a late notice of claim on grounds that the claim was patently without merit.[38] The Court's conclusion that the claim in this case was not patently meritless was based on its analysis of the substantive issue of a police officer's right to sue the public employer directly in tort for a line-of-duty injury under GML § 205-e where the employee already is entitled to certain medical benefits under GML § 207-c.[39]

The claimant in *Diegelman* was a retired police officer who was diagnosed with mesothelioma, a form of cancer, 17 years after he retired.[40] In a motion for leave to serve a late notice of claim against the City of Buffalo ("City"), claimant alleged that his cancer was caused by exposure to asbestos while he worked in city-owned buildings.[41] GML § 205-e(1) permits police officers to bring tort claims for line-of-duty injuries caused by violations of statutory or regulatory provisions by any person or persons.[42] However, GML § 205-e(1) also provides that this right to sue is subject to any limi-

tation imposed upon an employee by the Workers' Compensation Law.[43] Generally, benefits provided under the Workers' Compensation Law are the sole and exclusive remedy for employees for injuries suffered in the course of employment, and receipt of Workers' Compensation benefits precludes an employee from suing the employer.[44]

Buffalo, like other large municipalities in the state, had exercised the right not to provide benefits to its police officers pursuant to the Workers' Compensation Law.[45] However, claimant was entitled to the benefits in GML § 207-c, i.e., payment of the cost of medical and hospital care for police officers injured or made ill because of the performance of their duties.[46]

The City opposed the motion for leave to serve a late notice of claim on grounds that the claim was patently without merit.[47] The City argued that claimant's receipt of benefits under GML § 207-c is equivalent to receipt of benefits under the Workers' Compensation Law, and therefore that the claim was subject to the limitation in GML § 205-e(1) and no lawsuit could go forward against the employer.[48]

The Supreme Court granted claimant's motion for leave to serve a late notice of claim, but the Appellate Division reversed, adopting the City's argument.[49] The Court reversed, rejecting the City's argument that receipt of benefits under GML § 207-c is equivalent to receipt of benefits under the Workers' Compensation Law.[50] The Court cited prior decisions distinguishing between the two statutes—decisions that noted differences in standards of eligibility for benefits.[51] It also noted that the legislature, in the language limiting tort claims in GML § 205-e(1), made no reference to claimants entitled to GML § 207-c benefits. Finally, the Court found that the City's position was inconsistent with the remedial nature of GML § 205-e.[52] The case was remitted to the Appellate Division, Fourth Department.[53]

3. *Wally G. v. N.Y.C. Health and Hospitals Corp.*

In *Wally G. v. N.Y.C. Health and Hospitals Corp.*,[54] it was alleged that the infant plaintiff, who was born prematurely by emergency Cesarean section in June 2005, sustained various injuries, including brain damage and seizure disorder, because of the defendants' negligence and malpractice both during the mother's prenatal care and at the time of the birth.[55]

A notice of claim was served in January 2007, approximately 18 months after plaintiff was born.[56] The action was commenced in August 2008, and plaintiff did not make a motion for leave to serve a late notice of claim until December 2010.[57] Plaintiff argued that leave should be granted because the medical records from plaintiff's birth and treatment gave the defendants timely, actual knowledge of the essential facts constituting the claims of negligence and malpractice.[58] The Appellate Division, First Department, in a 3-2 decision, affirmed the Supreme Court's denial of the motion for leave to serve a late notice of claim.[59]

On appeal, the Court held that although plaintiff's claims were indeed based on the facts that were contained in the hospital records, the applicable test for whether medical records alone show that the defendant had actual knowledge of the essential facts underlying a claim is whether the records "evince that the medical staff, by its acts or omissions, inflicted an injury on the plaintiff."[60] In other words, "the medical records must do more than suggest" such malpractice.[61] The Court rejected the notion that if medical experts reasonably disagree on whether the records show that medical staff deviated from the applicable standard of care, a motion based on actual knowledge must be granted as a matter of law.[62] The Court concluded that the lower courts did not abuse their discretion in denying the motion based on the record.[63]

In dissent, the late Judge Abdus-Salaam, joined by Judges Rivera and Fahey, while agreeing with the majority's statement of the standard to be applied when a claimant alleges that the defendant obtained actual knowledge of the facts underlying a claim through hospital records, found that the hospital records in this case were in fact sufficient to confer such knowledge.[64]

4. *Villar v. Howard*

In *Villar v. Howard*,[65] the Court was called upon to interpret GML § 50-e(1)(b), which requires service of a notice of claim upon a public corporation where an action is brought not against the public corporation, but against an officer, appointee or employee of the corporation, and the public corporation is obligated by statute to indemnify the named defendant.[66]

The plaintiff in this case was sexually assaulted by another inmate while both were being held in the Erie County Correctional Facility.[67] He sued the Erie County Sheriff ("Sheriff") for negligence, and the Sheriff moved for dismissal pursuant to N.Y. CPLR 3211, based in part on plaintiff's failure to serve a notice of claim naming the Sheriff.[68]

It was not disputed in this case that N.Y. Public Officers Law § 18, which requires municipal employers to indemnify *employees* of a sheriff's department, does not require indemnification of the sheriff. The Sheriff in *Villar* argued, instead, that a separate statutory obliga-

tion to indemnify him was created by a 1985 resolution of the Erie County Legislature in which Erie County undertook to secure liability insurance for the Sheriff.[69] The resolution cited what was then a constitutional bar to a county indemnifying its sheriff.[70]

The Court agreed with the plaintiff that the 1985 resolution did not create a statutory obligation on the county's part to indemnify the Sheriff within the meaning of GML § 50-e(1)(b).[71] The Court also noted that the constitutional bar referenced in the resolution has since been removed,[72] but that Erie County has not modified the 1985 resolution or taken any other steps to create an obligation to indemnify the Sheriff.[73] Therefore, the Court concluded the plaintiff was not required to serve a notice of claim as a condition precedent to suing the Sheriff.[74]

Conclusion

As these recent decisions show, outcomes in litigation involving notices of claim are determined by a rich variety of factors, including not only the specific facts of the case but also the interplay between the notice of claim statutes and other laws.

Endnotes

1. N.Y. Gen Mun. Law § 50-i. The provision covers actions or proceedings for injury to a person or property allegedly sustained because of the negligence or wrongful act of a municipality, or of a municipal officer or employee. There are limited exceptions, e.g., actions alleging discrimination by a municipality in violation of the Human Rights Law (N.Y. Exec. Law. §§ 292 *et seq*.) can result in the award of damages but are not subject to GML § 50-i. *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 730 (2015).
2. Counties and school districts are also subject to specific notice of claim statutes, N.Y. Educ. Law § 3813(2) and N.Y. County Law § 52. However, both of these statutes explicitly incorporate GML § 50-e, including the 90-day limitation, where the claim is one for injury to a person or property.
3. Pursuant to N.Y. Gen. Constr. Law. § 66(1), the definition of "public corporation" includes cities, counties, towns, villages, fire districts, and school districts. *See Roslyn UFSD v. Barkan*, 16 N.Y.3d 643, 649-50 (2011).
4. *Thomann v. City of Rochester*, 256 N.Y. 165, 170 (1931), (Cardozo, J.) ("Raids [on the public purse] by the unscrupulous will multiply apace if claims may be postponed till the injury is stale."). *Cf. Heiman v. City of New York,* 85 A.D.2d 25, 31 (1st Dep't 1982) (noting the "pointed questions" raised by legal commentators as to the fundamental fairness of the notice of claim requirement).
5. Gen Mun. Law § 50-e(5).
6. *Id.*
7. *Id.*
8. *Catherine G. v. Essex County*, 3 N.Y.3d 175, 179 (2004) (citing *Katz v. Town of Bedford*, 192 A.D.2d 707 (2d Dep't 1993)). The Appellate Division, Second Department, held: "[A]lthough ordinarily courts should not delve into the merits of an action in determining an application for leave to file a late notice of claim, we note that the petitioner's claim here is patently meritless. Thus, it would make little sense to grant the right to file a late notice of claim." *Katz,* 192 A.D.2d at 708.
9. *See Fox v. New York*, 91 A.D.2d 624, 625 (2d Dep't 1982).
10. *See Hubbard v. Cty. of Suffolk*, 65 A.D.2d 567, 567-68 (2d Dep't 1978).
11. *Newcomb v. Middle Country Central Sch. Dist*., 28 N.Y.3d 455 (2016), *reh'd denied.*, 2017 N.Y. Slip Op. 69383 (April 4, 2017); *Diegelman v. City of Buffalo,* 28 N.Y.3d 231 (2016), *reh'd denied*, 2017 N.Y. Slip Op. 67996 (March 23, 2017); *Wally G. v. N.Y.C. Health and Hosps. Corp*., 27 N.Y.3d 672 (2016), *reh'd denied*, 28 N.Y.3d 905.
12. *Villar v. Howard*, 28 N.Y.3d 74 (2016).
13. Gen Mun. Law § 50-e(1)(b). The indemnification statutes include Gen Mun. Law § 50-j – § 50-n., N.Y. Pub. Off. Law § 18, and Educ. Law §§ 3023 and 3811.
14. 28 N.Y.3d 455 (2016).
15. Gen Mun. Law § 50-e(5).
16. *Newcomb*, 28 N.Y.3d at 461.
17. *Id.*
18. *Id.*
19. *Id.* at 462.
20. *Id.* at 461.
21. *Newcomb*, 28 N.Y.3d at 461-62.
22. *Id.* at 462.
23. *Id.*
24. *Id.* at 464.
25. *Id.*
26. *Newcomb*, 28 N.Y.3d at 465.
27. *Id.* at 464.
28. *Id.*
29. *Id.* at 465.
30. *Id.* at 466.
31. *Newcomb*, 28 N.Y.3d at 466.
32. *Id*. at 467.
33. *Id*. at 466.
34. *Id*. at 468.
35. *Id.*
36. *Newcomb*, 28 N.Y.3d at 466.
37. 28 N.Y.3d 231 (2016).
38. *Id.* at 234.
39. *Id.*
40. *Id.* at 233.
41. *Id.*
42. *Diegelman*, 28 N.Y.3d at 234.
43. *Id.* at 234-35.
44. *See Weiner v. City of New York*, 19 N.Y.3d 852, 854 (2012).
45. *Diegelman*, 28 N.Y.3d at 235.
46. *Id. at* 235
47. *Id. at* 233.
48. *Id. at* 235.

49. *Id* at 233.
50. *Diegelman*, 28 N.Y.3d at 241.
51. *Id.* at 235-36.
52. *Id*. at 236-37.
53. *Id.* at 241.
54. 27 N.Y.3d 672 (2016).
55. *Id.* at 675.
56. *Id.*
57. *Id.*
58. *Id.* at 676.
59. *Wally G.*, 27 N.Y.3d at 676.
60. *Id*. at 677 (quoting *Williams v. Nassau Cty. Med. Ctr.*, 6 N.Y.3d 531, 537 (2006).
61. *Id.*
62. *Id.*
63. *Id*.
64. *Wally G.*, 27 N.Y.3d at 681-82 (Abdus-Salaam, J., dissenting).
65. 28 N.Y.3d 74 (2016).
66. *Id.* at 78.
67. *Id.*
68. *Id.*
69. *Id.* at 79.
70. *Villar*, 28 N.Y.3d at 79.
71. *Id.* at 80.
72. *Id.* at 80, n. 1 (citing *Bardi v. Warren Cty. Sheriff's Dep't*, 194 A.D.2d 21, 23 (3d Dep't 1993)).
73. *Id.*
74. *Id.* at 80.

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Lexjac, LLC v. Inc. Village of Muttontown: Second Circuit Clarifies Key Elements of N.Y. Gen. Mun. Law Art. 18

By Steven G. Leventhal

More than half a century after the enactment of the statewide code of ethics for local municipalities, Article 18 of the New York General Municipal Law ("N.Y. Gen. Mun. Law"), the United States Court of Appeals for the Second Circuit ("Second Circuit") has finally clarified several of its core provisions.

Steven G. Leventhal

Article 18 of the N.Y. Gen. Mun. Law establishes minimum standards of conduct for the officers and employees of all municipalities within the state other than the City of New York. As noted by the New York Court of Appeals in *Landau v. Percacciolo*,[1] the statute was adopted in 1964 with the expressed purpose "to protect the public from municipal contracts influenced by avaricious officers."[2]

N.Y. Gen. Mun. Law § 801 prohibits a municipality from entering into a contract that will benefit an officer or employee with control over the contract. The statute is violated if three elements are established: (1) the existence of a contract with the municipality, (2) an interest (i.e., a benefit) accruing to an officer or employee of the municipality as a result of the contract, and (3) the power or duty of the officer or employee, either individually or as a member of a board, to negotiate, prepare, authorize or approve the contract, or to appoint an officer or employee that has any of those powers or duties.[3] A contract willfully entered into in violation of N.Y. Gen. Mun. Law § 801 is null, void and wholly unenforceable pursuant to N.Y. Gen. Mun. Law § 804.

The Facts of the Case

At a public hearing on July 2, 1969, the Village of Muttontown Planning Board approved a subdivision map conditioned upon the dedication to the Village of Muttontown ("Village")[4] of a 1.1 acre parcel of land located in the Village's half-acre zoning district ("Smallacre") for recreation purposes and tender of a deed. On July 27, 1972, the subdivision developer, Foreal Homes, Inc. ("Foreal"), irrevocably offered Smallacre to the Village for dedication as parkland pursuant to N.Y. Village Law § 7-730(4).[5] Foreal tendered a written offer of dedication and a warranty deed. The offer of dedication was recorded in the office of the Nassau County Clerk and was noted on the subdivision map filed with the County Clerk. However, in the decades that followed, the Village took no steps to formally accept the offer of dedication.

In 1988, the New York Court of Appeals, affirming a decision of the Second Department, rejected Foreal's attempt to revoke the offer of dedication because, *inter alia*, the subdivision residents purchased their homes in reliance upon the offer of dedication noted on the subdivision map.[6]

In 1996, Entel and his then wife purchased an abutting 3.3 acre residential property in an adjoining subdivision. In May 2002, Entel was appointed by the then mayor to fill a vacancy on the Village Board of Trustees. Entel informed the mayor that he wished to purchase Smallacre, but that he didn't "want to spend any money on it and do any refurbishing of it and then have the Village take it away from… [him] by accepting this offer of dedication." Several months later, Entel informed the Mayor that he had "made a deal" with Foreal for the purchase of Smallacre, but that "he wouldn't do it unless the Village extinguished their [sic] right or abandoned their [sic] right to take the property."

In a letter dated October 31, 2003, Entel's attorney informed the then village attorney of Entel's intention to purchase Smallacre. The village attorney responded in a letter dated December 23, 2003, informing Entel's attorney:

> …The filed offer of dedication does not in any way preclude the transfer of fee title to the parcel, but such transfer would be subject to the outstanding offer of dedication and the ultimate divesting of all rights, title and interest of the then current owner of the land without compensation at the time the offer is accepted by the Village….

In December 2003, Entel, acting through Lexjac, purchased Smallacre from Foreal for $90,000. A contemporaneous appraisal valued the development rights to the 1.1 acre parcel at $1,600,000. Entel proceeded to landscape Smallacre and incorporate it into the back yard of his abutting residential property.

On October 17, 2005, while Entel was a Village Trustee, the Village adopted a resolution (the "2005 Resolution") declining the offer of dedication in ex-

change for Entel's promise to plant and maintain screen plantings, among other things. As a result, Entel, through Lexjac, acquired unencumbered title to Smallacre, which was then free of any restrictions on development as two building lots.

The minutes of the October 17, 2005 meeting indicated that Entel *abstained from the vote*.[7] Contemporaneous notes of the meeting indicated that Entel attended an executive session that preceded the public meeting, that the "parkland resolution & conditions re: maintaining" were discussed in the executive session, and that the 2005 Resolution was then approved in a public session.

The terms upon which the Village would release all of its right, title and interest in Smallacre were discussed by Trustee Entel and the then mayor in advance of the October 17, 2005 meeting of the Board of Trustees. In a note dated October 5, 2005, the former mayor informed the village attorney that "I don't want to jeopardize Rich Entel's ability to gift the development rights and get a tax deduction."

On July 10, 2007, a mostly new Village Board of Trustees adopted a resolution rescinding the 2005 Resolution and accepting the irrevocable offer of dedication.

Questions Presented

Lurking beneath the statutory language was a host of unresolved legal issues.

- Can the agreement by a municipality to relinquish an interest in real property offered for dedication to the municipality, conditioned upon the performance of landscaping services, be a "contract" within the meaning of N.Y. Gen. Mun. Law § 801?
- If so, would the recusal of the interested officer or employee cure the statutory violation?
- If not, would the interested officer or employee need to know that his agreement with the municipality was a contract in order for the violation to be "willful" and thus void?
- If not, could the violation be waived by the actions of the municipality or by the passage of time?
- If not, would the interested officer or employee be entitled to procedural due process before the municipality reclaimed the property interest?

Round One

Initially, the United States District Court for the Eastern District of New York ("District Court") granted partial summary judgment in favor of the plaintiffs Entel and Lexjac ("Plaintiffs"), finding that the Village had confiscated Smallacre in violation of their right to procedural due process.[8] The district court reasoned that the 2005 Resolution was a "final (albeit belated) step in the village's original approval of the subdivision plat" and not a contract.[9] Therefore, the 2005 Resolution was a land use application governed by N.Y. Gen. Mun. Law § 809, which merely required disclosure by Lexjac of Entel's interest in the application. After a jury trial, Plaintiffs were awarded compensatory damages of $1,450,000.

In a summary order dated June 22, 2015, the Second Circuit vacated the judgment of the District Court.[10] The Second Circuit held that a resolution adopted by the Village Board of Trustees on October 17, 2005 (the "2005 Resolution") was a contract within the meaning of the N.Y. Gen. Mun. Law and not merely a land use application.

For purposes of N.Y. Gen. Mun. Law § 801, a "contract" is defined as "any claim, account or demand against or agreement with a municipality, express or implied."[11] Here, the 2005 Resolution provided that the Village would give up a valuable property interest in exchange for Entel's commitment to provide adequate care of Smallacre. The court noted that "the relinquishment of a valuable right in exchange for a promise of services constitutes a contract."[12] Therefore, the agreement by a municipality to relinquish a property interest, conditioned upon the officer's performance of landscaping services, was a contract within the meaning of N.Y. Gen. Mun. Law § 801.

Round Two

The Second Circuit remanded the case for the court below to consider whether the 2005 Resolution was null and void pursuant to N.Y. Gen. Mun. Law §§ 801 and 804 notwithstanding plaintiff Entel's purported recusal, and for further proceedings consistent with the summary order. Upon remand, the district court granted summary judgment in favor of the Village, finding that the 2005 Resolution was null and void. The court directed that the Plaintiffs transfer Smallacre to the Village and dismissed the complaint. In a summary order dated September 8, 2017, the Second Circuit affirmed the judgment of the District Court.[13]

All three elements of a N.Y. Gen. Mun. Law § 801 violation were established: a contract with the municipality; a benefit accruing to a municipal officer or employee; and the power or duty of that officer or employee to control the contract.

There was no dispute that Entel derived a benefit from the 2005 Resolution. Through his instrumentality, Lexjac, he acquired unencumbered title to two building lots, purchased at a price of $90,000 which, without

any restriction on development, was appraised at $1,600,000.

The benefit derived by Entel constituted an "interest" in the 2005 Resolution. N.Y. Gen. Mun. Law § 800(3) defines the term "interest" as "a direct or indirect pecuniary *or material benefit* accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves."[14] For purposes of N.Y. Gen. Mun. Law § 801, a municipal officer or employee is deemed to have an interest in the contract of "a firm, partnership or association of which such officer or employee is a member."[15]

In 1977, the State Comptroller of New York ("State Comptroller") responded to an inquiry involving a village trustee who owned property that adjoined a parcel owned by the village. The trustee proposed that the village quitclaim title to the parcel to him. As consideration for the parcel, the trustee proposed to grant an easement to the village over the parcel and his adjoining land. The proposal did not involve any exchange of monetary consideration. The State Comptroller opined:

> The benefit to the trustee does not necessarily have to be pecuniary in nature in order for him to have a statutory interest in the agreement with the village. This interest is prohibited by General Municipal Law § 801(1) because the trustee, as a member of the board of trustees, has the power or duty to approve the agreement. Village Law § 4-412(1). In this regard, it is immaterial that the trustee dissociates himself from board proceedings relative to the transaction. The § 801(1) prohibition stems from the power or duty of the trustee to approve or authorize the contract, etc., and it is irrelevant that he refrains from the exercise of that power or the performance of such duty.[16]

Finally, the power to approve village contracts is vested in the Board of Trustees.[17] The Board of Trustees exercised that power in adopting the 2005 Resolution. Trustee Entel, as a member of the board, had the power or duty to negotiate, prepare, authorize or approve the contract.

Recusal Cannot Cure a Violation of N.Y. Gen. Mun. Law § 801

N.Y. Gen. Mun. Law § 802 sets forth exceptions to § 801. Recusal is not among them. At least one of the statutory exceptions would be unnecessary if the vote of an interested municipal official was an essential element of a N.Y. Gen. Mun. Law violation. A contract that was entered into prior to the election or appointment of an official is deemed "grandfathered" and does not give rise to a violation of N.Y. Gen. Mun. Law § 801.[18] Such a contract would obviously have been approved without the official's vote. The "grandfather" exception would be unnecessary if such a contract, originally approved without a vote by the interested official, was not otherwise prohibited by N.Y. Gen. Mun. Law § 801.

In Dykeman v. Symonds,[19] the Fourth Department affirmed a trial court ruling that an interested legislator's recusal did not relieve her of the "power or duty" referred to in Section 801, because that "power or duty" came from the position she held, whether or not she voted on particular matters. *Dykeman* involved a county legislator who was elected to office while concurrently serving as motor vehicle supervisor for the county. The Fourth Department concluded that the legislator's employment contract was a "direct violation" of N.Y. Gen. Mun. Law § 801 because the legislator's salary as motor vehicle supervisor was subject to approval by the legislature, and the two positions were inherently incompatible because the legislator could not hold both without violating N.Y. Gen. Mun. Law § 801.[20] Abstention from the vote was not a cure because the conflict arose from the legislator's "power or duty," as a member of the county legislature, to approve the terms of the employment contract and not from her vote in exercise of that power.

Dykeman was problematic precedent. First, the court's analysis focused on the compatibility of the two public offices rather than the statutory elements of a prohibited contract. Under common law principles, in the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold two public offices unless they are incompatible. The leading case on compatibility of offices is *People ex rel. Ryan v. Green*,[21] in which the Court of Appeals held that two offices are incompatible if one is subordinate to the other (i.e., you cannot be your own boss) or if there is an inherent inconsistency between the two offices. Although *Ryan* involved two public offices, the same principle applies to the compatibility of a public office and a position of employment.[22] To determine whether two positions are inherently inconsistent, it is necessary to analyze their respective duties. An obvious example of two offices with inconsistent duties is those of auditor and director of finance.[23]

Further, neither the *Dykeman* trial court nor the Appellate Division addressed the fact that the employment contract, which was entered into before the legislator was elected to office, fell within the "grandfather" exception of N.Y. Gen. Mun. Law § 802(1)(h).

Nevertheless, despite the flawed analysis in *Dykman*, its conclusion was sound and consistently shared by other authorities. Many opinions of the State

Comptroller, relied upon for decades by municipalities throughout the state, and the learned commentary similarly concluded that recusal cannot cure a violation of N.Y. Gen. Mun. Law § 801.[24] No reported case, administrative opinion, or learned commentary has concluded that recusal may validate a contract otherwise prohibited by N.Y. Gen. Mun. Law § 801.

Entel's status as a Village Trustee gave him the "power or duty" to approve village contracts within the meaning of N.Y. Gen. Mun. Law § 801. For that reason, his recusal from the vote that approved the contract that gave him full title to the 1.1 acre parcel did not cure his violation of N.Y. Gen. Mun. Law § 801, nor did it prevent the contract from being "null, void and wholly unenforceable" under N.Y. Gen. Mun. Law § 804.

The 2005 Resolution Was Void *Ab Initio* Because Entel Willfully Entered Into the Contract Despite Having a Prohibited Interest

The civil nullification of N.Y. Gen. Mun. Law § 804 is triggered by the *willful making of a contract* in which there is a prohibited interest. N.Y. Gen. Mun. Law § 804 provides: "Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable."[25]

By contrast, the criminal liability imposed by N.Y. Gen. Mun. Law § 805 is triggered by a *willful and knowing violation of the statute*: "Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor."[26]

The term "willful" is not defined in Article 18 of the N.Y. Gen. Mun. Law or in the cases interpreting the statute. Black's Law Dictionary 1737 (9th ed. 2009) defines the term "willful" as "voluntary and intentional, but not necessarily malicious."

Citing *Landau*, *supra,* the New York State Comptroller opined in 1985:

> A contract is "willfully" entered into by a party if, at the time of making the contract, he had knowledge of facts which, under General Municipal Law, Article 18, constitute a prohibited interest in the contact on the part of a municipal officer or employee…. Clearly, the former supervisor's spouse was aware that her husband was the supervisor of the town when she agreed to prepare the report for compensation. As a result the claim of the former supervisor's spouse for six hundred dollars is rendered null and void by General Municipal Law, § 804 and should not be paid by the town.[27]

Needless to say, at the time Entel actively pursued and personally made the contract here, Entel was aware that he was a village trustee.

In *Bryan v. United States*,[28] the United States Supreme Court ("Supreme Court") distinguished between the frequent meaning of "willful" in a civil context and its different use in a criminal context. In the latter, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[29] The Supreme Court stated:

> The word 'willfully' is sometimes said to be a word of many meanings whose construction is often dependent on the context in which it appears. Most obviously, it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose.[30]

Here, definitions from criminal law are inapplicable as this case deals only with a civil nullification under N.Y. Gen. Mun. Law § 804 and not with a criminal conviction under N.Y. Gen. Mun. Law § 805.

Consistent with the reasoning of the Supreme Court in *Bryan*, the "willfulness" required for civil nullification under N.Y. Gen. Mun. Law § 804 is a lesser mental state than the willfulness and knowledge required for a criminal conviction under N.Y. Gen. Mun. Law § 805. The latter section provides that "[a]ny municipal officer or employee who *willfully and knowingly* violates the foregoing provisions of this article shall be guilty of a misdemeanor."[31] The element of "knowledge" required for the commission of a misdemeanor under N.Y. Gen. Mun. Law § 805 is absent from N.Y. Gen. Mun. Law § 804, which requires only that the contract be "willfully entered into" in order to render the contract void.

Though contrary to the facts here, a municipal officer or employee may acquire an interest in a municipal contract without willfully entering into the contract. For example, such a contract may exist even where the municipal officer or employee is not a party to the contract. An officer or employee will be deemed to have an interest in contracts of certain relatives, dependents and business entities pursuant to N.Y. Gen. Mun. Law § 800(3), which defines the term "interest" for purposes of N.Y. Gen. Mun. Law § 801 as:

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

A relative or a corporate employer of a municipal officer or employee may enter into a municipal contract without any participation by the municipal officer or employee. Similarly, an officer or employee who is the beneficiary of a trust may have an interest in contracts made by the trustee without his or her participation.

Thus, an officer or employee may unwittingly acquire an interest in a municipal contract. Under such circumstances, the officer or employee would not have willfully entered into a contract that violated N.Y. Gen. Mun. Law § 801, and the contract would not be void pursuant to N.Y. Gen. Mun. Law § 804.

Here, because Entel willfully entered into the contract memorialized in the 2005 Resolution the contract was null, void and wholly unenforceable pursuant to N.Y. Gen. Mun. Law § 804.

The 2005 Resolution Was Also Invalid Based on Common Law Principles Because Entel Improperly Influenced the Mayor and Trustees

Even in the absence of a statutory prohibition under N.Y. Gen. Mun. Law § 801, Entel's common law conflict of interest, and the influence he exerted, warranted the court's invalidation of the 2005 Resolution.[32]

Entel did not validly "recuse" himself from the discussions and deliberations leading to the adoption of the 2005 Resolution. Rather, its adoption was the culmination of three years of planning, preparation and discussions among Entel, the then mayor and the then village attorney that included Entel's conversations with the mayor prior to his purchase of Smallacre, his attendance at the executive session when the matter was considered, and his statement to the Board of Trustees that he would not develop the property.

Recusal involves more than the mere abstention from a vote. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.[33]

The New York Attorney General opined in 1995:

> The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board. Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.[34]

In *Eastern Oaks*, cited *supra,* the Second Department held that influence by a conflicted board member would be a sufficient basis for invalidating an action of the board, even where the conflicted member recused himself from the vote. There, a town planning board granted preliminary approval of a residential subdivision. The developer hired a member of the town board to construct a road, meeting specifications required by the town engineer, and offered the road for dedication to the town, together with a bond to ensure the repair of any damage to the road surface that might occur during construction.

A dispute arose between the developer and the contractor-board member over his alleged failure to pay a subcontractor. When the offer of dedication was considered by the town board, the town engineer recommended that the offer of dedication be declined until a sufficient number of homes were constructed. With the contractor-board member recusing himself from the vote, the town board declined to accept the dedication.

The developer challenged the decision in a special proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules, alleging, among

other things, that the town board made its decision in advance of the vote, and the contractor-board member had recused himself from the official vote only to conceal his conflict of interest and his efforts to undermine the subdivision project by influencing members of the town board to disapprove the road dedication. The town moved to dismiss the petition for failure to state a cause of action.

In affirming the trial court's denial of the motion to dismiss, the Second Department held that the allegation that the contractor-board member's dispute with the developer resulted in the town board's denial of the dedication would provide a sufficient basis for setting aside the town board's determination, even though the conflicted board member recused himself from the vote. The appellate court stated: "[G]iven the allegations in the petition regarding Budd's dispute with Eastern, the allegation that Budd, although recused from the official vote, brought about the Town Board's denial of the offer of cessation because of that dispute, would provide a basis for setting aside the Town Board's determination."[35]

Here, Entel's influence is evident in his communications with the mayor and trustees, and in the mayor's October 5, 2015 note to the village attorney stating that "I don't want to jeopardize Rich Entel's ability to gift the development rights and get a tax deduction." Accordingly, Entel cannot properly be said to have recused himself. Rather, he merely abstained from the vote. His abstention was ineffective as a recusal because he improperly exerted his influence over the decision of the then mayor and trustees.

A Violation of N.Y. Gen. Mun. Law § 801 May Not Be Waived

In *dicta*, the New York Court of Appeals stated in *Landau v. Percacciolo*[36] that N.Y. Gen. Mun. Law § 804 bars "any waiver" by a municipality of a conflict of interest prohibited by N.Y. Gen. Mun. Law § 801:

> The Section [N.Y. Gen. Mun. Law § 804] makes null and void any municipal contract "in which there is an interest prohibited by this article." The only prohibition set forth in the article is that found in Section 801, which provides that no municipal officer or employee shall have an interest in a contract with his municipality if he has the power or duty to negotiate or to approve the contract or payments thereunder, to audit bills or claims under the contract, or to appoint an officer or employee with any such authority. As to contracts in which such an interest exists, Section 804 of the General Municipal Law works a statutory nullification, thereby providing for municipal taxpayers the protection of a bar to any waiver of the prohibited conflicts of interest through consent of the governing body or authority of the municipality (such as may be effected in the private sector by a principal with respect to an agent who participates in the making of a contract on the principal's behalf).[37]

Landau involved an action for specific performance of a town contract to purchase real property following a failure to disclose a town employee's interest in the contract as required by N.Y. Gen. Mun. Law § 803. *Landau* did not involve a contract that was prohibited by N.Y. Gen. Mun. Law § 801 because the town employee had no power or duty to approve the contract. Therefore, the civil nullification imposed by N.Y. Gen. Mun. Law § 804 did not apply. Nevertheless, the *Landau* court declined to grant specific performance of the contract stating that success by the plaintiff would frustrate the purpose of N.Y. Gen. Mun. Law Article 18 "to protect the public from municipal contracts influenced by avaricious officers."[38]

Entel's expenditures to "clean up" Smallacre, which inured to his own benefit, could not justify a claim of detrimental reliance (i.e., quasi contract). Rather, the actual contract between Entel and the Village violated public policy and, by statute, was "null, void and wholly unenforceable." In *Smith v. Dep't of Education*,[39] a Virgin Island government procurement statute made an oral landscaping contract "null and ineffective." There, the court (in an opinion by Alito, J.) held:

> … [Plaintiff] may not circumvent this statutory provision by invoking the doctrine of *quantum meruit* or other related equitable theories…. Interpreting… [the Virgin Island statute] we held… that a contract that did not meet statutory requirements was "null and void *ab initio*" and could not be "enforced on a theory of *quantum meruit*, substantial compliance or estoppel." We explained that "if contracts violative of statutory prohibitions may be executed by government agencies and subsequently enforced, the power of the legislature and the process of government itself would be undermined."[40]

What the Village could not waive by its affirmative act, it certainly could not waive by implication. Therefore, a municipality may neither expressly or implicitly waive a violation of N.Y. Gen. Mun. Law § 801.

Plaintiffs Were Not Deprived of a Constitutionally Protected Property Interest in Smallacre

Because the 2005 Resolution was void *ab initio*, Plaintiffs acquired no property interest by its adoption. Accordingly, the only property interest that Plaintiffs maintained in Smallacre in 2007 when the new Board of Trustees rescinded the 2005 Resolution and accepted the offer of dedication was the interest that Lexjac acquired from Foreal in 2004. However, that interest was subject to the outstanding irrevocable offer of dedication given by Foreal to the Village in 1972, pursuant to N.Y. Village Law § 7-730(4).

By tendering a deed for Smallacre together with the irrevocable offer of dedication, Foreal invited the Village to accept the offer by recording the deed. In purchasing Smallacre, Lexjac stepped into Foreal's shoes. The Village was not required to give Lexjac further notice before accepting the tender of its predecessor in interest. In *Underhill Ave. Corp. v. Vil. of Croton-on-Hudson*,[41] the Second Department held:

> A municipality may accept an offer of dedication at any time prior to a valid revocation by all parties who have a legal interest in the land subject to such offer, including subdivision homeowners who purchase their lots with reference to a subdivision map noting the offer of dedication. A municipality may reject an offer of dedication. Here, however, the Village did not do so. A lapse of time does not extinguish an offer of dedication, which may be accepted at any time prior to a valid revocation by all interested parties…. Further, a failure to accept an offer of dedication is not a rejection of that offer…. Finally, the open offer of dedication noted on the subdivision plat remains enforceable against subsequent purchasers, regardless of the fact that the Village previously purported to convey Lot 14 without noting the open offer of dedication on the deed. Accordingly, the offer of dedication remains open and the Supreme Court properly awarded summary judgment to the defendants.[42]

Citations omitted.

Here, because the 2005 Resolution was a nullity, it was not a "valid revocation by all interested parties," and the Village was free to accept the offer "at any time." The lapse of time did not extinguish the offer of dedication. The offer of dedication was recorded in the office of the County Clerk and noted on the filed subdivision map and was enforceable against Lexjac as a subsequent purchaser.[43]

Protected property interests are "created and their dimensions are defined" by state law.[44] Here, plaintiffs' ownership of Smallacre was subject to the irrevocable offer of dedication created pursuant to N.Y. Village Law § 7-730(4) and the Planning Board's decision granting subdivision approval. The time for challenging the Planning Board decision expired 30 days after the decision was filed with the Village Clerk, in July 1969.[45]

As was the case with the untenured faculty member in *Roth*, cited *supra,* who possessed a property right in his employment that was subject to termination at the unfettered discretion of the Board of Regents, here Lexjac possessed a property right in Smallacre that was subject to termination at the unfettered discretion of the Village by its acceptance of the offer of dedication. Neither the faculty member in *Roth* nor the Plaintiffs here had any legitimate claim of entitlement beyond the interest created, and limited, by state law.

Cases finding a right to due process that involve non-consensual government interference with possessory interests are inapplicable. For example, in *Fuentes v. Shevin*[46] the Supreme Court held that goods sold under a conditional sales contract could not be repossessed without the intervening act of a default by the debtor. Here, no similar intervening act was required to trigger the Village's right to accept the offer of dedication.

In *Dunbar Corp. v. Lindsey*,[47] the plaintiff purchased real property after receiving assurance from the government that it had no interest in the subject property. Here, the opposite occurred. Lexjac purchased Smallacre after being informed by the village attorney that it remained subject to the outstanding offer of dedication "and the ultimate divesting of all rights, title and interest of the then current owner of the land without compensation at the time the offer is accepted by the Village…." In *Mennonite Bd. of Missions v. Adams*,[48] the Court determined that a mortgagee should have received prior notice of a tax sale, as it would have had a statutory opportunity to redeem the property under the applicable state tax law. By contrast, N.Y. Village Law § 7-730(4) provides no analogous right of redemption. The Village was authorized to accept the consensually given irrevocable offer of dedication and file the tendered deed without further notice to Lexjac, which stood in the shoes of the original offeror.

Conclusion

There is no longer any question that an agreement by a municipality to relinquish an interest in real property in favor of a municipal officer or employee having the power or duty to approve the agreement,

supported by consideration, is a "contract" within the meaning of N.Y. Gen. Mun. Law § 801. Recusal by the interested officer or employee will not cure the statutory violation.

The interested officer or employee need not know that his agreement with the municipality is a contract in order for the violation to be "willful" and the contract void. The interested officer or employee need only know the facts giving rise to the violation. Neither the actions of the Village in relinquishing the real property interest nor the passage of time will constitute a waiver of the statutory prohibition.

A property interest willfully acquired in violation of N.Y. Gen. Mun. Law § 801 is not constitutionally protected, and the interested municipal officer-applicant will not be entitled to procedural due process before the municipality reclaims the property interest.

Endnotes

1. 50 N.Y.2d 430 (1980).
2. L. 1964, ch. 946, § 1.
3. *See* N.Y. Gen. Mun. Law § 802 for contracts that are permitted as exceptions to § 801, notwithstanding that an officer or employee with control over the contact will derive a benefit. In such cases, recusal is required. *See, e.g.*, N.Y. Comp., Op. 2008-2 (2008) (a newly elected town board member should recuse himself from the discussions or decisions relating to a hauling contract between the town and his wholly owned company that met the "grandfather" exception set forth at N.Y. Gen. Mun. Law § 802(1)(h) because it was entered into prior to the board member's election to office); 1988 N.Y. St. Comp. 86 (a town board should recuse himself in connection with a contract between the town and his secondary employer that was permitted pursuant to N.Y. Gen. Mun. Law § 802(1)(b) even though the town board member derived no remuneration and had no employment duties in connection with the contact).
4. Village used throughout this article is in reference to the Village of Muttontown.
5. N.Y. Village Law § 7-730(4) authorizes a local municipality, in appropriate cases, to require a subdivision developer to dedicate land to the municipality for park, playground or other recreational purposes.
6. *Foreal Homes, Inc. v. Village of Muttontown*, 128 A.D. 2d 585 (2d Dep't 1987), *aff'd*, 71 N.Y.2d 821 (1988).
7. The minutes of the 2005 Resolution state that Entel "abstained from the vote." The minutes do not state that he recused himself from the discussions or deliberations preceding the vote; and he did not.
8. *Lexjac, LLC v. Village of Muttontown*, No. 07-CV-4614(JS), 2011 U.S. Dist. LEXIS 28655, at *18 (E.D.N.Y. Mar. 18, 2011).
9. *Id.* at 12.
10. *Lexjac, LLC v. Beckerman*, 616 F. App'x 435 (2d Cir. 2015).
11. N.Y. Gen. Mun. Law § 800(2).
12. *Beckerman*, 616 F. App'x at 438.
13. *Lexjac, LLC v. Board of Trustees*, 708 F. App'x 722 (2d Cir. 2017).
14. N.Y. Gen. Mun. Law § 800(3) (emphasis added).
15. N.Y. Gen. Mun. Law § 800(3)(b).
16. N.Y. Comp., Op. 77-714 (1977).
17. *See* N.Y. Village Law § 4-412; *Karedes v. Colella*, 292 A.D.2d 138, 141 (3d Dep't 2002), *rev'd on other grounds*, 100 N.Y.2d 45 (2003).
18. *See* N.Y. Gen. Mun. Law § 802(1)(h).
19. 54 A.D. 2d 159 (4th Dep't 1976).
20. *Id.* at 163-64.
21. 58 N.Y. 295 (1874).
22. *See* N.Y. Att'y Gen., Informal Op. 82-46 (1982).
23. *Id.*
24. *See, e.g.*, N.Y. Comp., Op. 2000-7 (2000); N.Y. Comp., Op. 88-44 (1988); N.Y. Comp., Op. 88-15 (1988); N.Y. Comp., Op. 88-13 (1988); N.Y. Comp., Op. 88-8 (1988); N.Y. Comp., Op. 87-75 (1987); N.Y. Comp., Op. 83-180 (1983); N.Y. Comp., Op. 82-48 (1982); N.Y. Comp., Op. 81-113 (1981); N.Y. Comp., Op. 77-714 (1977); *see also* Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 Alb. L. Rev. 1321, 1329 (1996).
25. N.Y. Gen. Mun. Law § 804.
26. N.Y. Gen. Mun. Law § 805.
27. N.Y.. Comp., Op. 85-9 (1985) (internal citations omitted).
28. 524 U.S. 184 (1998).
29. *Id.* at 191-92.
30. *Id*. (internal citations omitted).
31. N.Y. Gen. Mun. Law § 805 (emphasis added).
32. *See E. Oaks Dev., LLC v. Town of Clinton*, 76 A.D.3d 676, 678 (2d Dep't 2010).
33. N.Y. Att'y Gen., Informal Op. 95-2 (1995); *see Cahn v. Planning Bd. of Gardiner*, 157 A.D.2d 252, 258 (3d Dep't 1990) (Planning Board members "not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions.").
34. N.Y. Att'y Gen., Informal Op. 82-46 (1982).
35. *E. Oaks Dev., LLC*, 76 A.D.3d at 678.
36. 50 N.Y.2d 430,(1980).
37. *Id.* at 434.
38. *Id.* at 436 (internal citations omitted).
39. 942 F.2d 199 (3d Cir. 1991).
40. 942 F.2d at 202 (internal citations omitted).
41. 82 A.D.3d 963 (2d Dep't 2011).
42. *Id.* at 965 (internal citations omitted).
43. *See O'Mara v. Town. of Wappinger*, 9 N.Y.3d 303, 309 (2007) (an open space restriction shown on a final plat, when filed in the Office of the County Clerk, is enforceable against a subsequent purchaser).
44. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Safepath Sys. LLC v. N.Y.C. Dep't of Educ.*, 563 F. App'x 851, 854-55 (2d. Cir. 2014).
45. *Foreal Homes Inc. v. Village of Muttontown*, 128 A.D. 2d 585 (2d Dep't 1987), *aff'd*, 71 N.Y.2d 821 (1988); *see* N.Y. Village Law § 7-740.
46. 407 U.S. 67 (1972). *Fuentes* was considered "overruled" by Justice Powell in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 623 (1974) (Powell, J., concurring).
47. 905 F.2d 754 (4th Cir. 1990).
48. 462 U.S. 791 (1983).

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Ancient Streets: Creation of the Implied Easement

By Kristen M. Motel

The ancient streets doctrine, a seldom cited legal principle, has unexpected relevance in modern property law. At first look, this doctrine provides access rights that are somewhat of an anomaly. Indeed, the rights established under the ancient streets doctrine are not commonly discovered by a title report. Further study of this enigmatic area of case law reveals that the doctrine creates the right to an implied easement—a property right more durable than the typical easement. While there are a number of circumstances under which these rights could arise, the most common scenarios involve land situated in an incomplete subdivision or abutting a private road or abandoned public right-of-way.

"The map used to divide the property does not need to be filed at the time of the initial grants."

The ancient streets doctrine prescribes that lots abutting a street are entitled to have the street remain a street forever. The doctrine "grants to an abutting owner a private easement in the bed of a street if both the lot and street were owned and laid out by a common grantor, and the lot is then sold with reference to the street."[1] Interestingly, recovery under the doctrine "rests not upon the age of the street but upon the existence of private easements by grant."[2]

There are three factors required to establish an easement under the ancient streets doctrine. First, there must be a common grantor that has "by deed dedicated the street to the use of all grantees, thus 'creating private easements, in the street, which cannot be taken away without compensation.'"[3] This common grantor once owned a large tract of land, including the street, and then subdivided it, selling the lots to separate parties. The common grantor can be identified as the last grantor to appear in all parties' chain of title. Simply identifying a common grantor does not bring a case within the doctrine of ancient streets; the other two factors also must be satisfied.[4]

The second factor is that the common grantor must subdivide the land in accordance with a common scheme or plan.[5] The sequence in which the parcels were conveyed by the common grantor is not material.[6] The intent of the parties at the time of the original conveyance is *all* that can be considered when determining whether a common plan existed. A common grantor's subdivision of land in accordance with a map is typically evidence of a common scheme or plan. Since the intent of subsequent grantors has no bearing on this determination, the parcels can later transfer ownership several times and still be considered part of a common scheme. Subsequent abandonment of a street, by the common grantor, a municipality, or other entity, does not extinguish implied easements created under the ancient streets doctrine.[7]

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The third factor required to create an implied easement under the ancient streets doctrine is that the lots must be sold in reference to the street. This reference caused the purchaser to rely upon the existence of the street. This factor is met if the language of the deed bounds the parcel by the street or if the deed references a map that depicts the lot as being bound by a street. The map used to divide the property does not need to be filed at the time of the initial grants. The fact that the grantor does not expressly convey the easement to utilize the street is irrelevant if the deed and/or map show the lot as bounded by the street.[8] When reviewing deeds, any ambiguity in language is to be construed in favor of the grantee. [9]

"Overall, the court decided that '[i]t is the better rule to hold that, to exclude a grantee from the perpetual beneficial use of the open way in front of the premises granted to him, the language of the deed should clearly express such an intention.'"

The ancient streets doctrine is best illustrated by example. In *Ranscht v. Wright*, a seminal case on the matter, the court addressed whether a grant of land made to the plaintiff resulted in an implied easement in a private right-of-way.[10] In that case, it was undisputed that the land was established by a common grantor as a private right-of-way for himself and was continuously used by the common grantor when the plaintiff acquired his interest in the land. The plaintiff's deed described his property as being bound along the road. The court noted that

> where the grantor is the owner of a way then in use, in connection with the premises granted, and grants the land

> bounding thereon, by reference to such way as a boundary, in the grant, and the beneficial use of the land conveyed may require the use of the way, although not in the sense of being a necessity, that an easement in such way passes under the grant, which neither the grantor nor subsequent grantees of the premises can defeat. If the alley was to be abandoned, and no longer exist, it would hardly be made a part of the description of the land, to aid in identifying it, not merely at the time of giving the deed, but in the future…This rule is in harmony with that laid down by Mr. Justice Storey[11]…that every grant of a thing necessarily imparts a grant of it as it actually exists, unless it be otherwise provided.[12]

Overall, the court decided that "[i]t is the better rule to hold that, to exclude a grantee from the perpetual beneficial use of the open way in front of the premises granted to him, the language of the deed should clearly express such an intention."[13] In accordance with this principle, a right to utilize the ancient street does not need to arise out of necessity.[14] Therefore, a parcel can abut both a public right of way and an ancient street and still have an implied easement over the ancient street.

The subsequent law stemming from the *Ranscht* case upholds this principle. More recently, in *Clegg v. Grasso*, a leading case on easements by implication, a subdivision owner sought a declaratory judgment that he had an implied easement over private roads.[15] The parties' common grantor prepared a subdivision map showing the lots in question and two roadways. The map was not filed until almost 40 years after the parcels were sold by separate deed and subsequently transferred ownership several times. These parcels were sold abutting a private street, in accordance with the subdivision map.

"This doctrine creates the right to access a road when the land is described in the deed as being bounded by the street."

The *Clegg* court concluded that "[i]t is the well-established rule that an easement of access in the private streets appurtenant to the property generally passes with the grant when the conveyance describes the property conveyed by referring to a subdivision map which shows streets abutting the lot or lots conveyed."[16] The fact that the deed made no reference to the private street or subdivision map was immaterial, as was the fact that the subdivision map was not filed until after plaintiff's acquisition of the property. "Whether an easement by implication has been created depends on the intention of the parties at the time of the original conveyance, with the most important indicators of the grantor's intent being the appearance of the subdivision map and the language of the original deeds."[17]

In keeping with the principle laid down in *Ranscht*, the *Clegg* court noted there was no evidence suggesting that the plaintiff's deed did *not* convey to him the entire interest in the lot that was created when the common grantor conveyed the property.[18] The court found that an implied easement by grant over the private streets shown on the subdivision map was created in favor of the abutting lots conveyed by the parties' common grantor.

The ancient streets doctrine proves useful in cases where access over the ancient street is preferred to an alternative means of access, for topographic, privacy, or convenience reasons. The doctrine is also useful when assessing adequate frontage when assessing compliance with Zoning Code provisions and in obtaining site plan approval. A lot may have inadequate frontage along a public right of way but adequate frontage along an ancient street.

The philosophy behind the ancient streets doctrine is also reflected in related areas of property law, such as cases on street abandonment, which are guided by the theory that "[o]nce a road becomes a public highway, it remains such until the contrary is shown."[19] Similarly, the ancient streets doctrine also shares the underlying principle, and often intersects, with the doctrine of adjacency. This doctrine creates the right to access a road when the land is described in the deed as being bounded by the street.[20]

Given the durable property right created by the ancient streets doctrine, it is worth assessing the applicability of this principle when faced with a situation where the primary or alternative means of access to a parcel are not evident from the title search or other documentation.

Endnotes

1. *Low v. Humble Oil & Ref. Co.*, 31 A.D.2d 676, 677, 295 N.Y.S. 2d 859, 861 (3d Dep't 1968), *appeal denied*, 250 N.E.2d 256 (N.Y. 1969).
2. *In re East 5th Street Borough of Manhattan*, 1 Misc. 2d 977, 986, 146 N.Y.S. 2d 794, 805 (Sup. Ct., N.Y. Co. 1955) (citing *Dwornick v. State*, 251 A.D. 675, 676, 297 N.Y.S. 409, 411 (4th Dep't 1937), *aff'd*, 283 N.Y. 597, 28 N.E.2d 21 (N.Y. 1940)).
3. *In re East 5th Street Borough of Manhattan*, 1 Misc. 2d 977, 986, 146 N.Y.S. 2d 794, 804 (Sup. Ct., N.Y. Co. 1955) (citing *Dwornick v. State*, 251 A.D. 675, 676, 297 N.Y.S. 409, 411 (4th Dep't 1937), *aff'd*, 283 N.Y. 597, 28 N.E.2d 21 (N.Y. 1940)).

4. *Stupnicki v. Southern NY Fish & Game Ass'n*, 41 Misc. 2d 266, 271, 244 N.Y.S.2d 558, 563-64 (Sup. Ct, Columbia Co. 1962).
5. *Id.*
6. *Heim v. Conroy*, 211 A.D.2d 868, 870, 621 N.Y.S.2d 210, 212 (3d Dep't 1995). *See also Collins v. Barker*, 286 A.D. 349, 356, 143 N.Y.S.2d 173, 177-78 (3d Dep't 1955).
7. *Seven Springs, LLC v. Nature Conservancy*, 48 A.D.3d 545, 546, 855 N.Y.S.2d 547, 546 (2d Dep't 2008) (emphasis added) (citing *Holloway v. Southmayd*, 139 N.Y. 390, 401–07 (N.Y. 1893); *see also Glennon v. Mayo*, 221 A.D.2d 504, 505, 633 N.Y.S. 2d 400, 400 (2d Dep't 1995)).
8. *Fischer v. Liebman*, 137 A.D.2d 485, 487-88, 524 N.Y.S.2d 720, 722 (2d Dep't 1988).
9. *Heim v. Conroy*, 211 A.D.2d 868, 870. *See also Collins v. Barker*, 286 A.D. 349, 356, 143 N.Y.S.2d 173, 177-78 (3d Dep't 1955).
10. 9 A.D. 108 (2d Dep't 1896).
11. *Ranscht v. Wright*, 9 A.D. 108, 112, 41 N.Y.S. 108, 111 (2d Dep't 1896) (citing *U.S. v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463 (Circ. Ct. D. Mass. 1833)).
12. *Id*. (citing *Huttemeier v. Albro*, 18 N.Y. 48, 51-52 (1858)).
13. *Holloway vs. Southmayd*, 139 N.Y. 390 at 407.
14. *Clegg v. Grasso*, 186 A.D.2d 909, 911, 588 N.Y.S.2d 948, 950 (3d Dep't 1992); *Fischer*, 524 N.Y.S.2d 720 at 722; *Ranscht*, 9 A.D. 108 at 112.
15. 186 A.D.2d 909, 588 N.Y.S.2d 948 (3d Dep't 1992).
16. *Clegg*, 186 A.D.2d 909 at 910.
17. *Id.* at 910-11.
18. *Id.* at 911.
19. *In the Matter of Flacke v. Strack*, 98 A.D.2d 881, 882, 470 N.Y.S.2d 863, 863 (3d Dep't 1983).
20. "A deed describing the land being conveyed as bounded by a road owned by the grantor also impliedly grants an easement in such road or way unless the intention of the parties is to the contrary." *Cashman v. Shutter*, 226 A.D.2d 961, 962, 640 N.Y.S.2d 930, 931-32 (3d Dep't 1996). See also *Glennon*, 221 A.D.2d at 505 (plaintiffs were owners of contiguous parcels sharing a border along a private road that connected to a public street and sought a declaration of their entitlement to easements over the private road. The court found that the plaintiffs "established an implied easement by virtue of reference to the private road as a boundary in the deed which created their parcel, and the surrounding circumstances."). *Geasor v. Gerety*, 46 Misc.3d 1214(A), 2014 N.Y. Slip Op. 51919(U) (Sup. Ct., Westchester Co. 2014) (citing *Cashman*, 226 A.D.2d at 961); *Iovine v. Caldwell*, 256 A.D.2d 974, 977, 682 N.Y.S.2d 288, 290 (3d Dep't 1998). After conveying this land bounded by a street, the grantor and "those claiming under him are estopped to deny the existence of such street or way." *Collins*, 286 A.D. at 355.

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New Legislation on Sexual Harassment Will Significantly Affect the Handling of These Cases for Municipalities

Kristin Klein Wheaton

The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers, including public employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget, signed on April 12, 2018, contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training and settlements of sexual harassment cases immediately ("Legislation").[1] Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City.[2] These pieces of legislation will significantly impact the handling of sexual harassment cases by municipalities.

New York State Legislation

The legislation contained in the New York State budget includes amendments to the New York Executive Law, New York Finance Law, New York Labor Law, New York Civil Practice Law and Rules (CPLR) Law, New York Public Officers Law and New York General Obligations Law relating to the prevention, training and settlement of sexual harassment claims. Significantly, the legislation only applies to "sexual harassment," which is undefined. Earlier versions of the bill contained a definition of sexual harassment, but the definition was left out of the final legislation.

"The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law."

Significantly, individuals who are not employees are protected in the new legislation. The New York Executive Law has been amended to expand the unlawful discriminatory practice of an employer to include sexual harassment of non-employees in its workplace, including contractor, subcontractor, vendor, consultant or any other person providing services pursuant to contract in the workplace, or someone who is an employee of such contractor, subcontractor, vendor, consultant or other person providing service pursuant to a contract in the workplace.[3] Accordingly, all employers, including public entities, will now also need to expend resources investigating complaints made by non-employees in their work-places and take corrective action to the extent that a non-employee is committing harassment against an employee or an employee is harassing a non-employee, or face liability for failure to do so. Fortunately, the legislation provides that in reviewing cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.[4] Other forms of harassment and harassment based upon protected classes, including, but not limited to, race, age or sex discrimination (that is not sexual harassment) are not covered by this legislation.

Kristin Klein Wheaton

Requirements for State Contractors

The legislation imposes new requirements upon contractors that contract with the "state or any public department or agency thereof" where competitive bidding is required.[5] Effective January 1, 2019, each state contractor shall be required to submit a certification with all bids, under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees.[6] The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law.[7] Any bid that does not meet this requirement will not be considered. It is in the discretion of the state department or agency to require the certification of contracts for services that are not subject to competitive bidding.[8] In

the event the contractor is unable to make the certification, it must provide a signed statement "which sets forth in detail the reasons therefor."[9]

Requirements for All Employers, Including Municipalities

Effective October 9, 2018, all employers, including municipalities, must adopt the model sexual harassment policy promulgated pursuant to the amended Labor Law that equals or exceeds the standards set forth by the New York State Department of Labor, in consultation with the New York State Division of Human Rights.[10] The model sexual harassment prevention policy shall 1) prohibit sexual harassment consistent with the guidance issued by the Department of Labor and provide examples of prohibited conduct that would constitute unlawful sexual harassment; 2) "include but not be limited to, information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws"; 3) "include a standard complaint form"; 4) "include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties"; 5) inform employees of their rights of redress and all available forums for resolving complaints administratively and judicially (this would include notification about the opportunity to file a complaint with the New York State Division of Human Rights and United States Equal Employment Opportunity Commission); 6) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as supervisors and managers that knowingly allow such behavior to continue; and 7) "clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful."[11]

In addition, annual interactive training on sexual harassment must be provided by all employers, including municipalities, effective October 9, 2018.[12] The New York State Department of Labor, in consultation with the New York State Division of Human Rights, shall develop a model training program. The legislation provides that the training shall include 1) "an explanation of sexual harassment consistent with guidance issued by the Department [of Labor] in consultation with the Division of Human Rights"; 2) "examples of conduct that would constitute unlawful sexual harassment"; 3) "information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment"; and 4) "information concerning employees' rights of redress and all available forums for adjudicating complaints."[13] In addition, the annual training must address supervisory responsibilities for the prevention of sexual harassment, and address conduct by supervisors that may constitute sexual harassment.[14] Accordingly, the interactive training provided by municipalities must meet or exceed the requirements of the model training and must be provided to employees and supervisors on an annual basis. "Interactive" is not defined in the legislation so it appears to be an open question whether the training needs to be in-person live training or whether online training that has some interactive features will suffice. It appears that recorded training that has no interactive component may be deemed inadequate. The author recommends "live" training or interactive online training, pending further guidance from the Department of Labor.

Reimbursement by Employee Adjudicated to Have Committed Sexual Harassment

Most municipal lawyers have represented municipalities, officers and employees in claims of sexual harassment for years. The law is well established that municipalities are barred from defending and indemnifying employees for acts committed outside of the scope of their employment, for intentional wrongdoing and recklessness on the part of the employee and for punitive damages. The new legislation requires certain employees of municipalities to pay back the municipality for damages awarded in a sexual harassment case.

New York Public Officers Law § 18 has been amended to add a new section 18-a, effective immediately, which provides for reimbursement to the public entity for an award paid owing to an employee who is adjudicated to have committed harassment. Public entities include, but are not limited to, counties, towns, cities, villages, political subdivisions, school districts, BOCES or other governmental entities or entities operating a public school, college, community college or university, a public improvement or special district, public authorities, commissions, agencies or public benefit corporations and any other separate corporate instrumentality of the state.[15] "Employee" is broadly defined to include "commissioner, member of a public board or commission, trustee, director, officer, employee, or any other person holding a position by election, appointment, or employment in the service of the public entity, whether or not compensated" including a former employee or judicially appointed representative.[16] The new section provides that "any employee who has been subject to a final judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any public entity

that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment."[17] The tortious employee is required to reimburse the public entity within 90 days of the public entity's payment of the award and if the employee fails to do so, the public entity can garnish the employee's wages.[18] There is an additional amendment to New York Public Officers Law which adds section 17-a containing similar legislation applicable to employees of New York State and its agencies.

Fortunately, language that was in the draft bill which appeared to prohibit even the payment of settlements by municipalities, versus final judgments for sexual harassment cases, did not make it into the final legislation. Notwithstanding, there are questions regarding this new provision that may present practical problems for the municipality's lawyer. Does this language create a conflict of interest for the legal counsel between the duty to represent the municipality and defend the employee? For example, even if the municipality's investigation reveals that the employee acted appropriately, there is always a chance that a final judgment could find that the employee was individually liable (for example as an aider or abettor under the Human Rights Law) if the litigation proceeds to a hearing before an administrative agency or trial. Does the fact that the employee may ultimately have to pay a judgment personally create a conflict of interest in both the strategy of proceeding to trial on a case or deciding to settle, as well as in the defense of a claim? These situations are similar to potential conflicts of interest that arise when a plaintiff institutes a case under 42 U.S.C. § 1983 against a municipality and individual employees and seeks punitive damages against individual public employees. There seems to be a question of whether any disclosure to the employee who is accused of harassment as to the possibility of personal financial responsibility is recommended and/or ethically required. If required, should it be in writing? Should there be any waiver of a potential conflict of interest signed by the employee where the attorney is representing both the municipality and the employee? It will be interesting to see whether this new legislation has any impact on the handling of the defense of these cases.

Confidentiality

Non-disclosure or confidentiality agreements are prohibited in sexual harassment claims, except under limited conditions, effective July 11, 2018. New provisions in the New York General Obligations Law and the CPLR prohibit all employers, including municipalities, from utilizing confidentiality agreements in the settlement or resolution of any claim, "the factual foundation for which involves sexual harassment" unless confidentiality is the complainant's preference.[19] Borrowing from the Age Discrimination in Employment Act, the legislation provides that any such term (of confidentiality) must be provided to all parties and the complainant shall have 21 days to consider the provision, and if he or she agrees to confidentiality, it must be stated in a separately executed written agreement subject to revocation by the complainant within seven days after signing it.[20]

The CPLR has also been amended to add a new section under judgements that prohibits non-disclosure or confidentiality agreements as a condition of discontinuing or settling a case "the factual foundation of which involves sexual harassment" unless confidentiality is the plaintiff's preference.[21] The CPLR has also been amended to include provisions identical to those included in the General Obligations Law, including a 21-day consideration period, and seven-day revocation period, as well as the requirement of an additional written agreement evidencing the preference of the plaintiff to keep the matter confidential.[22]

Bar to Mandatory Arbitration Provision in Cases of Sexual Harassment

Finally, effective July 11, 2018, in limited circumstances, the new legislation bars mandatory arbitration provisions in contracts relating to claims of sexual harassment, except where inconsistent with federal law.[23] A new provision has been added to Article 75 of the CPLR that prohibits mandatory arbitration clauses that require that the parties submit to mandatory arbitration to resolve any allegation of claim of an unlawful discriminatory practice or sexual harassment as a condition of the enforcement of the contract or obtaining remedies under the contract.[24] The legislation does state under "exceptions" that "[n]othing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon."[25] Accordingly, under this legislation, mandatory arbitration clauses are not barred altogether other than in cases of sexual harassment. In the event there is any conflict between a collective bargaining agreement and the legislation, the legislation specifies that the collective bargaining agreement shall control.[26]

Stop Sexual Harassment in New York City Act

The New York City Council also passed a package of 11 bills—together referred to as the Stop Sexual Harassment in NYC Act (the "Act"). These bills are being hailed as the nation's farthest reaching anti-sexual

harassment laws. At the beginning of May, Mayor Bill de Blasio signed the bills into law. The respective bills that make up the Act have different implications for different employers. For example, certain employers will be required to conduct an ongoing assessment of risk factors associated with sexual harassment,[27] report annually on workplace sexual harassment,[28] be evaluated through a climate survey of their employees,[29] display anti-sexual harassment posters at their workplace,[30] and conduct annual anti-sexual harassment training for their employees.[31] The respective bills have various effective dates, some of which are effective immediately. While the legislation seems geared toward private employers, the exact impact on municipalities located in New York City should be followed closely.

Conclusion

While there are still some unanswered questions, what is certain is that there will be more legislation and regulations to come. The state legislation expressly directs issuance of guidance and regulations by the New York State Department of Labor, in consultation with the New York State Division of Human Rights. Some of the criticism of the legislation is that it does not go far enough since it does not cover other types of discrimination beyond sexual harassment. Also, while the proposed budget bill contained very detailed requirements for the conduct of investigations, the final bill does not specifically address what needs to be done in order to have a legally compliant investigation. For now, the case law addressing prompt investigations, as well as the EEOC's recommended best practices for investigations, may be the guidepost.[32] It may be assumed that some of the language in the proposed legislation that did not make it into the final bill may find its way into the regulations and guidance.

Employers may be wondering whether other discrimination claims should be treated similarly with respect to the annual training and development of a written policy. It seems that it may be a matter of time before additional legislation is enacted that applies to other forms of discrimination as well. Given that sexual harassment training and policies are often included in an overall harassment and discrimination prevention program that includes all forms of discrimination, it may make sense for municipalities to apply the same investigation and policy requirements to other forms of discrimination and have one policy that covers all forms of harassment and discrimination. In any event, municipal lawyers everywhere in New York State will be busy the next several months implementing the requirements of this new law.

Endnotes

1. 2018 Sess. Laws of N.Y. Ch. 57 (S.7507-C) (McKinney's 2018).
2. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354940&GUID=EE51AA28-8FAA-41FE-B063-BE965FAED119&Options=ID%7CText%7C&Search=Int+657-A.
3. N.Y. Executive Law § 296-d.
4. *Id.*
5. N.Y. State Finance Law § 139-1(1)(a).
6. *Id.*
7. *Id.*
8. *Id.* at § 139-1(1)(b).
9. *Id.* at § 139-1(3).
10. N.Y. Labor Law § 201-g(1)(b).
11. *Id.* at § 201-g(1)(a).
12. *Id.* at § 201-g(2)(a).
13. *Id.*
14. *Id.* at § 201-g(2)(b).
15. N.Y. Public Officers Law § 18-a(1)(a).
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19. N.Y. General Obligations Law § 5-336.
20. *Id.*
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22. *Id.*
23. *Id.* at § 7515.
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32. EEOC Checklist for Employers, "Checklist Three: A Harassment Reporting System and Investigations," found at https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm.

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Why *Commercial Litigation in New York State Courts*, 4th Edition, Belongs in Your Library

Edited by Robert Haig
Reviewed by Linda S. Kingsley

At first glance you might wonder why we are reviewing and urging the use of an eight volume series entitled *Commercial Litigation in New York State Courts*. I will admit to initially being skeptical myself. However, after reviewing the text, I am certain that every municipal and government attorney would greatly benefit from making this a prominent part of their law library. As I thought about it, I started counting the reasons in my head. So, in a less than traditional form of review, I will add to the title above, the following subtitle: Ten Reasons Why You Should Own This Series. Here they are.

1. *Commercial Litigation In New York State Courts*—4th Edition Is Written by the Best of the Best and Edited by Equal Quality Talent

A quick review of the Table of Contents will show a panoply of contributing authors (182 in all) far beyond anything one would expect in a single series. This group includes one present and one former Court of Appeals Chief Judge, a number of other sitting Court of Appeals and Appellate judges, and many "frontline" trial judges and federal magistrates and judges. There is no greater gift, when preparing your case, than being able to get inside the mind of the best of the judiciary. Beyond the judiciary, an incredible array of private sector attorneys author many of the chapters. Just as knowing what is in the mind of a judge is invaluable, so is hearing an issue argued from the position of your opponent. In sum, the authorship of this series is beyond reproach.

Editor–in-Chief Robert L. Haig has a resume too voluminous to detail in this review but suffice to say that he speaks of what he knows. His publications, bar association positions and experience in civil and commercial law are daunting. I know from my conversations with him that this is a work of love for him, not just another publication.

2. The Series Serves as a Comprehensive Treatise of Civil Litigation

My initial response when being asked to review this series was that there would be a few specific applicable sections for local and state government attorneys within a much larger group of writings. I am here to tell you that this is far from an accurate assessment. Almost all of the sections within the roughly 9,600 pages of knowledge are in one way or another beneficial to all attorneys. While its title refers to commercial litigation, it is in fact a comprehensive guide of both plaintiff and defense issues in almost every type of civil litigation that may arise in your practice.

3. Even if You Own an Earlier Version of the Treatise This Edition Brings a Great Deal of New Material

While many subsequent editions of a treatise will be found to only add a few cases to each volume, there are 22 new additional chapters in this Fourth Edition. Some that might be of particular interest to government attorneys are licensing, internal investigation, mediation, and arbitration, among others. This alone makes the purchase worthwhile. The series also includes annual pocket parts and an invaluable CD-ROM.

4. If You Practice on the Government Side This Gives You Insight Into the Arguments to Be Raised by Opposing Counsel

As many of the chapters are written by private sector attorneys—many on the plaintiffs side—it is a unique opportunity to read the minds of your opponents and be prepared for their actions (because if they are well prepared they will have read this, too).

5. There Is a Large Section of the Treatise Devoted Exclusively to Municipal and Government Actions

Chapter 115, *Governmental Entity Litigation,* followed by Chapter 116, *CPLR ARTICLE 78,* and Chapter 119, *Land Use Regulation,* focus almost exclusively on issues of concern to government attorneys over hundreds of pages. This alone makes this series invaluable as it allows you to understand your adversary's approach.

The *Governmental Entity Litigation* chapter covers immunities, jurisdiction, damages and myriad other

issues in detail. These chapters alone make the series worthwhile.

6. There Are Additionally Dozens of Other Topics Touched on That Should Be Within the Knowledge Base of Government Attorneys

While the chapters discussed above justify this acquisition, there are dozens of other sections within the series that would be of assistance to an attorney representing state or local government. They include punitive damages for government entities, health care and Medicaid fraud (particularly relevant for county and state attorneys), and a section devoted to how the actions of the Attorney General function within investigations. Further, several areas that at first glance may seem irrelevant have become essential, particularly in all but the smallest municipalities, addressing trademarks, patents and copyrights. What municipality has not developed a great idea only to have it stolen from them because they didn't take the proper regulatory protections? In other words: everywhere you look in this treatise, there is something of relevance.

7. Practical Help Abounds Throughout the Eight Volumes

Forms and checklists pop up as you work your way through the treatise. There are very few overworked attorneys who could not benefit from organizational help as they prepare a case or analyze a potential claim.

8. The Treatise Covers Both State and Federal Issues—a Rarity

Most often when studying an issue with state and federal implications you will have to consult one text on state issues and yet another on federal issues. As each issue is addressed, it is addressed from both viewpoints. It might even bring to your attention a federal issue that you did not know existed, an invaluable asset.

9. One of the Most Acclaimed New York State Government Lawyers Has Endorsed This Treatise

We all know that Patricia Salkin (former Dean of Touro College Law Center and now the Provost of the Graduate and Professional Divisions of Touro College) is a major expert on all issues municipal. Her glowing review of the previous edition was right on point. I am proud to follow in such eminent footsteps, and add that this edition has exceeded the value of the prior set.

10. We All Need a New Viewpoint of the Work We Do

As one who has been practicing municipal law for over 35 years, while it is hard to admit, it is easy to get set in our ways and not look for new avenues or arguments. This treatise is clearly broken into manageable sections with lots of new concepts and ideas as well as thought-provoking checklists and outlines. As a result, this book can not only make your practice easier, but more important, increase the quality of your practice.

In sum, pick any of the reasons one through 10 and they will justify the purchase of *Commercial Litigation In New York State Courts*-4th Edition. Enjoy this valuable tool.

Linda S. Kingsley is an attorney in Rochester, New York. Having previously served as Corporation Counsel of the City of Rochester and before that Corporation Counsel of the City of Binghamton and Counsel to NYCOM, Linda is now an Adjunct Professor at Albany Law School teaching State and Local Government Law while maintaining a private consulting practice.

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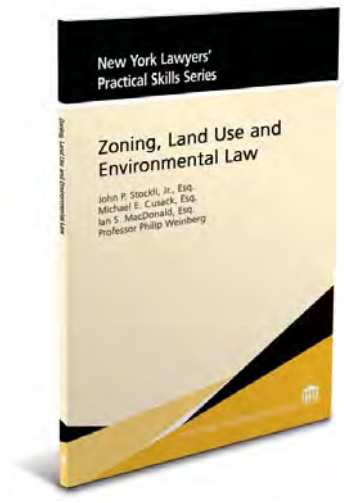

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