NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Local and State Government Law Section Fall Meeting 2019
Day 1 – Friday, October 25, 2019
The Embassy Suites Saratoga Springs, Saratoga Springs, NY

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

NEW YORK STATE BAR ASSOCIATION

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PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Local and State Government Law Section Fall Meeting 2019
Day 2 – Saturday, October 26, 2019
The Embassy Suites Saratoga Springs, Saratoga Springs, NY

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

Local and State Government Law Section Fall Meeting

Section Chair
Sharon N. Berlin, Esq.

Program Co-Chairs
Spencer Fisher, Esq.
Charles Malcomb, Esq.

October 25-26, 2019

The Embassy Suites Saratoga Springs
86 Congress St., Saratoga Springs, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

> The course materials may be accessed online at:
> http://www.nysba.org/LSGLFall19coursebook/

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Local and State Government Law Section Fall Meeting**
Dates: October 25-26, 2019 Location: Saratoga Springs, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_dbZZH9y4x3CbliZ
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **8.5 New York CLE credit hours**

Credit Category:
7.5 Areas of Professional Practice 1.0 Ethics and Professionalism

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via recording or webcast should refer to www.nycourts.gov/attorneys/cle regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

AGENDA

Friday, October 25

11:00 a.m.	**Registration in Foyer**
12:10 - 1:00 p.m.	**SAPA and Fair Hearings: NYS DEC Permitting and Enforcement Hearings** (1.0 credits in Areas of Professional Practice) This presentation will provide an overview of the NYS DEC's adjudicatory hearing procedures, which are critical to practitioners representing clients during the permit application process and enforcement actions. While each State agency's regulations differ in key respects, many of the principles governing a fair hearing under the State Administrative Procedure Act (SAPA) that are the foundation of NYS DEC's procedures apply broadly to practice before the State's various administrative tribunals.
Speaker:	**Hon. James T. McClymonds**, Chief Administrative Law Judge, NYS DEC
1:00 – 1:50 p.m.	**SEQRA Basics and Recent Amendments to the SEQRA** (1.0 credits in Areas of Professional Practice) The presentation will provide an overview of the State Environmental Quality Review Act with a focus on the 2018 amendments to the regulations that implement that law.
Speaker:	**Lawrence H. Weintraub, Esq.**, NYS DEC
1:50 – 2:00 p.m.	**Refreshment Break**
2:00 – 2:10 p.m.	**Welcoming Remarks – Hank Greenberg, Esq.**, NYSBA President Introductions – Program Co-Chairs: Spencer Fisher, Office of the NYC Corp. Counsel, and Charles W. Malcomb, Esq., Hodgson Russ LLP
2:10 – 3:00 p.m.	**Coming on Board: How to Advise New Municipal Officials** (1.0 credits in Areas of Professional Practice) This presentation will provide guidance for all attorneys for municipal government about the most important components of municipal law and practice that need to be communicated to newly appointed or elected official clients.
Speaker:	**Wade Beltramo, Esq.**, General Counsel, New York Conference of Mayors and Municipal Officials
3:00 – 3:50 p.m.	**2019 Election Law Update** (1.0 credits in Areas of Professional Practice) There have been many new developments in New York State's election laws in 2019, including a new early voting system and consolidation of primary dates. This presentation will provide an overview of the changes, and of reforms that may be enacted in the upcoming years.
Speakers:	**Kwame Akosah, Esq.**, Office of the New York City Corp. Counsel; **Myrna Perez, Esq.** (or designee), Brennan Center for Justice
3:50 – 4:05 p.m.	**Refreshment Break**

4:05 – 4:30 p.m. **Alcoholic Beverage Regulation and Local Governments**
(0.5 credits in Areas of Professional Practice)
This presentation will outline the current state of the interplay between the Alcoholic Beverage Control Law (and its implementing regulations) and the role of local governments in addressing the concerns of their own communities.

Speaker: **Paul Karamanol, Esq.**, New York State Liquor Authority

4:30- 5:20 p.m. **SEQRA and Land Use Case Law**
(1.0 credits in Areas of Professional Practice)
This presentation will address the most recent developments in case law governing land use and environmental review statewide.

Speaker: **Charles W. Malcomb, Esq.**, Hodgson Russ LLP

5:20 – 5:30 p.m. **Closing Remarks**

5:30 – 6:30 p.m. **Please join us in the Skidmore Room for a reception**.

Dinner is on your own this evening.

Saturday, October 26

8:00 a.m. **Continental Breakfast**

9:00 – 12:00 p.m. **General Session**

9:00- 9:10 a.m. **Welcoming Remarks**
Introductions – Section Chair: Sharon N. Berlin, Esq., Lamb & Barnosky; Program Co-Chairs: Spencer Fisher, Office of the NYC Corp. Counsel, Charles W. Malcomb, Esq., Hodgson Russ LLP

9:10 – 10:00 a.m. **Update on Governmental Regulation of Religious Education**
(1.0 credits in Professional Practice)
In recent years, there has been increasing interest in the constitutional status of state aid to religious schools as well as regulation of such schools. This presentation will provide an update on the current state of case law in this evolving area.

Speaker: **Andrea Fastenberg, Esq.**, Office of the NYC Corp. Counsel

10:00 - 10:10 a.m. **Refreshment Break**

10:10 - 11:00 a.m. **Public Sector Labor and Employment Law 2019 Update**
(1.0 credits in Areas of Professional Practice)
This presentation will review recent PERB and court decisions, as well as other legislative and administrative developments, in the practice of law concerning public sector collective bargaining and labor relations.

Speakers: **James D. Bilik, Esq.**, Arbitrator and Mediator; **Chris Trapp, Esq.**, Greco Trapp, PLLC

11:00 – 11:50 a.m.	**Ethics for Land Use Practitioners** (1.0 credits in Ethics) This session will review recent case law from New York as well as interesting cases from across the country that raise issues related to conflicts of interest, bias and other litigated areas where the conduct of board members, lawyers and other players in the land use game has been called into question. Questions of disclosure and recusal will also be discussed.
Speakers:	**Patricia E. Salkin Esq.**, Provost, Graduate and Professional Divisions, Touro College; **Aisha Scholes**,Touro Law Center Class of 2020
11:50 a.m. – 12:00 p.m.	**Closing Remarks**
12:00 – 1:00 p.m.	**Executive Committee Meeting**

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

☐ As a NYSBA member, **PLEASE BILL ME $30 for Local and State Government Law Section dues.** (law student rate is $15)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Local and State Government Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Local and State Government Law Section Committees

Please select which committees you would like to join. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Administrative Law Judges (MUNI3700)
___ Attorneys in Public Service (MUNI4600)
___ Awards (MUNI3800)
___ Employment Relations (MUNI1900)
___ Ethics and Professionalism (MUNI2000)
___ Land Use, Green Development and Environmental (MUNI2100)
___ Law Student (MUNI3400)
___ Legislation (MUNI1030)
___ Liability and Insurance (MUNI3200)
___ Membership and Diversity (MUNI1040)
___ Municipal Counsel (MUNI3000)
___ Publications (MUNI3900)
___ State Counsel (MUNI3600)
___ State and Federal Constitutional Law (MUNI3100)
___ Taxation, Finance and Economic Development (MUNI2200)

JOIN OUR SECTION

2020 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$275
Attorneys admitted 2013-2014	185
Attorneys admitted 2015-2016	125
Attorneys admitted 2017 - 3.31.2019	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$180
Attorneys admitted 2013-2014	150
Attorneys admitted 2015-2016	120
Attorneys admitted 2017 - 3.31.2019	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2019

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

TABLE OF CONTENTS

SAPA and Fair Hearings: NYC DEC Permitting and Enforcement Hearings

Hon. James T. McClymonds
Chief Administrative Law Judges, NYS DEC

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
OFFICE OF HEARINGS AND MEDIATION SERVICES

DEC HEARING PROCEDURES

James T. McClymonds
Chief Administrative Law Judge

I. INTRODUCTION

A. Background: DEC's Jurisdiction

1. Policy: to conserve, improve and protect the State's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the State and their overall economic and social well being (Environmental Conservation Law [ECL] § 1-0101[1])

2. Environmental Conservation Law (ECL) -- Chapter 43-B of the Consolidated Laws of New York

3. Federal Clean Water Act and Clean Air Act

4. Other statutes: Navigation Law; Public Service Law article 10

5. Department's Regulations: Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

B. Department of Environmental Conservation (DEC): Overview
-- see Appendix A

1. Nine DEC Regions: Regional Staff
2. Central Office
3. Office of General Counsel
4. Office of Hearings and Mediation Services (OHMS)

C. DEC Office of Hearings and Mediation Services: Key Players

1. Commissioner of Environmental Conservation

2. Administrative Law Judges (Environmental Impact Examiners)
   a. Separate from Department staff; the ALJ is the Commissioner's representative in complying with procedural and substantive statutory and regulatory mandates
      -- see Matter of Bath Petroleum Storage, Inc., ALJ Ruling, Dec. 10, 2004, at 4-5
   b. Vested with broad powers to manage and conduct proceedings, and rule on motions, requests, and issues presented for decision
   c. Executive Order 131 -- ALJ independence
   d. Ex parte communication rules
      -- see 6 NYCRR 622.16; 6 NYCRR 624.10

3. Deputy Commissioner for Hearings and Mediation Services; Chief Administrative Law Judge (Supervising Envtl. Impact Examiner); Hearings Counsel

D. Applicable DEC Hearing Regulations: State Administrative Procedure Act (SAPA) Article 3 Adjudicatory Proceedings

1. Uniform Enforcement Hearing Procedures (6 NYCRR part 622)

2. Permit Hearing Procedures (6 NYCRR part 624)
   -- see also Public Service Law article 10 (16 NYCRR Part 1000)

3. Miscellaneous Procedures (not covered here)
   a. Freedom of Information Law (FOIL) (see Public Officers Law article 6; 6 NYCRR part 616)

   b. Mediation: Including settlement conferences pursuant to 6 NYCRR 621.9

II. PART 622 -- UNIFORM ENFORCEMENT HEARING PROCEDURES

A. General Background: Application

1. Quasi-criminal in nature; CPLR-like civil proceedings; results in imposition of civil penalties and remedial obligations
-- see ECL article 71; 6 NYCRR 622.1

2. Department initiated -- generally two parties: DEC staff attorney as prosecutor; respondents

3. Alleged violation of ECL, regulations, and permits, certificates or orders issued by DEC; adjudication of past acts

4. Scope of proceedings: determine liability, impose penalties, permit revocation, and remedial action

5. ALJ's Role -- Trier of Fact: develop record, draft hearing report based upon record, make recommendations to the Commissioner

B. Initiation of Proceedings

1. Commencement of Proceedings

a. Notice of Hearing and Complaint (see 6 NYCRR 622.3[a])

b. Motion for Order Without Hearing (in lieu of or in addition to complaint) (see 6 NYCRR 622.12)

c. Notice of Intent To Modify, Suspend or Revoke an existing permit, where violation of law alleged (see 6 NYCRR 622.3[b][2]; 6 NYCRR 621.13)

d. Summary abatement and summary suspension orders (see 6 NYCRR 622.14; 6 NYCRR part 620) (imminent danger to health or welfare of the people or irreversible or irreparable damage to natural resource [ECL 71-0301])

2. Answer/Response to Motion for Order Without Hearing (20 days) (see 6 NYCRR 622.4; 6 NYCRR 622.12[c])
   -- Answers are filed with staff
   -- Responses to motions for order without hearing are filed with staff and Chief ALJ
   -- Extension requests made first to staff; inform the Chief ALJ if granted. If denied, may make application to Chief ALJ.

3. Methods of Service of Complaint (see 6 NYCRR 622.3[a][3])
   -- Personal service consistent with CPLR
   -- Certified Mail/complete upon receipt

4. Pre-Hearing Conference: Staff initiated; OHMS not involved (see 6 NYCRR 622.8)
   -- Opportunity to resolve, define, and clarify issues between parties before hearing

5. Discovery (see 6 NYCRR 622.7)
   -- Governed by CPLR article 31
   -- Bills of particulars not allowed; depositions only by leave

C. Referral to OHMS

1. Statement of Readiness for Adjudicatory Hearing (see 6 NYCRR 622.9)
   a. Staff initiated
   b. Discovery complete (see 6 NYCRR 622.7)
   c. Reasonable attempt has been made to settle

2. Staff initiated Motions for Order Without Hearing/Default Judgment

3. Other Motions (Staff and Respondent initiated) (see 6 NYCRR 622.6[c] [Motion practice])
   a. Motions addressed to the pleadings
      -- Motion for more definite statement of the complaint (within 10 days of completion of service of complaint) (see 6 NYCRR 622.4[e])
      -- Motions to Clarify or Dismiss Affirmative Defenses (see Matter of Truisi, Chief ALJ Ruling on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010)
      -- Motions to Dismiss the Complaint (see Matter of Estate of Ryan, Ruling of the Chief ALJ on Motion to Dismiss, Oct. 15, 2010, at 11 [failure to state a claim]; Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014, at 10 [defense based on documentary evidence])
   b. Discovery motions (see 6 NYCRR 622.7)
   c. If no ALJ assigned, motions made to Chief ALJ (see 6 NYCRR 622.6[c][1])

4. Assignment of ALJ; Assignment letter

5. Notice of Enforcement Hearing (see 6 NYCRR 622.9[e])

D. Conduct of Hearings

1. Date and Location: Date by agreement of parties; usually located in DEC Regional Office where violation allegedly occurred.

2. ALJ has broad authority to conduct hearing, including subpoena power (see 6 NYCRR 622.10[b])
   -- Subpoena duces tecum to be served on State or local government official, see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Discovery Requests, Dec. 11, 2013, at 4-5.

3. Trial-like proceedings: Opening statements; presentation of sworn witnesses and documentary evidence; direct and cross examination; closing statements (see 6 NYCRR 622.10[a]; 6 NYCRR 622.11[a])

4. Burden of Proof (see 6 NYCRR 622.11[b])
   -- Department staff has burden of proving all charges
   -- Respondent has burden of proving all affirmative defenses

5. Standard of Proof (see 6 NYCRR 622.11[c])
   -- preponderance of the evidence
   -- hearsay not per se inadmissible; goes to weight of evidence (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008)

6. Stipulations (see 6 NYCRR 622.18[c])
   -- Removes issues from proceeding
   -- Stipulation on all charges results in termination of proceedings with no further action (see Organization and Delegation Memorandum 94-13, “Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings” [May 5, 1994])

E. Post-Hearing Proceedings

1. Closing Briefs and Replies: if allowed by ALJ (see 6 NYCRR 622.10[a][5])

2. Close of Record -- Upon ALJ's receipt of stenographic record, submission of additional materials agreed to at hearing, briefs or replies, whichever occurs last

3. ALJ's Hearing Report -- 45 days after close of record. Usually not issued until Commissioner's order. Contains findings of fact, conclusions of law, and recommendations on penalty, remediation and all other issues before ALJ (see 6 NYCRR 622.18[a])

4. Recommended Decision – ALJ's hearing report may be issued as recommended decision. Additional comment period (see 6 NYCRR 622.18[a][2], [3])

5. Commissioner's Order/Decision and Order -- 60 days after close of record, or 30 days after comments due on recommended decision if one issued. Commissioner's order contains:
   a. Findings of fact and conclusions of law, or reasons for final decision
   b. Finding of liability or dismissal of charges
   c. Assessment of penalties and other sanctions
   d. Direction for abatement or restoration or provision of financial security (see 6 NYCRR 622.18[e])

6. Distribution of Commissioner's Order

F. Summary Procedures

1. Motion for Default Judgment (6 NYCRR 622.15)
   -- see Matter of Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006 (standards)
   -- see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 2-3 (proof of facts sufficient to support the claim charged); Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 (proof of facts must be sufficient to enable ALJ and Commissioner to determine that staff has a viable claim)
   -- Notice of motion for default judgment to be provided to respondent (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2)
   -- Consistent with CPLR 3215(g)(4), additional service of complaint on corporation (see Matter of Milu, Inc., Order of the Commissioner, May 25, 2007, at 1)

2. Motion for Order Without Hearing (6 NYCRR 622.12)
   -- administrative equivalent of summary judgment (see Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003)
   -- Sufficiency of evidence on summary judgment, see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008
   -- for example of unopposed motions, see Matter of Hornburg, Commissioner Order, Aug. 26, 2004, adopting Chief ALJ Ruling/Hearing Report, at 10

3. Summary Abatement/Suspension Proceedings (6 NYCRR 622.14; 6 NYCRR part 620)
   -- condition or activity presents an imminent danger to health or welfare, or results in or is likely to result in irreversible or irreparable damage to natural resources (see 6 NYCRR 620.2[a])
   -- DEC staff's burden of persuasion; respondent's burden of production to prove condition or activities do not come within section 620.2(a)

4. Expedited Enforcement Proceeding
   -- SPDES Discharge Monitoring Report (DMR) violations; Petroleum Bulk Storage (PBS) registration violations; Hunting Related Shooting Incident (HRSI) license revocation hearings
   -- Default hearing

G. Part 622 Appeals

1. Expedited Interlocutory Appeals: during proceedings, only by leave of the Commissioner, except motions for recusal of ALJ (see 6 NYCRR 622.10[d][2]; 6 NYCRR 622.6[e] [time periods]). Movant must demonstrate:
   a. failure to decide the appeal would be unduly prejudicial to one of the parties, or
   b. would result in significant inefficiency in hearing process (see 6 NYCRR 622.10[d][2][ii])

2. At conclusion of hearing (see 6 NYCRR 622.10[d][1])
   -- In final brief, if provided for
   -- By motion

III. PART 624 -- PERMIT HEARING PROCEDURES

A. General Background

1. Decision to invoke DEC's permit hearing procedure shifts decision making concerning permit issuance from Department staff to the Commissioner

2. Purpose -- To develop a record for informed decision making by the Commissioner

3. Scope -- To resolve issues concerning a proposed project's compliance with statutory and regulatory permit requirements

4. Applicability -- Applicable to virtually all permits administered by DEC. Governs permit issuance, renewal, modification, suspension and revocation, except where enforcement is involved (see 6 NYCRR 624.1)

5. Public participation component -- Pursuant to provisions of ECL 70-0119, designed for public participation and multiple parties. Legislative hearing and issues conference: unlike any other civil proceedings (but see Public Service Law article 10) Parties:
   -- Department staff
   -- Applicant/permittee
   -- Intervenors

6. Relationship to review under State Environmental Quality Review Act (ECL article 8 [SEQRA]) -- Review of SEQRA issues in hearing generally limited; review of sufficiency of draft environmental impact statement (DEIS), if one was prepared

B. Pre-Referral Administrative Procedures: Uniform Procedures Act (ECL article 70) and Regulations (6 NYCRR part 621)

1. Permit application submittal; SEQRA determination of significance; preparation of DEIS, if required; preparation of draft permit or letter indicating grounds for denial of permit

2. Hearing referral determination

   a. By staff: where staff review or public comments raises substantive and significant issues (see 6 NYCRR 621.8[b])
      -- Staff may use a Part 621 Legislative Hearing to determine whether to refer for adjudicatory hearings

   b. By applicant/permittee: Applicant may request a hearing based upon denial of permit, modification of project, or imposition of significant conditions (see 6 NYCRR 621.10[a][1], [2]; 621.11[g]; 621.13[d])

3. Hearings Request -- Submitted by staff to Chief ALJ, together with a copy of the filed application and supporting documents, the DEIS or negative declaration as appropriate, and a copy of filed correspondence from applicant and public

C. Post-Referral, Pre-Hearing Proceedings

1. Assignment of ALJ by Chief ALJ; Assignment Letter

2. Notice of Public Hearing (see 6 NYCRR 624.3)
   -- Published at least 21 to 30 days prior to hearing, depending on permit; establishes comment period and party-status petition deadline. Published in:
   a. Environmental Notice Bulletin (ENB; located at http://www.dec.ny.gov/enb/enb.html)
   b. At least one newspaper of general circulation in project area
   c. Sent to CEO of municipality in which project proposed
   d. Sent to persons who filed responses to notice of complete application, if any
   e. Sent to anyone believed to have an interest
   f. Hearing location usually in community where project proposed; cost born by applicant unless Department-initiated proceeding

3. Pre-Issues Conference Discovery: Absent extraordinary circumstances, limited to Freedom of Information Law (FOIL) requests (see 6 NYCRR 624.7[a])

D. Legislative Public Hearings: Opportunity for Public Comment (see 6 NYCRR 624.4[a])

1. Public comment on permit application -- not evidence, but may provide basis for further inquiry by ALJ during issues conference
2. Public comment on DEIS, if applicable
3. Written or oral comments accepted

E. Issues Conference: Identify Parties and Narrow Issues for Adjudication (see 6 NYCRR 624.4[b])

1. Purpose -- To limit and define subject matter of adjudicatory hearing; determine party status; identify factual issues requiring hearing; argue issues of law; determine pending motions (see 6 NYCRR 624.4[b][2]); similar to summary judgment, but without evidentiary proof (see Matter of Hyland Facility Assocs., Commissioner Third Interim Decision, Aug. 20, 1992, at 1-2)

2. Outcome: ALJ's Issues Ruling -- 30 days after close of issues conference record
   -- If no adjudicable issues, ALJ cancels hearing and directs staff to continue processing permit application

3. Adjudicable Issues -- Substantive and Significant Standard
   a. Adjudicable Issues -- An issue is adjudicable if:
      i. relates to a dispute between staff and applicant over a substantial term or condition of the draft permit;
      ii. relates to matter relied upon by staff as a basis to deny the permit and is contested by applicant; or
      iii. proposed by a potential party (intervenor) and is substantive and significant (see 6 NYCRR 624.4[c][1])

   b. Substantive – "sufficient doubt" about applicant's ability to meet statutory or regulatory criteria "such that a reasonable person would inquire further" (6 NYCRR 624.4[c][2])

   c. Significant – "has potential to result" in permit denial, major modification to proposed project, or imposition of significant permit

conditions in addition to those in the draft permit (6 NYCRR 624.4[c][3])

4. SEQRA Issues -- DEC lead agency or no coordinated review (see 6 NYCRR 624.4[c][6])
   a. Staff determination not to require preparation of EIS -- irrational or error of law standard (see Matter of Metro Recycling and Crushing, Inc., Decision of the Acting Commissioner, April 21, 2005, at 5-6).
   b. Sufficiency of DEIS
   c. Ability to make SEQRA findings as required by 6 NYCRR 617.11

5. Burdens of Persuasion
   a. Where staff and applicant disagree, issue by definition adjudicable

   b. Where staff finds component of applicant's project, as proposed or conditioned by draft permit, conforms to all applicable requirements of statute and regulations, burden of persuasion upon potential party proposing any issue related to that component to demonstrate that it is both substantive and significant (see 6 NYCRR 624.4[c][4])

   c. Offers of proof: Proposed intervenors seeking full party status must support their petition with an adequate offer of proof (see 6 NYCRR 624.5[b][2][ii]). Offer of proof should:
      -- specify witnesses and the nature of and bases for those witnesses' testimony

      -- identify documentary and other evidence to be presented

      -- see Matter of St. Lawrence Cement Co., LLC, Second Interim Decision of the Commissioner, Sept. 8, 2004, at 93-95 [discussing offers of expert testimony]; Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2; Matter of Hydra-Co. Generations Inc., Interim Decision of the Commissioner, April 1, 1988, at 2-3; Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2.

6. Party Status
   a. Staff and Applicant -- designated by regulations as full parties

   b. Other parties -- must apply for party status in writing by date established in notice of hearing.

i. Full party status -- successfully raise a substantial and significant issue for adjudication, or demonstrate an ability to contribute meaningfully to an issue raised by another party (see 6 NYCRR 624.5[d][1]). Full rights as party.
ii. Amicus status -- identify a legal or policy issue that needs to be resolved by the hearing (see NYCRR 624.5[d][2]). Right to file brief.
iii. Contents of petitions, see 6 NYCRR 624.5(b)

F. Expedited Appeals to Commissioner

1. Expedited Appeals as of right (see 6 NYCRR 624.8[d][2]; 624.6[e])
   a. ruling to include or exclude an issue for adjudication
   b. ruling on merits of legal issue as part of issues ruling
   c. ruling affecting party status
   d. denial of motion for recusal

2. Expedited Appeals by Leave -- discretionary with Commissioner (see 6 NYCRR 624.8[d][2][v])
   a. Any other ruling of the ALJ
   b. Movant must demonstrate:
      i. failure to decide the appeal would be unduly prejudicial to one of the parties, or
      ii. would result in significant inefficiency in hearing process

3. Appeals after completion of all testimony -- in final brief or by motion where no final brief provided for (see 6 NYCRR 624.8[d][1])

G. Other Pre-Hearing Proceedings
1. Post-issues conference discovery (see 6 NYCRR 624.7)
2. Pre-filed direct testimony (see 6 NYCRR 624.7[e])
3. Other motion practice (see 6 NYCRR 624.6[c])

H. Adjudicatory Hearings: Conduct of Hearing

1. ALJ has broad authority to conduct hearing, including subpoena power (see 6 NYCRR 624.8[b]; Matter of Suffolk County Water Authority, ALJ Ruling, Aug. 17, 2006, at 1-4 [subpoena duces tecum served on State or local government official])

2. Trial-like proceedings: Opening statements; presentation of witnesses and documentary evidence; direct and cross examination; closing statements (see 6 NYCRR 624.8[a]; 6 NYCRR 624.9[a])

3. Burden of Proof (see 6 NYCRR 624.9[b])
   -- Applicant has burden of proof demonstrating that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see Matter of Karta Corp., Decision of the Executive Deputy Commissioner, April 20, 2006, at 3-6)
   -- Where Department staff has initiated permit modification, suspension or revocation proceedings, staff has burden of proving modification, suspension or revocation is supported by a preponderance of the evidence
   -- On application for permit renewal, permittee has burden of proof -- a demonstration of no change in permitted activity is prima facie case for permittee
   -- Burden of proof on motions is on moving party
   -- For a discussion of the parties' burdens of proof, see Matter of Entergy Nuclear Indian Point 2, LLC, Interim Decision of the Assistant Commissioner, Aug. 13, 2008, at 50-52

4. Standard of Proof (see 6 NYCRR 624.9[c])
   -- preponderance of the evidence

5. Stipulations (see 6 NYCRR 624.12[b]; 6 NYCRR 624.13[d])
   -- Stipulation executed by all parties resolving any or all issues removes such issues from the proceeding

   -- Stipulation resolving all issues results in termination of hearing proceedings (see Organization and Delegation Memorandum 94-13, "Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings" [May 5, 1994])

I. Post-Hearing Proceedings

1. Closing Briefs and Replies: if allowed by ALJ (see 6 NYCRR 624.8[a][5], [6]) -- Opportunity to appeal rulings directly to Commissioner

2. Close of Record -- Upon ALJ's receipt of stenographic record, submission of additional materials agreed to at hearing, briefs or replies, whichever occurs last. ALJ notifies parties of closing of record by mail (see 6 NYCRR 624.8[a][5])

3. ALJ's Hearing Report -- 45 days after close of record. Usually not issued until Commissioner's decision. Contains findings of fact, conclusions of law, and recommendations on all issues before ALJ (see 6 NYCRR 624.13[a]).
   -- If SEQRA involved, ALJ's hearing report together with the DEIS constitutes the final EIS (see 6 NYCRR 624.13[c]).

4. Recommended Decision – ALJ's hearing report may be issued as recommended decision. Additional comment period (see 6 NYCRR 624.13[a]).

5. Commissioner's Decision -- 60 days after close of record, or 30 days after comments due on recommended decision if one issued. Commissioner's decision contains:
   a. Findings of fact and conclusions of law, or reasons for decision, determination or order (see SAPA § 307).
   b. SEQRA Findings -- if SEQRA involved (see 6 NYCRR 617.11[d])

6. Distribution of Decision

IV. CONCLUSION

A. Two different kinds of procedures for two different types of determinations:

1. Part 622 -- Determinations of liability, penalty and remedial obligations; limited parties; CPLR-like procedures

2. Part 624 -- Often complex permit issues; multiple parties; public participation

B. Research Tools

1. ECL, 6 NYCRR

2. LEXIS/Westlaw

3. DEC Website
   a. DEC Regulations
   b. DEC Guidance
   c. Environmental Notice Bulletin (ENB)

4. OHMS Website (located at http://www.dec.ny.gov/hearings/395.html and http://www.dec.ny.gov/regulations/2398.html)
   a. Decisions, Orders and Rulings
   b. Hearing Guides
   c. OHMS Docket
   d. Part 622 Annotations

C. Appendices: Regulations and Other Materials

Appendix A: Central and Regional Offices; DEC Organization Charts; OHMS Websites
Appendix B: 6 NYCRR Part 622
Appendix C: 6 NYCRR 621.13
Appendix D: 6 NYCRR Part 624

Article: Robert H. Feller, DEC's New Hearing Rules (April 1994), reprinted in 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 49.

SAPA and Fair Hearings: New York State Department of Environmental Conservation Permitting and Enforcement Hearings

Hon. James T. McClymonds
Chief Administrative Law Judge

SHORT OUTLINE
Revised 9/13/19

I. Overview of the State Administrative Procedure Act (SAPA) article 3 (15 minutes)

A. General Background
B. Elements of a Fair Hearing under SAPA article 3 and Their Implementation through DEC's Enforcement and Permit Hearings Procedures

II. 6 NYCRR Part 622 – DEC's Uniform Enforcement Hearing Procedures – Specific Topics (15 Minutes)

A. General Background
B. Initiation of Proceedings
C. Referral to OHMS
D. Conduct of Hearings
E. Post-Hearing Proceedings
F. Summary Procedures
G. Part 622 Appeals
H. Expedited / Calendar Call Procedures

III. 6 NYCRR Part 624 – DEC's Permit Hearing Procedures: Public Participation and Other Topics (15 Minutes)

A. General Background
B. Pre-Referral Administrative Procedures: Uniform Procedures Act (ECL article 70) and Regulations (6 NYCRR Part 621)

C. Post-Referral, Pre-Hearing Proceedings
D. Public Notice
E. Legislative Public Hearings
F. Issues Conference
G. Expedited Appeals to Commissioner
H. Other Pre-Hearing Proceedings
I. Adjudicatory Hearings
J. Post-Hearing Proceedings
K. Major Power Plant Siting Proceedings (Public Service Law article 10)

IV. Conclusions, Questions and Answers (5 minutes)

Total time: 50 minutes

Course Materials:

Administrative Hearings under the New York State Administrative Procedure Act Outline

State Administrative Procedure Act excerpts

DEC Hearing Procedures Outline

Appendix A: DEC Organization Charts; Regional Offices; OHMS Website

Appendix B: 6 NYCRR Part 622

Appendix C: 6 NYCRR 621.13

Appendix D: 6 NYCRR Part 624

Appendix E: Article: Robert H. Feller, DEC's New Hearing Rules (April 1994), reprinted in 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 49.

Administrative Hearings under the New York State Administrative Procedure Act

LONG OUTLINE
Revised 9/13/19

I. Introduction

A. State Administrative Procedure Act (SAPA) Generally -- Background

1. Genesis

a. Rise of administrative state; concerns about concentration of exec., legis., and judicial power in single agencies; lack of uniformity.

b. Legislative response -- Adopted Laws of 1975, chapter 167 (effective Sept. 1, 1976)

c. Hybrid of Federal Administrative Procedure Act and the 1946 and 1961 versions of the Model State Administrative Procedure Act promulgated by the Commissioners on Uniform State Laws (Gifford 1977).

2. Intent (SAPA § 102[1]) -- establish minimum standards and procedures governing agency activities. Incorporate separation of powers and other rule of law principles into agency proceedings.

3. Structure

a. Article 2 -- Rule Making
b. Article 3 -- Adjudicatory Proceedings
c. Article 4 -- Licenses

B. Adjudicatory Proceedings Defined

1. SAPA § 102(3): "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto

is required by law to be made only on a record and after an opportunity for a hearing. [Emphasis added]

2. Adjudicatory proceeding is exercise of an agency's quasi-judicial function.

3. Contrast to Rule Making -- SAPA § 102(2) -- agency statement, regulation or code of general applicability that implements or applies law, or the procedure or practice requirements of any agency -- quasi-legislative function of an agency.

C. Applicability of Article 3

1. SAPA does not specify when an adjudicatory hearing is required. To determine whether an adjudicatory hearing is required examine:
   a. Agency's implementing statute – if the statute requires that the determination be made "only on a record and after an opportunity for hearing," an adjudicatory hearing is required;
   b. In licensing context, when licensing is required by law to be preceded by "notice and opportunity for hearing" or "opportunity to be heard," an adjudicatory hearing is required (SAPA § 401[1]). Definition of license -- SAPA § 102(4) and (5);
   c. Due Process -- an administrative hearing prior to agency action may also be required by due process, even when a statute or regulation does not otherwise expressly require a hearing. Where the exercise of a statutory power adversely affects property rights, the requirement of notice and hearing may be implied, even where the statute is silent (see Hecht v Monaghan, 307 NY 461, 468 [1954]).

2. If a hearing is required by law, the provisions of SAPA article 3 apply.

D. Agency Subject to SAPA -- see SAPA § 102(1)
1. Some agencies expressly excluded, i.e. Division of State Police.

E. Summary

Where hearing required by law, SAPA article 3’s minimum due process standards apply. The minimum due process requirements are:

1. a hearing before an impartial decision maker
2. with notice and an opportunity to be heard, and
3. a determination based upon and limited to a record.

II. Presiding Officer: Impartiality

A. Impartiality; Disqualification

1. "Hearings shall be conducted in an impartial manner" (SAPA § 303)

2. ALJ's factual findings be based exclusively on the record and on matters officially noticed (SAPA § 302[3])

3. ALJ may be disqualified upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification. The determination whether to disqualify the ALJ is part of the hearing record, and subject to judicial review at the conclusion of the adjudicatory proceeding. New ALJ may be assigned to continue case, unless "substantial prejudice" to a party will result. (SAPA § 303).

4. Grounds for disqualification not provided for in SAPA. Must look elsewhere:

   a. ALJ Disqualification -- Judiciary Law § 14

      i. Applicable to courts of record.

      ii. Rule: "[a] judge shall not sit as such in, or take any part in the decision of, . . . [a] proceeding to which he [or she] is a party, or in which he [or she] has been attorney or counsel, or in which he [or she] is interested, or if he [or she] is related by consanguinity or affinity to any party to the controversy within the sixth degree."

      iii. In Matter of Beer Garden, Inc. v New York State Liq. Auth., COA applied to agency head acting in adjudicatory role. Therefore, applicable to ALJs. Held: "[w]hile we recognize that this provision pertains only to courts of record, the common-law rule of disqualification embodied by the statute has been applied to administrative tribunals exercising quasi-judicial functions."

b. Former Prosecutor -- M/O Beer Garden, Inc. v New York State Liq. Auth. (79 NY2d 266 [1992]). Commissioner who was SLA counsel when charges against licensees filed and heard should have recused herself from final agency determination. Role as prosecutor inherently incompatible with subsequent role as judge.

c. Former Prosecutor -- M/O General Motors Corp. -- Delco Prods. Div. v Rosa (82 NY2d 183 [1993]). (State Div. of Hum. Rts.) Commissioner's two roles, first as General Counsel and then as Commissioner required recusal; Rule of Necessity did not apply.

d. Prejudgment of Facts -- M/O 1616 Second Ave. Rest. v New York State Liq. Auth. (75 NY2d 158 [1990]). (Preppy murder case.) Chairman of SLA testified before Senate Committee. Public statement suggesting prejudgment of facts grounds for disqualification. NOTE: mere familiarity with facts not a conflict. Predisposition on law and policy not a conflict.

e. Financial Interest in Outcome of Case -- New York Pub. Interest Research Group, Inc. v Williams (127 AD2d 512 [1st Dept 1987]). ALJ financial interest could be affected by outcome of the case; disqualified. Dual roles as adjudicator and investigator; ALJ advised DEC and private developers on energy projects; might derive benefit from decision. NOTE: being paid a fee no matter the outcome is not a conflict of interest.

5. Other bases:
   a. Public Officers Law § 73 (Ethics in Government Act); Public Officers Law § 74 (Code of Ethics)
   b. Code of Judicial Conduct (if adopted by agency)
   c. Model Code of Judicial Conduct for State Administrative Law Judges (NYSBA House of Delegates 2009)

6. Summary -- Specific grounds for disqualification are provided for by statute and decisional law. Same as for judges in judicial branch.

B. Ex Parte Communication Rule -- SAPA § 307(2)

1. Applies to members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding -- i.e. Commissioners, ALJs, etc.

2. Questions of Fact: “Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party” (SAPA 307[2]).

3. Questions of Law: Agency member or employee shall not communicate “with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case” (SAPA 307[2]).

C. Hearing Officer Independence (Executive Order No. 131)

1. In General

a. Adopted by Governor Mario Cuomo in 1989. Codified at 9 NYCRR 4.131. Continued by Govs. Pataki, Spitzer, Paterson, and Andrew Cuomo. Reaction to efforts to create a central panel of ALJs in NY.

b. Key feature: directive that every agency that conducts administrative adjudication develop administrative adjudication plan and adopt organizational structure that incorporates principles of administrative adjudication set forth in order.

2. Ex parte communications

a. Applicability expressly limited to ALJs and hearing officers; not applicable to agency heads or board or commission members. Slightly narrower rule than SAPA rule.

b. Rule: “Unless otherwise authorized by law . . . , a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate” (Exec Order 131, II[B][1]).

c. Notwithstanding the above prohibition, the order does allow ALJs to consult on questions of law with supervisors, agency attorneys or other ALJs not currently or previously engaged in the investigation or prosecution of the case or factually related cases. The ALJ may also consult with supervisors, other ALJs, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. (Exec Order 131, II[B][2]).

3. Limits on agency influence

a. Separate unit, physically separated from agency attorneys

b. Shall not report to any agency official other than the agency head, a supervisor of ALJs, or the general counsel.

c. Agency may not order or otherwise direct an ALJ to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal or other decision on the record of the proceeding. If agency head reverses or modifies an ALJ’s decision, must set forth in writing the reasons for the conflicting conclusion.

d. ALJ’s supervisor is not precluded, however, from giving legal advice or guidance to an ALJ where the supervisor determines that such advice or guidance is appropriate to assure the quality standards of the agency or to assure consistent or legally sound decisions.

e. The work of the ALJ is to be evaluated on general areas of performance, including competence, objectivity, fairness, productivity, diligence and temperament. Whether ALJ's decision favor or disfavor agency may not be considered for salary, promotion, and so on. Quotas are not allowed.

D. Powers of the Presiding Officers (SAPA § 304)

1. Presiding officers are authorized to:
   1. administer oaths and affirmations;
   2. sign and issue subpoenas in agency's name;
   3. provide for taking testimony by deposition;
   4. regulate the course of the hearing; and
   5. direct the parties to appear and confer regarding potential settlement.

2. Presiding officer are also authorized to exclude irrelevant or unduly repetitious evidence or cross-examination (SAPA § 306[1]).

3. Administrative Subpoenas (SAPA § 304; CPLR 2302)

a. Enabling statutes often grant to agencies the power to issue subpoenas. For agencies to whom a specific grant of subpoena power has been granted, their power to issue subpoenas is derived solely from such grant (Matter of Irwin v Board of Regents of Univ. of State of N.Y., 27 NY2d 292 [1970]). Statutes commonly grant agencies the power to issue two kinds of subpoenas: subpoenas ad testificandum (subpoenas requiring a witness to attend and testify) and subpoenas duces tecum (subpoenas requiring the recipient to turn over material evidence). Where an agency is granted the subpoena power, subpoenas that would require a court order under the CPLR, such as a subpoena duces tecum served on a department or bureau of a municipal corporation or of the State (see CPLR 2307), must be obtained from the agency, not the courts (Matter of Irwin, 27 NY2d at 297).

b. Challenges to subpoenas issued by an agency granted the subpoena power must be made to the agency in the first instance. Review of an agency's denial of a request to withdraw or modify a subpoena are reviewable in court pursuant to CPLR 2304 on motion to

quash, fix conditions, or modify the subpoena. On a CPLR 2304 motion, the agency must make a preliminary showing that the information sought in the subpoena is reasonably related to a proper subject of inquiry and that some basis for the inquisitorial action exists (Matter of Levin v Murawski, 59 NY2d 35 [1983]).

c. In the absence of a statutory grant of subpoena power to the agency, agency attorneys and attorneys of record for any party to the proceeding are granted the general subpoena power afforded attorneys under CPLR 2302.

III. Notice

A. Contents of Notice -- SAPA § 301(2)

1. See SAPA § 301(2) for contents:
   a. statement of place, time and nature of hearing;
   b. legal authority and jurisdiction for hearing;
   c. reference to particular statute and rules involved;
   d. short and plain statement of the matters asserted; and
   e. statement that interpreter services will be made available to deaf persons.

2. Notice need only be reasonably specific, in light of all relevant circumstances:
   a. To apprise a party whose rights are being determined of the charges against him or her;
   b. and to allow for the preparation of an adequate defense (Matter of Bloch v Ambach, 73 NY2d 323 [1989]).

3. Motion for more definite and detailed statement -- SAPA § 301(2).

B. Time and place of hearing -- convenience of the parties -- SAPA § 301(4)

IV. Opportunity To Be Heard

A. Opportunity to Participate

1. All parties afforded opportunity to present written argument on issues of law, and evidence and argument on issues of fact -- SAPA § 301(4)

2. Interpreter Services for Deaf Persons -- SAPA § 301(6)
   a. Cost charged to the agency

3. Interpreter Services for Limited English Proficiency (LEP) Persons -- not required by SAPA
   a. Executive Order No. 26 (Cuomo 2011)
   b. Required by title VI of the federal Civil Rights Act of 1964 -- form of national origin discrimination (Lau v Nichols, 414 US 563 [1974]).
   c. DOJ guidance (67 Fed Reg 421455 [2002]) requires interpreter services in administrative hearings to allow LEP person to "meaningfully participate."

B. Right to Counsel -- SAPA § 501

1. Courts have essentially held that appearing before an agency is not the practice of law (see Matter of Board of Educ. v NYS PERB, 233 AD2d 602 [3d Dept 1996]). Accordingly, a party to an adjudicatory hearing may be represented by someone other than an attorney.

C. Timing/Unreasonable Agency Delay – SAPA § 301(1)

1. Some agency statutes and regulation establish time frames for the commencement of hearings.

2. Unless otherwise provided by statute or regulation, hearing to be held "within reasonable time."

3. "Unreasonable agency delay" Cortlandt factors -- actual prejudice in the defense of the proceeding (Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169 [1980], cert denied 476 US 1115 [1986])

   a. To warrant dismissal of an administrative proceeding under Cortlandt, respondents must establish substantial actual prejudice resulting from the Department's delay in convening the hearing (see Cortlandt, 66 NY2d at 177-178; Matter of Diaz Chemical

Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]). The mere lapse of time in rendering an administrative determination does not, standing alone, constitute prejudice (see Matter of Louis Harris and Assocs., Inc. v deLeon, 84 NY2d 698, 702 [1994]). Thus, no fixed period exists after which delay becomes unreasonable as a matter of law (see id. [6 year delay before probable cause hearing and over 7 years before final determination not unreasonable as a matter of law]; Diaz, 91 NY2d at 933 [11 year delay before holding hearing and 3 year delay in issuing order not unreasonable]; Matter of Hansen v New York State Dept. of Envtl. Conservation, 288 AD2d 473 [2d Dept 2001] [9 year delay in bringing complaint not unreasonable]; St. Joseph's Hosp. Health Ctr. v Department of Health, 247 AD2d 136, 151-152 [4th Dept 1998], lv denied 93 NY2d 803 [1999] [10 year delay not unreasonable]).

b. To determine whether a period of delay is reasonable within the meaning of SAPA § 301(1), agencies and reviewing courts weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation (see Cortlandt, 66 NY2d at 177-178; see also Matter of Hansen, ALJ Hearing Report, at 4-5, adopted by Commissioner Order, Jan. 3, 2000, confirmed on judicial review 288 AD2d 473 [Dept. of Envtl. Conservation]). “Contrary to the ALJ's conclusion, ‘close scrutiny’ of the record here fails to reveal substantial actual prejudice to respondents due to the four and one-half year delay in holding the penalty hearing” (Matter of Giambrone, Decision and Order of the Commissioner, March 17, 2010, at 11-12 [citing Diaz, 91 NY2d at 993; Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 626 (1994)], modified on other grounds sub nom. Matter of Giambrone v Grannis, 88 AD3d 1271 [4th Dept 2011]).

D. Discovery

1. Discovery not required -- SAPA § 305 -- Agency may determine no discovery allowed.

2. Exception -- When agency seeks to revoke a license or permit previously granted -- SAPA § 401(4)

3. Exception -- Fair hearing may require access to complaints against a party (see Matter of McBarnette v Sobol, 83 NY2d 333 [1994] [physician disciplinary proceeding – author of complaints testified and known to physician])

4. Freedom of Information Law (FOIL) (Public Officers Law article 6) -- Some exemptions apply; agency records otherwise presumptively available

E. Presentation of Evidence/Right of Cross Examination

1. All parties afforded opportunity to present written argument on issues of law, and evidence and argument on issues of fact -- SAPA § 301(4)

2. All parties have the right of cross-examination -- SAPA § 306(3)

3. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record (SAPA § 306[2]). Documentary evidence may be received in the form of copies or incorporated by reference (id.).

F. Intervention

1. SAPA does not address third-party intervention. Left to the agencies. However, at least one court has recognized a party's right to intervene in an agency proceeding even though the governing statute and regulations did not expressly provide for it (see Matter of Village of Pleasantville v Lisa's Cocktail Lounge, 37 AD2d 848 [2d Dept 1971], lv denied 30 NY2d 483 [1972]).

G. Streamlined Proceedings for Small Business

1. The statute allows agencies to adopt regulations providing an option for small businesses to participate in adjudicatory hearings by mail, electronic mail, telephone conference or video conference (SAPA § 308).

2. Under SAPA § 102(8), a small business means any business which is resident in New York, independently owned and operated, and employs one hundred or less individuals.

V. Record

A. Decisional Record

1. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding (SAPA § 306[1]).

2. Findings of fact shall be based exclusively on the evidence and on matters official noticed (SAPA § 302[3]).

3. Contents of the Record -- SAPA § 302(1) -- includes:
(a) all notices, pleadings, motions, intermediate rulings;
(b) evidence presented;
(c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose;
(d) questions and offers of proof, objections thereto, and rulings thereon;
(e) proposed findings and exceptions, if any;
(f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and
(g) any decision, determination, opinion, order, or report rendered.

B. Record of Proceedings -- SAPA § 302(2)

1. Agency shall make a complete record of the adjudicatory proceeding.

2. Unless required by statute, agency may use stenographic transcripts, electronic recording devices, or other means it deems necessary.

3. Upon request of party, within a reasonable amount of time, must produce a copy of the record and transcript. May charge cost to requester.

C. Rules of Evidence

1. Unless otherwise provided by statute, an agency need not observe the rules of evidence observed by courts (SAPA § 306[1]).

2. Thus, hearsay evidence is not per se inadmissible in SAPA hearings and can be the basis of an administrative enforcement determination (see SAPA § 306[1][agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; Matter of Gray v Adduci, 73 NY2d 741, 742 [1988]; People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]).

3. Although hearsay evidence is admissible in administrative adjudicatory proceedings, it must nonetheless be sufficiently reliable, relevant and probative to provide a basis for the agency's determination (see Matter of Dadson Plumbing Corp. v Goldin, 104 AD2d 346 [1st Dept 1984], affd as modified on other grounds 66 NY2d 713 [1985]). The fact that evidence is hearsay goes to its weight.

4. Agencies are required to give effect to the rules of privilege recognized by law (SAPA § 306[1]).

5. Evidence obtained in violation of the Fourth Amendment is not per se excludable from an administrative proceeding. In New York, the exclusionary rule is subject to a “balancing approach,” in which the probable deterrent effect of the exclusionary rule is balanced against the detrimental impact on the truth-finding process (see Matter of Boyd v Constantine, 81 NY2d 189 [1993] [Buffalo city police not working for Div. of State Police when conducting search; contraband seized during search admissible at State Police disciplinary hearing]).

D. Official Notice -- SAPA § 306(4)

1. Official Notice may be taken of all facts of which judicial notice could be taken, and of other facts "within the specialized knowledge of the agency" (SAPA § 306[4]).

2. When official notice is taken of a material fact not appearing in evidence in the record and of which judicial notice could not be taken, notice and opportunity to be heard prior to decision.

E. Burden of Proof/Standard of Proof

1. Unless otherwise provided by statute, burden of proof is on the party who initiated the proceeding (SAPA 306[1]).

2. Standard of Proof

a. SAPA requires that an agency decision must be "supported by and in accordance with substantial evidence" (SAPA § 306[1]). Substantial evidence test -- whether the factual "'finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' . . . Put another way, substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (People ex rel. Vega v Smith, 66 NY2d 130, 139 [citations omitted]; see also 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978] ["substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably -- probatively and logically"]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and a challenger must demonstrate that the agency's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d

494, 499 [2011] [internal quotation marks and citations omitted]).

b. Courts have recognized that due process may require proof by a preponderance of evidence in some cases (see Matter of Miller v DeBuono, 90 NY2d 783, 794 [1997]). Many agencies apply the preponderance of evidence evidentiary standard by regulation.

F. Hearing Costs

1. General Rule: The general rule in New York is that an agency may not impose administrative hearing costs upon the applicant for a permit, license or other agency approval absent express statutory authority (see Matter of Spears v Berle, 63 AD2d 372, 381 [3d Dept 1978], revd on other grounds 48 NY2d 254 [1979], citing Jewish Reconstructionist Synagogue of North Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 165 [1976]). Where no express statutory authorization exists, an agency's authority to impose costs may be implied, but only for expenditures necessary to carry out an express statutory mandate, and not for the mere convenience of the agency (see id.). If neither express nor implied authority exists, an agency may not apply a regulation imposing hearing costs on an applicant (see id.).

2. In the absence of express statutory authority to impose hearing costs on an applicant, the courts have held that cost of the hearing room and the preparation of a hearing transcript may not be imposed upon an applicant (see Spears, 63 AD2d at 381; Jewish Reconstructionist Synagogue, 40 NY2d at 165). These costs do not represent necessary expenditures, but rather conveniences to the agency (see id.).

3. With respect to transcription costs, absent express statutory authorization, the agency must bear the cost of the original stenographic record, the original transcript, and the agency's copies (see Spears, 63 AD2d at 381). Only where the applicant requests its own copy of the transcript may the agency charge the applicant the cost of preparing and furnishing the copy to the applicant (see SAPA § 302[2]).

4. With respect to hearing notices, however, the Court of Appeals has concluded that where a statute requires public notice, the costs of publication may be imposed upon an applicant (see Jewish Reconstructionist Synagogue, 40 NY2d at 165). Where public notice is required by statute, the cost of publication is viewed as necessary to carry out the statutory mandate and, thus, the agency has the implied authority to impose publication costs on the applicant (see id.).

VI. Decisions and Intra-Agency Appeals

A. Statement of Decision -- SAPA § 307(1)

1. Final decision must be in writing or stated on the record
2. Shall include findings of fact and conclusions of law or reasons for the decision
3. Copy of decision must be delivered or mailed to each party and the party's attorney of record.

B. Findings of Fact Limited to Record (SAPA § 302[3])

C. Intra-Agency Appeals; Review of Hearing Officer's Decision

1. SAPA does not expressly require administrative appeal process, but contemplates that such a process might be used by an agency. Left to statute or agency regulation.

2. Final agency decision makers review of hearing officer's report is de novo; no deference required to be given to hearing officer's findings of fact.

3. If agency head reverses or modifies an ALJ's decision, must set forth in writing the reasons for the conflicting conclusion (see Executive Order No. 131). Moreover, if final decision maker reverses a hearing officer's findings of fact, the agency is required to make new findings and identify the basis for them (see Matter of Simpson v Wolansky, 38 NY2d 391, 394 [1975]).

D. Agency Duty to Decide Consistently

1. When agencies adjudicate, they are required to decide factually similar cases consistently, or offer a reasoned explanation for departures from precedent (see Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516 [1985]).

VII. Licensing

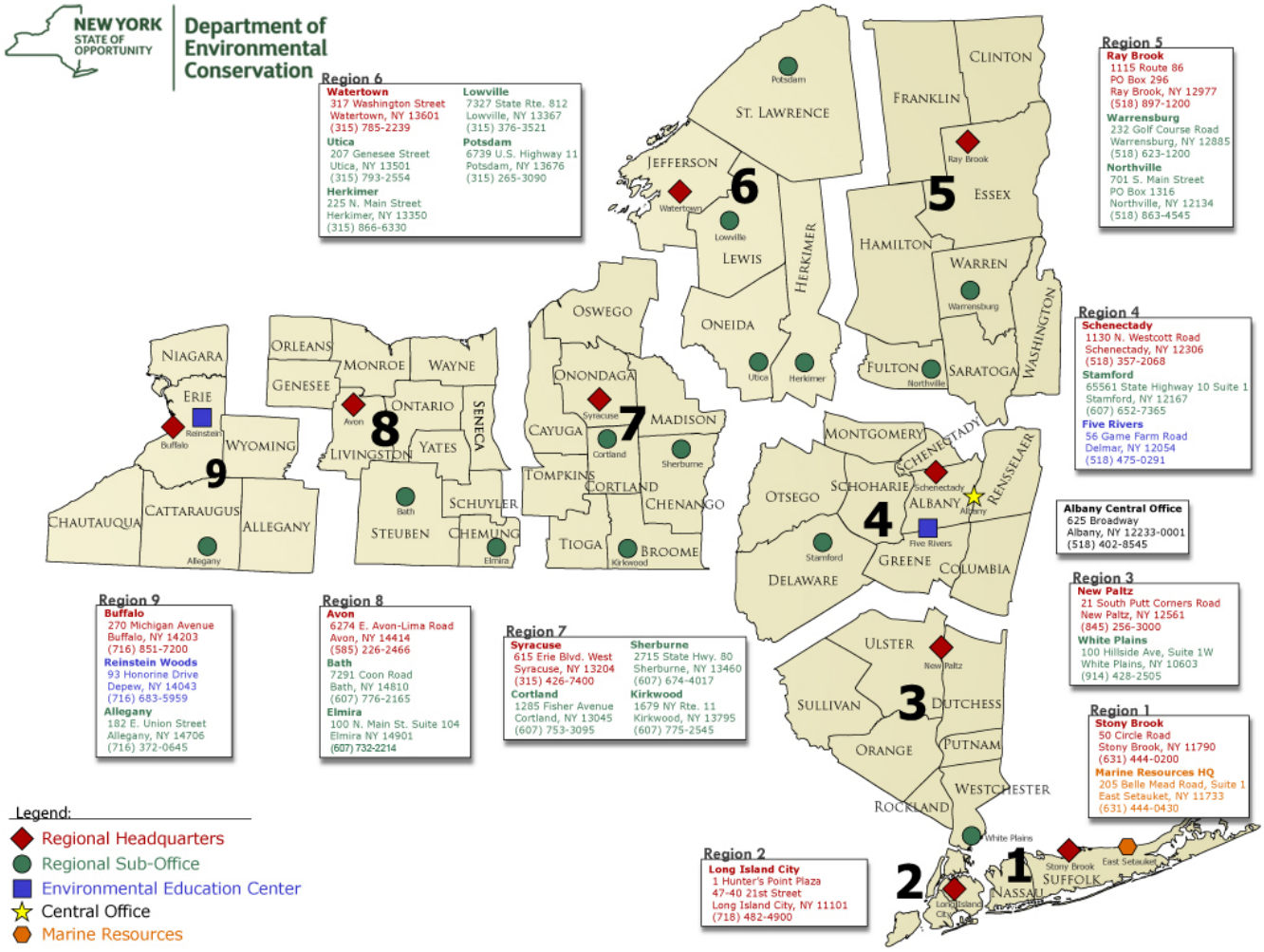
A. SAPA license extension -- SAPA § 401(2) – upon a timely and sufficient application for renewal of a license or a new license for activities of a "continuing nature," the existing license does not expire until the application has been finally determined by the agency.

B. Summary suspension of a license -- SAPA § 401(3) -- based upon finding that "public health, safety, or welfare imperatively require emergency action," an agency may issue an order summarily suspending a license before a hearing. The hearing must be promptly instituted and determined.

VIII. Conclusion

SAPA article 3 provides the minimum procedural due process requirements for agency adjudications subject to the article. Those minimum requirements include:

1. a proceeding before an impartial decision maker
2. with notice and opportunity to be heard; and
3. a determination based upon and limited to a record.



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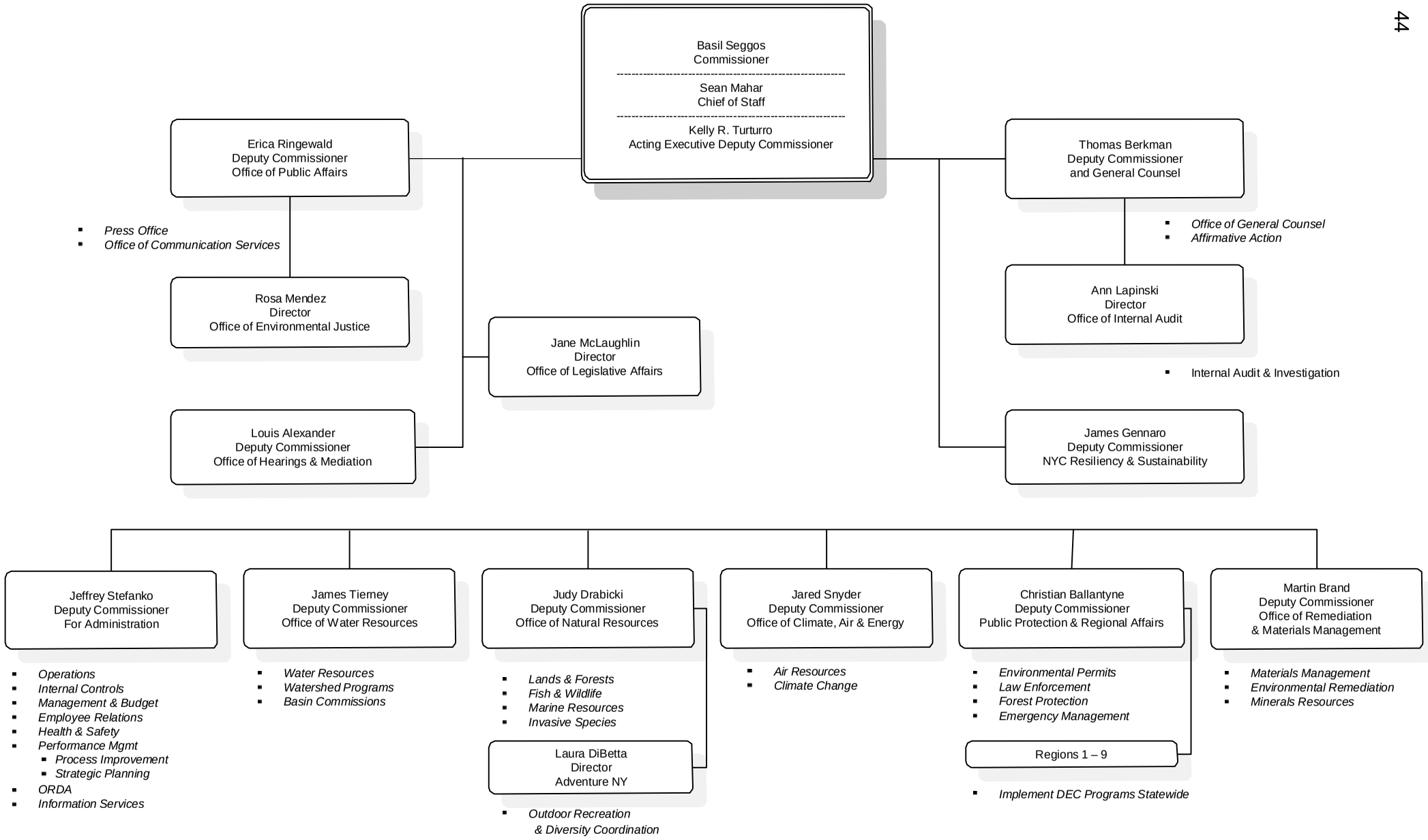
Executive Organization – June 2019



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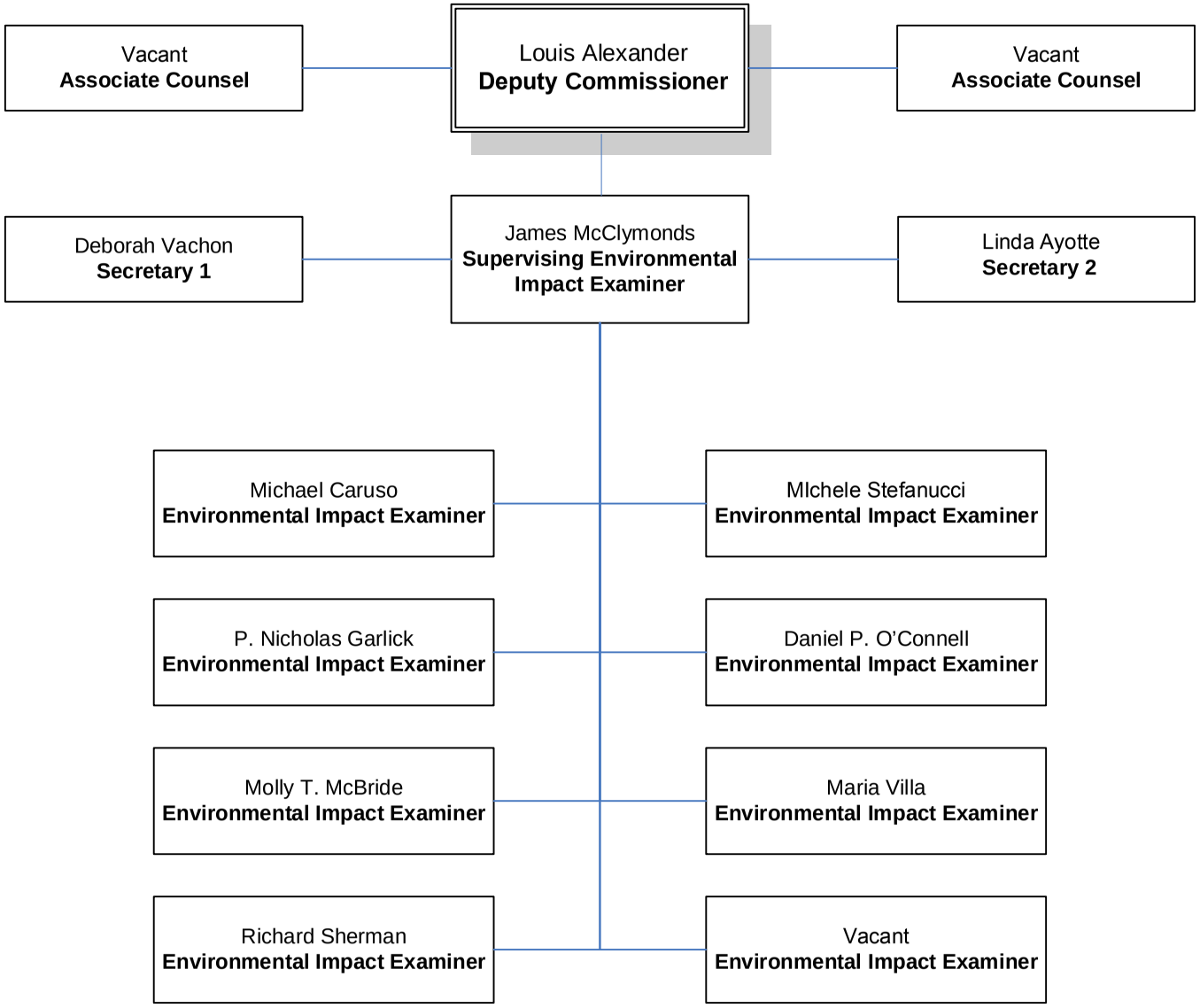
OFFICE OF HEARINGS AND MEDIATION SERVICES



Updated on 9/19

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Hearings and Decisions

This website provides information about the Office of Hearings docket and hearing outcomes, including Decisions and Orders by the Commissioner, as well as Administrative Law Judge (ALJ) rulings and hearing reports. The list of Decisions, Orders, rulings, and hearing reports dates from 1992, and is updated regularly. The documents posted on the website are listed alphabetically.

Also available here are links to DEC guidance documents for people who are participating in permit or enforcement hearings.

Now you can search all of DEC's ENB notices and hearing decisions together in one place:

Search ENB notices and hearing decisions

Docket Management System

The docket management system is a database of cases that have been referred to the Office of Hearings and Mediation Services (OHMS) for public hearings or other action by an administrative law judge and a decision by the Commissioner of the New York State Department of Environmental Conservation. The docket contains cases that have closed on or after January 1, 2005. For cases that closed before January 1, 2005, contact OHMS at 518-402-9003 or send an e-mail to the Hearings Office.

More about Hearings and Decisions:

Recent Decisions - List of 10 Most Recent Decisions

Hearing Decisions from A to C - NYS DEC Hearing Decisions from A to C

Hearing Decisions from D to G - NYS DEC Hearing Decisions from D to G

Hearing Decisions from H to L - NYS DEC Hearing Decisions from H to L

Hearing Decisions from M to N - NYS DEC Hearing Decisions from M to N

Hearing Decisions from O to R - NYS DEC Hearing Decisions from O to R

Hearing Decisions of S - NYS DEC Hearing Decisions for S

Hearing Decisions from T to Z - NYS DEC Hearing Decisions from T to Z

Adirondack Park Agency Hearing Decisions Index - Adirondack Park Agency Hearing Decisions Index

Lake George Park Commission Hearing Decisions Index - List of Lake George Park Commission Rulings

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Hearing Office Guidance Documents

Guide to Permit Hearings

- Guide to Permit Hearings - A permit hearing offers the public an opportunity to participate in DEC project review. This document gives an overview of the DEC permit hearing process.
- Guide to Permit Hearings (Spanish) - Una audiencia para obtener permiso ofrece al público una oportunidad de participar en el análisis del proyecto de DEC. Este documento ofrece una perspectiva general del proceso de audiencia de DEC para obtener un permiso.

Guide to Enforcement Hearings

- Guide to Enforcement Hearings - This guide was written to help you understand the enforcement hearing procedure used by the New York State Department of Environmental Conservation (DEC). It explains the hearing process from when the charges are made to the Decision by the Commissioner.
- Guide to Enforcement Hearings (Spanish) - Esta guía tiene como objeto facilitar la comprensión del procedimiento utilizado en las audiencias ejecutorias del Departamento de Conservación Ambiental del Estado de Nueva York (DEC, por sus siglas en inglés).

Guide to Mediation

- Guide to Mediation - This guide will help answer your questions about mediation services provided by DEC's Office of Hearings and Mediation Services (OHMS).
- Guide to Mediation (Spanish) - Esta guía ayudará a responder sus preguntas acerca de los servicios ADR proporcionados por la Oficina de Audiencias y Servicios de Intermediación de DEC.

Guidance Memoranda

Several of the Organization & Delegation ("O&D") Memoranda continue to provide guidance with respect to hearing procedures in the Office of Hearings and Mediation Services. These include the following:

- O&D Memo #84-10 March 22, 1984 "Adjudicatory Hearings: Avoiding Ex Parte Communications within the Department (PDF)"
- O&D Memo #85-06 February 11, 1985 "Development and Use of Draft Permit Conditions in Permit Hearings (PDF)"
- O&D Memo #90-04 February 13, 1990 "Governor's New Executive Order on Administrative Adjudication (PDF)"
- O&D Memo #94-13 May 5, 1994 "Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings (PDF)" (supercedes O&D Memo #85-13)
- O&D Memo #95-30 November 7, 1995 "The Conduct of Legislative Hearings (PDF)"

December 1993 Comments/Response Document

In 1994, the Department substantially revised the regulations governing administrative enforcement proceedings (6 NYCRR part 622) and permit hearing proceedings (6 NYCRR part 624). As part of the regulatory amendment process, the Department issued in December 1993 a Comments/Response Document (PDF) which provides further details and elaboration on the regulatory revisions.

More about Hearing Office Guidance Documents:

Part 622 Annotations - Annotations from selected Commissioner orders and decisions and ALJ rulings from 2003 to the present. Please refer to the Office of Hearings and Mediation Services's Hearings and Decisions website page for the full text of the orders, decisions and rulings that are referenced in the annotations.

Guide to Mediation - Mediation and other forms of alternative dispute resolution (ADR): (1) reduce litigation costs; (2) avoid delays associated with litigation; (3) recognize the need to cooperate and communicate; and (4) shift the focus of decision-making from others to you.

Guide to Mediation in Spanish - Beneficios de la intermediación y otras formas alternativas de resolución de disputas (ADR) Reduce los costos de litigios Evita retrasos ocasionados por los litigios Reconoce la necesidad de cooperar y comunicarse Cambia el enfoque de la toma de decisiones de otros a usted

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

6 NYCRR PART 622
Uniform Enforcement Hearing Procedures

(Statutory authority: Environmental Conservation Law, 3-0301, 15 -0901, 17-0303, 17-1709, 19-0301, 23-0305, 71-0301, 33-0303 and State Administrative Procedure Act Article 3)

[Effective date: January 9, 1994; as amended effective September 6, 2006]

Sec.

§622.1 Applicability

(a) This Part is applicable to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted.

(1) all administrative enforcement proceedings brought pursuant to the Environmental Conservation Law (ECL) or other law administered by the commissioner;

(2) any proceeding brought pursuant to ECL 71-0301 (summary abatement) or ECL 71-1709 except to the extent inconsistent with the provisions of Part 620 of this Title;

(3) any proceeding brought pursuant to SAPA 401(3);

(4) any proceeding brought pursuant to ECL 15-0511 (unsafe dams);

(5) any proceeding brought pursuant to ECL 27-1313 (inactive hazardous waste disposal site remedial programs) unless superseded by Part 375 of this Title;

(6) a request for a hearing made by a permittee pursuant to provisions of section 621.13 of this Title (permit modifications, suspensions or revocations by the department) or any other department initiated modification, suspension or revocation where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL, its implementing regulations or an order, permit, license or other entitlement issued by the department;

(7) proceedings on termination of appointment pursuant to Parts 183 and 184 of this Title and denial of state operation and maintenance aid for municipal sewage treatment plants; and

(8) any other proceeding which is either enforcement or disciplinary in character.

(b) The provisions of this Part do not apply to the determination of disputed environmental regulatory program fees and penalties that are assessed pursuant to ECL Article 72. Enforcement proceedings arising out of a failure to comply with a final determination as to such fees and penalties issued pursuant to procedures set forth in ECL Article 72 or its implementing regulations are governed by this Part.

(c) Provisions of this Part apply to those proceedings commenced on or after the effective date of these regulations.

§622.2 Definitions

Whenever used in this Part, unless otherwise expressly stated, the following terms will have the meanings indicated in this section. The definitions of this section are not intended to change any statutory or common law meaning of these terms, but are merely plain language explanations of legal terms.

(a) *Administrative Law Judge* or *ALJ* means the commissioner's representative who conducts the hearing.

(b) *Commissioner* means the Commissioner of Environmental Conservation of the State of New York or the commissioner's designee.

(c) *CPLR* means the New York State Civil Practice Law and Rules.

(d) *Department* means the Department of Environmental Conservation of the State of New York.

(e) *Department staff* means those department personnel participating in the hearing, but does not include the commissioner, any personnel of the Office of Hearings, the ALJ or those advising them.

(f) *Discovery* means disclosure of facts, titles, documents, or other things which are in the exclusive knowledge or possession of a party and which are necessary to the person requesting the discovery as a part of the requester's case.

(g) *ECL* means the New York State Environmental Conservation Law.

(h) *Evidence* means sworn testimony of a witness, physical objects, documents, records or photographs representative of facts which have been admitted into the record by the ALJ.

(i) *Hearsay* means a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted.

(j) *Interrogatories* means written questions regarding the case which are served by a party on an adversarial party, which the adversary must then answer in writing and under oath.

(k) *Motion* means a request for a ruling or an order.

(l) *Office of Hearings* means the office within the department principally responsible for conducting adjudicatory hearings.

(m) *Party* means the department staff, all persons designated respondent and any party granted intervenor status pursuant to subdivision 622.10(f) of this Part but does not include the commissioner or the Office of Hearings.

(n) *Permit* means any permit, certificate, license or other form of department approval, other than an enforcement order, issued in connection with any regulatory program administered by the department.

(o) *Person* means any individual, public or private corporation, bistate authority, political subdivision, government agency, department or bureau of the State, municipality, industry copartnership, association, firm, trust, estate or any legal entity whatsoever.

(p) *Protective Order* means an order denying, limiting, conditioning or regulating the use of material requested through discovery.

(q) *Relevant* means tending to support or refute the existence of any fact that is of consequence or material to the commissioner's decision.

(r) *Report* means the ALJ's summary of the hearing record including the ALJ's findings of fact and conclusions.

(s) *Respondent* means the person charged with one or more violations of the ECL, rules and regulations promulgated thereunder or any permit, certificate or order issued thereunder or a person alleged by staff to be a responsible party for the relief sought.

(t) *SAPA* means the New York State Administrative Procedures Act.

(u) *Service* means the delivery of a document to a party by authorized means and, where applicable, the filing of a document with the ALJ, Office of Hearings or the commissioner.

(v) *Stipulation* means an agreement between two or more parties to a hearing, and entered into the hearing record, concerning one or more issues of fact or law which are the subject of the hearing.

(w) *Subpoena* means a legal document that requires a person to appear at a hearing and testify and/or bring documents or physical objects.

§622.3 Commencement of a proceeding

(a) *Notice of hearing and complaint.*

(1) The department staff may commence an administrative proceeding by the service of a notice of hearing. If the action is commenced by a notice of hearing it must be accompanied by a complaint. The complaint must contain:

(i) a statement of the legal authority and jurisdiction under which the proceeding is to be held;

(ii) a reference to the particular sections of the statutes, rules and regulations involved; and

(iii) a concise statement of the matters asserted.

(2) The notice of hearing must state that a hearing date will be set by the Office of Hearings upon the filing of a Statement of Readiness for Adjudicatory Hearing as set forth in section 622.9 of this Part. The notice of hearing must also contain a statement that any affirmative defenses, including exemptions to permit requirements, will be waived unless raised in the answer and may set forth the date, time and place of a pre-hearing conference. The notice must contain a statement that the failure to answer or failure to attend a pre-hearing conference will result in a default and a waiver of respondent's right to a hearing.

(3) Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received. If personal service and service by certified mail is impracticable, upon application by the staff the ALJ may provide for an alternative method of service consistent with CPLR section 308.5.

(b) *Other methods for commencing a proceeding*.

(1) Proceedings may be commenced pursuant to sections 622.12 and 622.14 of this Part.

(2) Where a proceeding arises out of department staff's notification of intent to take specified action which will become final unless a hearing is requested, such notification shall take the place of a complaint. Service of the notice of intent shall be in the same manner as prescribed in subdivision (a) of this section. In these cases, the request for a hearing shall take the place of an answer.

§622.4 Answer

(a) Within 20 days of receiving the notice of hearing and complaint or an amended complaint, the respondent must serve on the department staff an answer signed by respondent, respondent's attorney or other authorized representative. The time to answer may be extended by consent of staff or by a ruling of the ALJ. Failure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing.

(b) The respondent must specify in its answer which allegations it admits, which allegations it denies and which allegations it has insufficient information upon which to form an opinion regarding the allegation.

(c) The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.

(d) Affirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the ALJ. The ALJ shall only allow such defense upon the filing of a satisfactory explanation as to why the defense was not pled in the answer and a showing that such affirmative defense is likely to be meritorious.

(e) The respondent may move for a more definite statement of the complaint within 10 days of completion of service on the grounds that the complaint is so vague or ambiguous that respondent cannot reasonably be required to frame an answer.

(1) If the motion is denied, respondent must answer within 10 days of receipt of notice that the motion is denied.

(2) If the motion is granted, the department staff must serve an amended complaint within 15 days of receipt of notice that the motion is granted and respondent must serve an answer within 20 days of the receipt of the amended complaint.

(f) The department staff may move for clarification of affirmative defenses within 10 days of completion of service of the answer on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based.

§622.5 Amendment of pleadings

(a) A party may amend its pleading once without permission at any time before the period for responding expires or, if no responsive pleading is required, at least 20 days prior to commencement of the hearing.

(b) Consistent with the CPLR a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond.

§622.6 General rules of practice

(a) *Service of papers.*

(1) Rule 2103 of the CPLR will govern service of papers except that service upon the respondent's duly authorized representative may be made by the same means as provided for service upon an attorney.

(2) Any required filing or proof of service must be made with the Office of Hearings.

(b) *Computation of time limits*.

(1) Computation of time will be according to the rules of the New York State General Construction Law.

(2) If a period of time prescribed under this Part is measured from the date of the ruling, pleading, motion, appeal, decision or other communication instead of the date of service,

(i) five days will be added to the prescribed period if notification is by ordinary mail; and

(ii) one day will be added to the prescribed period if notification is by express mail or other overnight delivery.

(c) *Motion practice*.

(1) Motions and requests made at any time must be part of the record. Motions and requests made prior to the hearing must be filed in writing with the ALJ and served upon all parties. During the course of the hearing, motions may be made orally except where otherwise directed by the ALJ. If no ALJ has been assigned to the case, the motion must be filed with the Chief ALJ.

(2) Every motion must clearly state its objective and the facts upon which it is based and may present legal argument in support of the motion.

(3) All parties have five days after a motion is served to serve a response. Thereafter, no further responsive pleadings will be allowed without permission of the ALJ.

(4) The ALJ should rule on a motion within five days after a response has been served or the time to serve a response has expired. The ALJ must rule on all pending motions prior to the completion of testimony. Any motions not ruled upon at that time will be deemed denied.

(d) *Office of Hearings*.

(1) Prior to the appointment of an ALJ to hear a particular case, the commissioner or the commissioner's designee from the Office of Hearings may take any action which an ALJ is authorized to take.

(2) The Office of Hearings may establish a schedule for hearing pretrial motions and other matters for cases which have no assigned ALJ.

(e) *Expedited Appeals*. The time periods for expedited appeals filed pursuant to section 622.10 of this Part are as follows:

(1) Expedited appeals or applications for leave to appeal must be filed with the commissioner in writing within five days of the disputed ruling.

(2) Upon being granted leave to appeal, appellant must file the appeal in writing within five days if it has not already been filed as part of appellant's motion papers. Thereafter the other parties may file briefs or other arguments in support of or in opposition to the appealed issues within five days.

(3) Notice of the appeal and a copy of all briefs must be filed with the ALJ and served on all parties to the hearing. Upon receipt of notice of any appeal, the ALJ may adjourn or continue the hearing or make such other order protecting the interests of the parties.

(f) To avoid prejudice to any of the parties, all rules of practice involving time periods may be modified by direction of the ALJ and, for the same reasons, any other rule may be modified by the commissioner upon recommendation of the ALJ or upon his own initiative.

(g) Tape recording or televising of the adjudicatory hearing for rebroadcast is prohibited by section 52 of the New York State Civil Rights Law.

§622.7 Discovery

(a) *Scope*. The scope of discovery must be as broad as that provided under article 31 of the CPLR.

(b) *Discovery devices.*

(1) Except as noted below, the parties may employ any disclosure device contained in article 31 of the CPLR. Where production and inspection of documents is sought, the requested documents must be furnished within 10 days of receipt of the discovery request unless a motion for a protective order is made.

(2) Depositions and written interrogatories will only be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding.

(3) Bills of particulars are not permitted.

(c) *Protective order and motion to compel.*

(1) A party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR section 3103, to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such a motion must be filed within 10 days of the discovery demand and must be accompanied by an affidavit of counsel, or by the moving party if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the ALJ to compel disclosure.

(3) Sanctions. The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

(d) *Subpoenas.* Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas. A party not represented by an attorney admitted to practice in New York may request the ALJ to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. This Part does not affect the authority of an attorney of record for any party to issue subpoenas under the provisions of section 2302 of the CPLR, except that all subpoenas shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR article 23.

(e) When the hearing seeks the revocation of a license or permit previously granted by the department, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

§622.8 The pre-hearing conference

(a) A pre-hearing conference must be held when notice thereof is provided in the notice of hearing. A pre-hearing conference may not be held when a proceeding is commenced by motion for an order without hearing. In any situation where provisional relief is imposed prior to the opportunity for a hearing or where the respondent is entitled by law or regulation to a hearing within a stated period of time, a pre-hearing conference may only be permitted with the consent of the respondent.

(b) The purpose of the conference is to resolve, define and clarify issues between the parties prior to the hearing.

(c) The conference must be attended by the department staff and the respondent(s). No ALJ will be present at the conference but the parties may consult by conference call with the Office of Hearings during the conference. Attendance at the conference is mandatory and failure to attend constitutes a default and a waiver of the opportunity for a hearing.

(d) No stenographic record of the conference will be made.

(e) At the conclusion of the conference, the parties will notify the Office of Hearings of any resulting agreement or stipulation.

§622.9 Statement of readiness for adjudicatory hearing

(a) *General.* A case will be placed on the hearing calendar upon department staff filing a statement of readiness for adjudicatory hearing with the Office of Hearings. Such statement must be in a form established by the department and must be served on all parties to the hearing. However, wherever the respondent is entitled by law or regulation to a hearing within a stated period of time, the case will be placed on the hearing calendar upon the filing of a copy of the answer with the Office of Hearing.

(b) *Contents.* The statement of readiness for adjudicatory hearing must include:

(1) the name, address and telephone number of each of the parties and their attorneys;

(2) a statement that discovery is complete or has been waived or an explanation as to why it hasn't been completed;

(3) an affirmative assertion that a reasonable attempt has been made to settle, and that the case is ready for adjudication; and

(4) a request for the setting of a hearing date.

(c) The accuracy and sufficiency of the statement of readiness will not be subject to motion practice or any form of adjudication.

(d) On receipt of a statement of readiness for adjudicatory hearing that conforms to the requirements of this section, the Office of Hearings will assign an ALJ to hear the case and will schedule a hearing date.

(e) The ALJ will notify all parties to the hearing in writing of the time, date and place of the hearing. Such notification shall also contain a statement that the failure to appear at the hearing constitutes a default and a waiver of respondent's right to a hearing.

§622.10 Conduct of the hearing

(a) *Order of events*.

(1) Before any evidence is offered the department staff and then the respondent may make an opening statement.

(2) The ALJ will determine the order in which parties present evidence but will generally require that the party with the burden of proof present its case first. Department staff may present a rebuttal case with respect to any affirmative defenses presented by the respondent. At the discretion of the ALJ, rebuttal cases may be allowed in other situations.

(3) Each witness will first be questioned by the party calling the witness (direct examination) and then examined by the opposing party (cross examination). These examinations may be followed by re-direct and re-cross examinations.

(4) The ALJ will determine the sequence in which the issues will be tried and otherwise regulate the conduct of the hearing in order to achieve a speedy and fair disposition of the matters at issue.

(5) At the conclusion of the evidentiary hearing the ALJ may give the parties an opportunity to make closing statements or to file briefs.

(6) A hearing shall be conducted as nearly as practicable in the manner of a trial by court.

(b) *The ALJ*.

(1) The ALJ has the power to:

(i) rule upon motions and requests, including those that decide the ultimate merits of the proceeding;

(ii) set the time and the place of hearing, recesses and adjournments;

(iii) administer oaths and affirmations;

(iv) issue subpoenas upon request of a party not represented by counsel admitted to practice in New York State;

(v) upon the request of a party, issue, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested;

(vi) summon and examine witnesses;

(vii) admit or exclude evidence;

(viii) allow oral argument, so long as it is recorded;

(ix) hear and determine argument on facts and law;

(x) do all acts and take all measures necessary for the maintenance of order and efficient conduct of the hearing;

(xi) direct the convening of any conference required for administrative efficiency;

(xii) preclude irrelevant or unduly repetitious, tangential or speculative testimony or argument;

(xiii) issue orders limiting the length of cross-examination, size of briefs and similar matters; and

(xiv) exercise any other authority available to ALJs under this Part or presiding officers under article 3 of the SAPA.

(2) Impartiality of the ALJ and motions for recusal:

(i) The ALJ will conduct the hearing in a fair and impartial manner.

(ii) An ALJ must not be assigned to any proceeding in which the ALJ has a personal interest.

(iii) Any party may file with the ALJ a motion in conformance with section 622.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. Such motions will be determined as part of the record of the hearing.

(iv) Upon being notified that an ALJ declines or fails to serve, or in the case of the ALJ's death, illness, resignation, removal or recusal, the Chief ALJ must designate a successor.

(3) The designation of an ALJ as the commissioner's representative must be in writing and filed in the Office of Hearings.

(c) *Appearances*.

(1) A party may appear in person or by counsel.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show his or her authority to act in such capacity and must file a notice of appearance with the ALJ.

(d) *Appeals of ALJ rulings.*

(1) Any ruling of an ALJ may be appealed to the commissioner after the completion of all testimony as part of a party's final brief or by motion where no final brief is provided for.

(2) During the course of the hearing, the following rulings may be appealed to the commissioner on an expedited basis:

(i) any ruling in which the ALJ has denied a motion for recusal.

(ii) by seeking leave to file an expedited appeal, any other ruling of the ALJ where it is demonstrated that the failure to decide such an appeal on an expedited basis would be unduly prejudicial to one of the parties, or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary.

(3) A motion for leave to file an expedited appeal must demonstrate that the ruling in question falls within one of the categories set forth in subparagraph 2(ii) of this subdivision.

(4) The commissioner may review any ruling of the ALJ on an expedited basis upon the commissioner's own initiative or upon a determination by the ALJ that the ruling should be appealable.

(5) Whenever the commissioner grants leave to file an expedited appeal, the parties must be so notified and provided with an opportunity to file a response to the appeal.

(6) Failure to file an appeal will not preclude appealing the ruling to the commissioner after the hearing.

(7) There will be no adjournment of the hearing while an appeal is pending except by permission of the ALJ or the commissioner.

(e) *Consolidation and severance.*

(1) In proceedings which involve common questions of fact, the Chief ALJ upon the ALJ's own initiative or upon motion of any party, may order a consolidation of proceedings or a joint hearing of any or all issues.

(2) The ALJ, upon the ALJ's own initiative or upon request of any party, in order to avoid prejudice or to achieve administrative efficiency, may order a severance of the hearing and hear separately any issue or any party to the proceeding.

(f) *Intervention.*

(1) At any time after the institution of a proceeding, the commissioner or the ALJ, upon receipt of a verified petition in writing and for good cause shown, may permit a person to intervene as a party.

(2) The petition of any person desiring to intervene as a party must state with preciseness and particularity:

(i) the petitioner's relationship to the matters involved;

(ii) the nature of the material petitioner intends to present in evidence;

(iii) the nature of the argument petitioner intends to make; and

(iv) any other reason that the petitioner should be allowed to intervene.

(3) Intervention will only be granted where it is demonstrated that there is a reasonable likelihood that the petitioner's private rights would be substantially adversely affected by the relief requested and that those rights cannot be adequately represented by the parties to the hearing.

(g) *Adjournment*. After a date has been set for the hearing adjournments will be granted only for good cause and with the permission of the ALJ. A request for an adjournment prior to the commencement of the hearing must be in writing and must be filed with the ALJ prior to the hearing. Adjournments must specify the time, day and place when the hearing will resume or specify the time and day on which the parties will advise the ALJ of the status of the case.

§622.11 Evidence, burden of proof and standard of proof

(a) *Evidence.*

(1) Before testifying, each witness must be sworn or make an affirmation.

(2) When necessary, in order to prevent undue prolongation of the hearing, the ALJ may limit the repetitious examination or cross-examination of witnesses or the amount of corroborative or cumulative testimony.

(3) The rules of evidence need not be strictly applied; provided, however, the ALJ will exclude irrelevant, immaterial or unduly repetitious evidence and must give effect to the rules of privilege recognized by New York State law.

(4) Every party must have the right to present evidence and cross-examine witnesses.

(5) Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to the final decision of the commissioner to dispute the fact or its materiality.

(6) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, must be admissible in evidence in proof of that act, transaction, occurrence or event, if the ALJ finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record including lack of personal knowledge by the maker, may be proved to affect its weight, but they will not affect its admissibility. The term *business* includes a business, profession, occupation and calling of every kind.

(7) Where a public officer is required or authorized by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed by him in the course of his official duty, and to file or deposit it in a public office of the State, the certificate or affidavit so filed or deposited is *prima facie* evidence of the facts stated.

(8) A statement signed by an officer or a qualified agent or representative having legal custody of specified official records of the United States or of any state, country, town, village or city or of any court thereof, or kept in any public office thereof, that he has made diligent search of the records and has found no record or entry of a specified nature, is *prima facie* evidence that the records contain no such record or entry, but only if the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person. The certification must be made by a person described in rule 4540 of the CPLR.

(9) All maps, surveys and official records affecting real property, which are on file in the State in the office of the registrar of any county, any county clerk, any court of record or any department of the State or City of New York are *prima facie* evidence of their contents.

(10) Samples may be displayed at the hearing and may be described for purposes of the record, but need not be admitted in evidence as exhibits.

(11) All written statements, charts, tabulations and similar data offered in evidence at the hearing must, upon a showing satisfactory to the ALJ of their authenticity, relevancy and materiality, be received in evidence and constitute a part of the record.

(12) Where the testimony of a witness refers to a statute, a report or a document, the ALJ must, after being satisfied of the identity of such statute, report or document, determine whether it will be produced at the hearing and physically made a part of the record or of it will be incorporated in the record by reference.

(b) *Burden of proof.*

(1) The department staff bears the burden of proof on all charges and matters which they affirmatively assert in the instrument which initiated the proceeding.

(2) The respondent bears the burden of proof regarding all affirmative defenses.

(3) The party making a motion bears the burden of proof on that motion.

(c) *Standard of proof.* Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR article 78.

§622.12 Motion for order without hearing

(a) In lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence. Simultaneously with the service of the motion for order without hearing or as soon as practical thereafter, department staff shall send a copy of the motion and supporting papers to the Chief ALJ together with proof of service on the respondent.

(b) The motion shall include a statement that a response must be filed with the Chief ALJ within 20 days after the receipt of the motion and that the failure to answer constitutes a default.

(c) Within 20 days of receipt of such motion, the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence. When it appears from affidavits and documentary evidence filed in opposition to the motion, that facts essential to justify opposition may exist but cannot then be stated, the assigned ALJ may deny the motion or order a continuance to permit the submission of such essential facts and make such other orders as may be just.

(d) A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. Likewise, where the motion includes several causes of actions, the motion may be granted in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established. Upon determining that the motion should be granted, in whole or in part, the ALJ will prepare a report and submit it to the commissioner pursuant to section 622.18 of this Part.

(e) The motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing. If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel and/or directing a conference. The ALJ will thereupon make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing. Upon the issuance of such a ruling, the moving and responsive papers will be deemed the complaint and answer, respectively, and the hearing will proceed pursuant to this rule.

(f) The existence of a triable issue of fact regarding the amount of civil penalties which should be imposed will not bar the granting of a motion for an order without hearing. If this issue is the only triable issue of fact presented, the ALJ must immediately convene a hearing to assess the amount of penalties to be recommended to the commissioner.

§622.13 Expedited fact finding

Where a complaint includes the allegation that a respondent is unlawfully conducting an activity without a permit, the ALJ must, upon motion from staff or respondent, sever this issue from the other allegations for expedited adjudication. Upon completion of the expedited adjudication, the ALJ will submit a report to the commissioner containing findings of fact, conclusions of law and recommendations limited to the issue of whether or not the respondent is unlawfully conducting an activity which requires a permit. The commissioner may issue an order to desist upon finding that respondent is conducting such an unpermitted activity. All remaining issues, including the assessment of civil penalties, must be heard and resolved as part of the original proceeding.

§622.14 Summary abatement and summary suspension orders

(a) The department staff may commence a proceeding by serving upon a person a summary abatement order pursuant to ECL 71-0301 and 71-1709 or a summary suspension order pursuant to SAPA 401(3). Any such order must provide a clear statement of its basis and of the opportunity for a hearing. The date for the hearing must be set in the order and the order shall also contain a statement that the failure to appear at the hearing constitutes a default and the waiver of the right to a hearing.

(b) Sections 622.3, 622.4, 622.8, 622.9 and 622.13 of this Part are not applicable to proceedings brought pursuant to this section.

(c) In a summary abatement proceeding, the provisions of Part 620 of this Title also apply and supersede any inconsistent provision of this Part.

(d) Where a person is served with a summary abatement order or a summary suspension order, such person may also be served with a complaint as provided in section 622.3 of this Part. Whenever possible, but without prejudice to the respondent's rights, the matters that are the subject of the complaint may be heard together with those that are the subject of the summary abatement or summary suspension order.

§622.15 Default procedures

(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record or in writing and must contain:

(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;

(2) proof of the respondent's failure to appear or failure to file a timely answer; and

(3) a proposed order.

(c) Upon a finding by the ALJ that the requirements of subdivision (b) of this section have been adequately met, the ALJ will submit a summary report, which will be limited to a description of the circumstances of the default, and the proposed order to the commissioner.

(d) Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists.

(e) The defaulting party must be served with a copy of the final determination and order of the commissioner.

§622.16 Ex parte rule

(a) Except as provided below, an ALJ must not communicate, directly or through a representative, with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.

(b) An ALJ may consult on questions of law or procedure with supervisors and other staff of the Office of Hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) ALJs may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

(d) Parties or their representatives must not communicate with the ALJ or the commissioner, or any person advising or consulting with either of them, in connection with any issue without providing proper notice to all the other parties.

§622.17 Record of the hearing

(a) Testimony given and other proceedings at a hearing must be recorded verbatim. For this purpose and consistent with respondent's rights, the ALJ may use whatever means the ALJ deems appropriate, including but not limited to the use of stenographic transcriptions or recording devices. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.

(b) The record of the hearing must include: the notice of hearing, complaint and any other pleadings; motions and requests filed, and rulings thereon; the transcript or recording of the testimony taken at the hearing; exhibits submitted and filed; stipulations, if any; a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; the hearing report; and briefs as may have been filed including any comments to the hearing report filed pursuant to section 622.18(a)(3) of this Part.

(c) A copy of the stenographic transcript of the hearing, or if the hearing is recorded, a copy of the tape, or a transcript of the recording will be available to any party upon request to the stenographer or department, as appropriate, and upon payment of the fees allowed by law.

§622.18 Final decision

(a) *Hearing report*.

(1) The ALJ will submit a hearing report to the commissioner within 45 days after the close of the record. The report must include findings of fact, conclusions of law and recommendations on all issues before the ALJ.

(2) The hearing report may be circulated to the parties as a recommended decision when:

(i) required by law; or

(ii) directed by the commissioner.

(3) All parties to the hearing must have 14 days after receipt of the recommended decision to file comments to the commissioner, unless such time is varied by the ALJ or the commissioner.

(b) *Final decisions*.

(1) Where a recommended decision has not been issued, the final decision of the commissioner, together with the hearing report of the ALJ will be issued 60 days after the close of the record.

(2) Where a recommended decision has been issued, the final decision of the commissioner will be issued within 30 days after the close of the record, such event occurring at the expiration of the time allowed for comment on the recommended decision.

(c) *Stipulations.* Any time prior to receipt of the ALJ's report or recommended decision, the department and respondent may enter into a stipulation on any matter. Where a stipulation is reached on all charges the hearing will be canceled and no further action of the commissioner will be required.

(d) *Reopening the record*. At any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

(e) The final determination will be embodied in an order which must contain findings of fact and conclusions of law or reasons for the final determination and may provide for:

(1) a finding of liability or the dismissal of the charges;

(2) assessment of penalties or other sanctions consistent with the applicable provisions of the ECL;

(3) direction for abatement or restoration or provision for financial security;

(4) a combination of any or all of the foregoing; and

(5) any determination deemed appropriate under the circumstances, and consistent with applicable provisions of the Environmental Conservation Law or the rules and regulations promulgated thereunder.

(f) A copy of the final determination and order will be served on the parties in the same manner as is provided for the service of notice of hearing by these rules.

Official Compilation of Codes, Rules and Regulations of the State of New York,
Title 6. Department of Environmental Conservation
Part 621. Uniform Procedures

As amended effective Sept. 6, 2006

Section 621.13 Permit modifications, suspensions or revocations by the department.

(a) Permits may be modified, suspended or revoked at any time by the department on the basis of any ground set forth in paragraphs (1) through (6) below:

(1) materially false or inaccurate statements in the permit application or supporting papers;

(2) failure by the permittee to comply with any terms or conditions of the permit;

(3) exceeding the scope of the project as described in the permit application;

(4) newly discovered material information or a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit;

(5) noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the Environmental Conservation Law or regulations of the department related to the permitted activity; or

(6) for SPDES permits, in addition to paragraphs (1) through (5) above, any of the reasons listed in Part 750-1.18 (b)(1) through (7) of this Title.

(b) The department may consider requests from any interested party for modification, suspension or revocation of permits based on reasons given in paragraphs 621.13(a)

(1) through (6) above. Requests must be in writing, contain facts or reasons supporting the request and be sent to the regional permit administrator as listed in section 621.19 of this Part. The department must decide whether the request is justified and the action to be taken in response to the request. A brief response giving the reason(s) for the department's decision must be sent to the party making the request. Rejection of interested party requests for modification, suspension or revocation are not subject to public notice, comment or hearings.

(c) The department must send a notice of intent to modify, suspend or revoke a permit to the permittee by certified mail return receipt requested or personal service. The notice must state the alleged facts or conduct which appear to warrant the intended action and must state the effective date, contingent upon administrative appeals, of the modification, suspension or revocation.

(d) Within 15 calendar days of mailing a notice of intent, the permittee may submit a written statement to the regional permit administrator or chief permit administrator, as directed, giving reasons why the permit should not be modified, suspended or revoked,

or requesting a hearing, or both. Failure by the permittee to timely submit a statement will result in department's action becoming effective on the date specified in the notice of intent.

(e) Where the department proposes to modify, suspend or revoke a permit and the permittee requests a hearing on the proposed modification or change in permit status, the original permit conditions or permit status will remain in effect until a decision is issued by the commissioner pursuant to subdivision (h) of this section. At such time, the permit conditions or permit status supported by the commissioner's decision will take effect.

(f) For delegated permits, a modification which would result in less stringent regulatory standards in the permit or is initiated following a SPDES Environmental Benefits Permit Strategy full technical review will be processed as a new application for a permit pursuant to this Part. For purposes of this subdivision the date of transmittal of the notice and modified draft permit will be considered the completeness date.

(g) Within 15 calendar days of receipt of the permittee's statement, the department will either:

(1) rescind or confirm the notice of intent based on a review of the information provided by the permittee, if a statement without a request for a hearing is submitted; or

(2) notify the permittee of a date and place for a hearing, if a statement with a request for a hearing has been submitted, to be commenced not later than 60 calendar days from this notification, except for a SPDES permit, the hearing must not commence earlier than 30 days from notification.

(h) In the event such a hearing is held, the commissioner must, within 30 calendar days of receipt of the complete record, issue a decision which:

(1) continues the permit in effect as originally issued;

(2) modifies the permit, or suspends it for a stated period of time or upon stated conditions; or

(3) revokes the permit; including, where ordered by the commissioner, removal or modification of all or any portion of a project, whether completed or not.

Notice of such decision, stating the findings and reasons therefor, must be provided under the procedures of section 621.10 of this Part.

(i) Revocation or suspension of Waste Transporter permits that were issued pursuant to Part 364 of this Title requires the department to publish a public notice of the revocation or suspension in the Environmental Notice Bulletin and a newspaper or newspapers having a general circulation in the area or areas served by the permittee. The notice must include a statement that the permittee is no longer permitted to handle such waste. The notice must be published once each week for two consecutive weeks. The first notice must be published within fifteen days following the revocation or suspension.

(j) Nothing in this Part shall preclude or affect the commissioner's authority to issue summary abatement orders under section 71-0301 of the Environmental Conservation Law, or to take emergency actions summarily suspending a permit under section 401(3) of the State Administrative Procedure Act.

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

6 NYCRR PART 624
Permit Hearing Procedures

(Statutory authority: Environmental Conservation Law, §70-0107[1] and State Administrative Procedure Act, Article 3)

[Effective date: January 9, 1994; as amended effective July 12, 2000; as amended effective September 6, 2006]

Sec.

Introduction

Note: This Part provides a detailed explanation of the public hearing process which is sometimes necessary to make a determination on permit applications submitted to the department, and on which agreement among parties involved cannot be reached otherwise. The principal function of the hearing is to resolve disputed issues of fact. It is the policy of the department to ensure that the public hearings it conducts provide a fair and efficient mechanism for the development of a factual record for the decision on a permit and, to that end, that all statements and testimony be relevant and directed toward achieving that goal. The process described in the following text may involve a legislative hearing session on a draft environmental impact statement, an adjudicatory hearing session with sworn testimony and cross-examination, formal filing of documents, and expenses to the applicant for a hearing room, stenographic services and public notice. This Part also contains provisions for subpoenas, stipulations, conferences, standards and evidence, and exchange of information by parties.

§624.1 Applicability

(a) This Part is applicable to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted.

(1) a determination by the department staff to hold an adjudicatory hearing pursuant to section 621.8(b) of this Title (on identification by department staff of substantive and significant issues);

(2) a request made by an applicant in conformance with the provisions of section 621.10(a)(1) and (2) of this Title (based on department staff's denial of permit or attachment of significant conditions);

(3) a determination made by department staff to hold an adjudicatory hearing pursuant to 621.15(f) of this Title (conceptual review);

(4) a request made by an applicant in conformance with the provisions of section 621.11(g) of this Title (based on department staff's denial or conditioning of a permit in response to an application to renew or modify);

(5) a request made by a permittee in conformance with the provisions of section 621.13(d) of this Title (based on department staff's proposed modification, suspension or revocation of a permit); except, where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a

violation of the ECL, its implementing regulations, an order, permit, license or other entitlement issued by the department. In such cases the provisions of Part 622 of this Title govern;

(6) any circumstance comparable to those set forth in paragraph (1), (2), (3), (4) or (5) of this subdivision which arises out of permits, licenses or other entitlements that are not subject to ECL article 70 or Part 621 of this Title. The circumstances where this Part applies include, but are not limited to, permits for aquatic pesticide applications, the registration of pesticides, oil and gas well spacing variances, oil facility certifications and water supply rate disputes.

(b) The provisions of this Part do not apply to the conduct of legislative hearings except those that are included in a notice of hearing issued pursuant to section 624.3 of this Part.

(c) The provisions of this Part do not apply to the determination of disputed environmental regulatory program fees and penalties that are assessed pursuant to ECL article 72.

(d) The provisions of this Part apply to those proceedings in which the determination to hold an adjudicatory hearing was made on or after the effective date [January 9, 1994] of these regulations.

§624.2 Definitions

Whenever used, in this Part, unless otherwise expressly stated, the following terms will have the meanings indicated below. The definitions of this section are not intended to change any statutory or common law meaning of these terms, but are merely plain language explanations of legal terms.

(a) *Adjudicatory hearing* means a hearing, held pursuant to ECL section 70-0119 or SAPA article 3, where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the commissioner's rendering of a decision on the merits, but does not include legislative hearings.

(b) *Administrative law judge* or *(ALJ)* means the commissioner's representative who conducts the hearing.

(c) *Amicus status* means a person who is not otherwise eligible for party status but who is allowed to introduce written argument upon one or more specific issues.

(d) *Applicant* means the person who has applied for one or more permits from the department or the modification or renewal of such permit(s). In the case of a water supply rate dispute, the petitioning party shall be the applicant.

(e) *Argument* means opinions or viewpoints, as distinguished from evidence.

(f) *Commissioner* means the Commissioner of the Department of Environmental Conservation or the commissioner's designee.

(g) *CPLR* means the New York State Civil Practice Laws and Rules.

(h) *DEIS* means the draft environmental impact statement prepared in response to the requirements of article 8 of the ECL.

(i) *Delegated permit* (as further defined under Part 621 of this Title) means a permit issued by the department which substitutes for a comparable permit required by Federal law and is recognized by the Federal agency responsible for administering the Federal program.

(j) *Department* means the Department of Environmental Conservation of the State of New York.

(k) *Department staff* means those department personnel participating in the hearing, but does not include the commissioner, any personnel of the Office of Hearings, the ALJ or those advising them.

(l) *Discovery* means the disclosure of facts, titles, documents, or other things which are in the exclusive knowledge or possession of a party and which are necessary to the person requesting the discovery as a part of the requester's case.

(m) *Draft permit* means a document prepared by department staff which contains terms and conditions staff find are adequate to meet all legal requirements associated with such a permit, but is subject to modification as a result of public comments or an adjudicatory hearing.

(n) *ECL* means the New York State Environmental Conservation Law.

(o) *ENB (Environmental Notice Bulletin)* means the publication of the department published pursuant to section 3-0306 of the ECL, and accessible on the department's internet web site at http://www.dec.ny.gov.

(p) *Evidence* means sworn testimony of a witness, physical objects, documents or records or photographs representative of facts which have been admitted into the record by the ALJ.

(q) *FEIS* means the final environmental impact statement prepared pursuant to the requirements of article 8 of the ECL.

(r) *Hearsay* means a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted.

(s) *Interrogatories* means written questions regarding the case which are served by a party on an adversarial party, which the adversary must then answer in writing and under oath.

(t) *Legislative hearing* means the portion of the hearing process during which unsworn statements are received from the public and the parties.

(u) *Motion* means a request for a ruling or an order.

(v) *Office of Hearings* means the office within the department principally responsible for conducting adjudicatory hearings.

(w) *Party* means any person granted full party status or *amicus* status in the adjudicatory portion of the hearing according to the procedures and standards set forth in section 624.5 of this Part but does not include the ALJ, the Office of Hearings, or the commissioner.

(x) *Permit* means any permit, certificate, license or other form of department approval, other than an enforcement order, issued in connection with any regulatory program administered by the department.

(y) *Person* means any individual, public or private corporation, bistate authority, political subdivision, government agency, department or bureau of the State, municipality, industry copartnership, association, firm, trust, estate or any legal entity whatsoever.

(z) *Potential party* means any person who has filed a petition pursuant to section 624.5 of this Part whose petition has not received either final denial or acceptance.

(aa) *Project* means the physical activity or undertaking for which one or more permits are required from the department.

(bb) *Protective order* means an order denying, limiting, conditioning or regulating the use of material requested through discovery.

(cc) *Relevant* means tending to support or refute the existence of any fact that is of consequence or material to the commissioner's decision on a permit.

(dd) *Report* means the ALJ's summary of the hearing record including findings of fact and conclusions.

(ee) *SAPA* means the New York State Administrative Procedure Act.

(ff) *SEQRA* means the New York State Environmental Quality Review Act, article 8 of the ECL.

(gg) *Service* means the delivery of a document to a party or potential party by authorized means or the filing of a document with the ALJ, the Office of Hearings or the commissioner.

(hh) *Statement of intent to deny* means a document prepared by staff which identifies the reasons why the permit(s) for the project may not be issued as proposed or conditionally.

(ii) *Stipulation* means an agreement between two or more parties to a hearing, and entered into the hearing record, concerning one or more issues of fact or law which are the subject of the hearing.

(jj) *Subpoena* means a legal document that requires a person to appear at a hearing and testify and/or bring documents or physical objects.

(kk) *UPA* means the New York State Uniform Procedures Act, article 70 of the ECL.

§624.3 Notice of hearing

(a) *When notice is required.* Unless otherwise provided by statute or regulation, the Office of Hearings must publish notice of the hearing in the ENB, and provide notice to the applicant and to persons who have made written request to participate. The applicant must provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located. The notices in the ENB and the newspaper must be published at least once and not less than 21 calendar days prior to the hearing date. In the case of applications involving State Pollutant Discharge Elimination System (SPDES) permits, revisions to the State implementation plan, federally delegated air permits, and Hazardous Waste Management Facility (HWMF) permits, and Remedial Action Plans (RAPs), the notice must be published at least 30 days prior to the hearing date. In addition, public notice by means of radio is required for hearings on all HWMF permits or RAP applications. These requirements are minimums and the ALJ shall direct the applicant to provide additional notice or to provide the notice further in advance of the hearing where the ALJ finds it necessary to do so in order to adequately inform the potentially affected public about the hearing. Where the ALJ finds that a large segment of the potentially affected public has a principal language other than English, he or she shall direct the publication of the notice in a foreign language newspaper(s) serving such people. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in UPA without the applicant's consent.

(b) *Required contents of notice.* The notice must be in the form specified by the Office of Hearings and must contain the following information:

(1) the date of issuance of the notice of hearing and the date of the notice of complete application.

(2) the date, time, location and purpose of the hearing and any pre-hearing conference, if scheduled. The location must be in the town, village or city in which the project is located, as reasonably near the project site as practicable, depending upon the availability of suitable facilities. However, another location may be selected based on the convenience of parties and witnesses at the discretion of the ALJ;

(3) the name and address of the applicant or permittee;

(4) the permits, approvals or action sought together with citations to applicable statutes and regulations;

(5) a description of the project;

(6) the accessibility and location for review, and a list of the available application materials, including, if available at the time of issuance of the notice of hearing, the staff's draft permit or statement of intent to deny;

(7) the status of the action under SEQRA and, where the department is lead agency pursuant to SEQRA and Part 617 of this Title and a DEIS has been prepared, an indication that comments on the DEIS may be received at the legislative hearing and of the provisions for their review;

(8) instructions for filing a petition for party status (see generally section 624.5 of this Part); and

(9) other notices required pursuant to any delegated permit program.

(c) *Optional contents.* The notice may also specify the issues of concern to the department and the public.

(d) *Service on specific persons.* Not less than 21 calendar days prior to the hearing date, individual copies of the notice must be sent to the chief executive officer of any municipality in which the project is located and such other persons as the department deems to have an interest in the application. In the case of applications for delegated permits, as defined by section 621.2(g) of this Title, notice of the type specified in this section must be sent to those persons specified in section 621.7(a) of this Title not less than 30 calendar days prior to the hearing date. The ALJ shall direct the applicant to provide notice further in advance of the hearing to those persons specified in this subdivision where the ALJ finds it necessary to do so in order to adequately inform them about the hearing. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in UPA without the applicant's consent.

§624.4 Legislative hearing and issues conference

(a) *Legislative hearing.*

(1) The ALJ will hear and receive the unsworn statements of parties and non-parties relating to the permit applications. A stenographic transcript of such statements will be made but will not be part of the record of the proceeding, as defined by section 624.12 of this Part (except as described in paragraph [3] of this subdivision or as otherwise admitted into evidence).

(2) The ALJ may require that lengthy statements be submitted in writing and summarized for oral presentation.

(3) Whenever a DEIS accompanies the application and the department is the lead agency as defined in Part 617 of this Title, all statements made at the legislative hearing will constitute comments on the DEIS and all substantive comments must be addressed pursuant to the procedures set forth in section 617.14 of this Title.

(4) The statements made at the legislative hearing do not constitute evidence but may be used by the ALJ as a basis to inquire further of the parties and potential parties at the issues conference.

(b) *Issues conference*.

(1) Following the legislative hearing, the ALJ will schedule an issues conference (if one was not scheduled in the hearing notice) which will be held in advance of the adjudicatory hearing. At the ALJ's discretion, the issues conference may be reconvened at any time to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues conference. Upon a demonstration that the public review period for the application prior to the issues conference was insufficient to allow prospective parties to adequately prepare for the issues conference, the ALJ shall adjourn the issues conference, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the prospective parties.

(2) The purpose of the issues conference is:

(i) to hear argument on whether party status should be granted to any petitioner;

(ii) to narrow or resolve disputed issues of fact without resort to taking testimony;

(iii) to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues set forth in subdivision (c) of this section;

(i) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues; and

(ii) to decide any pending motions.

(2) The ALJ will preside over the issues conference and the participants will be department staff, the applicant and any person who has filed a petition for party status pursuant to section 624.5 of this Part.

(3) The ALJ may require the submission of written argument to supplement the record of the issues conference.

(4) Upon the completion of the issues conference or as soon as practicable thereafter, but in no event later than 30 days after the issues conference or the receipt of written submissions thereafter, the ALJ will:

(i) determine which persons will be granted party status;

(ii) determine which issues satisfy the requirements of adjudicable issues as set forth in subdivision (c) of this section and define those issues as precisely as possible;

(iii) rule on the merits of any legal issue where ruling does not depend on the resolution of disputed issues of fact; and

(iv) decide any pending motions to the extent practicable.

(c) *Standards for adjudicable issues*.

(1) Generally applicable rules. Subject to the limitations set forth in paragraphs (6), (7) and (8) of this subdivision, an issue is adjudicable if:

(i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;

(ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant; or

(iii) it is proposed by a potential party and is both substantive and significant.

(2) An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and

related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.

(3) An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.

(4) In situations where the department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.

(5) If the ALJ determines that there are no adjudicable issues, the ALJ will direct that the hearing be canceled and that the staff continue processing the application to issue the requested permit.

(6) SEQRA Issues.

(i) Department is the lead agency or there has been no coordinated review.

(a) As part of the issues ruling, the ALJ may review a determination by staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the determination must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb the staff's determination.

(b) Whenever the department, as lead agency, has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the department to make the findings required pursuant to section 617.9 of this Title will be made according to the standards set forth in paragraph (1) of this subdivision.

(ii) Another agency serves as the lead agency.

(a) Whenever the lead agency has determined that the proposed action does not require the preparation of a DEIS, the ALJ will not entertain any issues related to SEQRA. Such issues may be considered, however, if lead agency status is re-established with the department pursuant to the provisions in section 617.6(f) of this Title.

(b) Whenever the lead agency has required the preparation of a DEIS, no issue that is based solely on compliance with SEQRA and not otherwise subject to the department's jurisdiction will be considered for adjudication unless:

(1) the department notified the lead agency during the comment period on the DEIS that the DEIS was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond; or

(2) the department is serving as lead agency for purposes of supplementing the FEIS. In such case, only issues that are the subject of the supplementation will be considered for adjudication.

(3) whenever issues addressed in this subparagraph are eligible for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

(7) UPA Issues. The completeness of an application, as defined in section 621.2(f) of this Title, will not be an issue for adjudication. The ALJ may require the submission of additional information pursuant to section 621.14(b) of this Title.

(8) Department initiated modifications, suspensions or revocations. The only issues that may be adjudicated are those related to the basis for modification, suspension or revocation cited in the department's notice to the permittee. Whenever such issues are proposed for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

§624.5 Hearing participation

Participation in the hearing may be as a full party or as *amicus*, depending upon the demonstrated compliance with the criteria set forth in subdivisions (b) through (d) of this section. Non-parties who wish to have their comments recorded will be permitted to submit oral or written comments during the legislative portion of the hearing, or as otherwise provided by the ALJ, as set forth above at section 624.4 of this Part. Such statements will not constitute evidence in the adjudicatory hearing, but will constitute comments on the DEIS, if one exists, and may be used by the ALJ as a basis to inquire further of all parties and potential parties at the issues conference.

(a) *Mandatory parties.* The applicant and assigned department staff are automatically full parties to the proceeding. However, in the case of a water supply rate dispute only the municipalities involved in the dispute are mandatory parties.

(b) *Other parties.* By the date set in the notice of hearing, a person desiring party status must file a petition in writing which includes the requirements of either paragraphs (1) and (2) or paragraphs (1) and (3) of this subdivision.

(1) Required contents of petition for party status:

(i) fully identify the proposed party together with the name(s) of the person or persons who will act as representative of the party;

(ii) identify petitioner's environmental interest in the proceeding;

(iii) identify any interest relating to statutes administered by the department relevant to the project;

(iv) identify whether the petition is for full party or *amicus* status;

(v) identify the precise grounds for opposition or support.

(2) Additional contents required for petitions for full party status:

(i) identify an issue for adjudication which meets the criteria of section 624.4(c) of this Part; and

(ii) present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue.

(3) Additional contents required for petitions for *amicus* status:

(i) identify the nature of the legal or policy issue(s) to be briefed which meets the criteria of section 624.4(c) of this Part; and

(ii) provide a statement explaining why the proposed party is in a special position with respect to that issue.

(4) Inadequate petition. If a potential party fails to file a petition in the form set forth above, the ALJ may deny party status or may require additional information from the filer.

(5) Supplementation of petitions. Where the ALJ finds that a prospective party did not have adequate time to prepare its petition for party status, the ALJ shall provide an opportunity for supplementation of the petition.

(c) *Late filed petitions for party status.*

(1) Petitions filed after the date set in the notice of hearing will not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision.

(2) In addition to the required contents of a petition for party status, a petition filed late must include the following in order to receive any consideration:

(i) a demonstration that there is good cause for the late filing;

(ii) a demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and

(iii) a demonstration that participation will materially assist in the determination of issues raised in the proceeding.

(d) *Rulings on party status.* Rulings on party status will be made by the ALJ after the deadline for receipt of petitions for party status and will be set forth in the rulings on issues provided for in section 624.4 of this Part.

(1) Full party status. The ALJ's ruling of entitlement to full party status will be based upon:

(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (2) of this section;

(ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and

(iii) a demonstration of adequate environmental interest.

(2) Amicus status. The ALJ's ruling of entitlement to *amicus* status must be based upon:

(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (3) of this section;

(ii) a finding that the petitioner has identified a legal or policy issue which needs to be resolved by the hearing; and

(iii) a finding that the petitioner has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.

(e) *Rights of parties.*

(1) A full party has the right to:

(i) participate at the hearing in person or through an authorized representative;

(ii) present relevant evidence and to cross-examine witnesses of other parties;

(iii) present argument on issues of law and fact;

(iv) initiate motions, requests, briefs or other written material in connection with the hearing, and receive all correspondence to and from the ALJ and to and from all other parties which is circulated to the parties generally;

(v) appeal adverse rulings of the ALJ; and

(vi) exercise any other right conferred on parties by this Part or SAPA.

(2) A party with *amicus* status has the right to file a brief and, at the discretion of the ALJ, present oral argument on the issue(s) identified in the ALJ's ruling on its party status but does not have any other rights of participation or submission.

(3) A potential party has the same rights it would be entitled to if its petition for party status were granted.

(f) *Loss of party status.* Upon determining that the party or its representative has failed to comply with the applicable laws, rules or directives of the ALJ and has substantially disrupted the hearing process or prejudiced the rights of another party to the proceeding, the ALJ may revoke the party status of the offending party.

§624.6 General rules of practice

(a) *Service*.

(1) Rule 2103 of the CPLR will govern service of papers except that service upon the party's duly authorized representative may be made by the same means as provided for service upon an attorney.

(2) Proof of service must be made in the same manner as under the CPLR. Any required filing or proof of service must be with the Office of Hearings.

(b) *Computation of time limits*.

(1) Computation of time will be according to the rules of the New York State General Construction Law.

(2) if a period of time prescribed under this Part is measured from the date of the ruling, pleading, motion, appeal, decision or other communication instead of the date of service,

(i) five days will be added to the prescribed period if notification is by ordinary mail; and

(ii) one day will be added to the prescribed period if notification is by express mail or other overnight delivery.

(c) *Motion practice*.

(1) Motions and requests made at any time are part of the record. Motions and requests prior to the hearing must be filed in writing with the ALJ and must be served upon all parties. During the course of the hearing, motions may be made orally except where otherwise directed by the ALJ. If no ALJ has been assigned to the case, the motion must be filed with the Chief ALJ of the Office of Hearings.

(2) Every motion must clearly state its objective, the facts on which it is based, and may present legal argument in support of the motion.

(3) All parties have five days after a motion is served to serve a response. Thereafter no further responsive pleadings will be allowed without permission of the ALJ.

(4) The ALJ should rule on a motion within five days after a response has been served or the time to serve a response has expired. The ALJ must rule on all pending motions prior to the completion of testimony. Any motion not ruled upon prior to the completion of testimony must be deemed denied.

(d) *Office of Hearings*.

(1) Prior to the appointment of an ALJ to hear a particular case, the commissioner or the commissioner's designee from the Office of Hearings may take any action which an ALJ is authorized to take.

(2) The Office of Hearings may establish a schedule for hearing pretrial motions and other matters for cases which have no assigned ALJ.

(e) *Expedited Appeals*. The time periods for expedited appeals filed pursuant to section 624.8(d) of this Part are as follows:

(1) Expedited appeals or applications for leave to appeal must be filed to the commissioner in writing within five days of the disputed ruling.

(2) Upon being granted leave to appeal, a party must file the appeal in writing within five days if it has not already been filed. Thereupon the other parties may submit briefs or other arguments in support of or in opposition to the appealed issues within five days.

(3) Notice of the appeal and a copy of all briefs must be filed with the ALJ and served on all parties to the hearing. Upon receipt of notice of any appeal, the ALJ may adjourn or continue the hearing or make such other order protecting the interests of the parties.

(f) Tape recording or televising the adjudicatory hearing for rebroadcast is prohibited by section 52 of the New York State Civil Rights Law.

(g) To avoid prejudice to any party, all rules of practice involving time frames may be modified by direction of the ALJ and, for the same reasons, any other rule may be modified by the commissioner upon recommendation of the ALJ or upon the commissioner's initiative.

§624.7 Discovery

(a) *Prior to the issues conference.* Discovery is limited to what is afforded under Part 616 of this Title (Access to Records). In the absence of extraordinary circumstances the ALJ will not grant petitions for further discovery. This provision does not alter the rights of any person under Part 616 of this Title nor does it limit the ability of any party to seek disclosure after the issues conference.

(b) *Without permission of the ALJ.* Within 10 days after service of the final designation of the issues any party has the right to serve a discovery demand upon any other party demanding that party provide:

(1) documents, in general conformance with CPLR 3120(a)(1)(i);

(2) a list of witnesses to be called, their addresses, and the scope and content of each witness's proposed testimony, and the qualifications and published works of each, in general conformance with CPLR 3101(d)(1), except that disclosure of fact witnesses as well as expert witnesses may be demanded;

(3) an inspection of property, in general conformance with CPLR 3120(a)(1)(ii), except that drilling and other intrusive sampling and testing is not provided as of right;

(4) a request for admission, in general conformance with CPLR 3123; or

(5) lists of documentary or physical evidence to be offered at the hearing.

(c) *By permission.* With permission of the ALJ, a party may:

(1) obtain discovery prior to the issues conference;

(2) use discovery devices from the CPLR not provided for in subdivision (b) of this section;

(3) submit late requests for discovery or vary the time for responding to requests; and

(4) access real property in the custody or control of another for the purpose of conducting drilling or other sampling or testing. In such instance, all parties must be given notice of such activities and be allowed to observe and to take split samples or use other specified methods of verification.

(d) *Protective order and motion to compel.*

(1) A party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR Section 3103 to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such a motion must be submitted within 10 days of the discovery demand and must be accompanied by an affidavit of counsel, or by the moving party or other authorized representative if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a discovery demand without having made a timely objection, the proponent of discovery demand may apply to the ALJ to compel disclosure. The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

(e) *Prefiled testimony.* The ALJ may require the submission of prefiled written testimony for expert witnesses. Such testimony must be attested to at the hearing and the witness must be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ. Whenever the ALJ requires the submission of prefiled testimony, the testimony must provide, or must be accompanied by a technical report which provides, a full explanation of the basis for the views set forth therein, including data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography of reports,

studies and other documents relied upon. Upon 10 days notice (which time may be shortened or extended by the ALJ) the party submitting prefiled testimony may also be required to make available all raw data, well logs, laboratory notes, and other basic materials, as well as all items on the bibliography provided. Whenever prefiled testimony is not required, any party may demand, from any other party or the department propounding an expert witness, all backup information that would be required in connection with prefiled testimony.

(f) *Subpoenas.* Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas. A party who is not represented by an attorney admitted to practice in New York State may request the ALJ to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. A subpoena must give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR article 23. This Part does not affect the authority of an attorney of record for any party to issue subpoenas under the provisions of section 2302 of the CPLR.

(g) When the hearing seeks the revocation of a license or permit previously granted by the department, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

§624.8 Conduct of the adjudicatory hearing

(a) *Order of events.* The ALJ has discretion to determine and adjust the order of events and presentation of evidence, and to establish procedures to promote the conduct of a fair and efficient hearing. In general, the order of events at a hearing will be as follows:

(1) Formal opening. The ALJ will convene the hearing by opening the record, identifying the applications involved, and making appropriate procedural announcements.

(2) Noting appearances. The ALJ will call the name of each person who has been granted status as a party.

(3) Opening statements. Prior to the commencement of the adjudicatory sessions each party will be called upon to offer a brief opening statement of position on the application.

(4) Admission of evidence. The applicant will present its direct case first and will start by identifying all documents which constitute the application and the DEIS (where applicable) and all supporting documents which are relevant to the issues to be adjudicated. A panel of witnesses may be used for presenting testimony or for cross-examination at the ALJ's discretion. Cross-examination will be conducted by parties in a sequence to be established by the ALJ, which normally will be the sequence in which the parties will present their direct cases. The evidence will be confined to that which is relevant to issues identified in the ALJ's determination following the issues conference.

(5) Close of record. Closing statements of position will be dealt with in the same manner as opening statements. At the concluding session of the hearing, the ALJ will determine whether to allow the submission of written post-hearing briefs. The hearing record will be officially closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, or the submission of briefs and reply briefs, conclusions of law, memoranda, and exceptions, if any, by the various parties, whichever occurs last. The ALJ must notify the applicant by certified mail, and all other parties by regular mail, immediately upon official closing of the hearing record.

(6) Where the ALJ permits the filing of briefs, the ALJ will also determine whether replies will be permitted and the schedule for filing. Simultaneous filing will normally be required. A party must give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief. Briefs will be considered only as argument and must not refer to or contain any evidentiary material outside of the record.

(b) *The ALJ.*

(1) The ALJ has power to:

(i) rule upon all motions and requests, including those that decide the ultimate merits of the case;

(ii) set the time and place of the hearing, recesses and adjournments;

(iii) administer oaths and affirmations;

(iv) issue subpoenas upon request of a party not represented by counsel admitted to practice in New York State;

(v) upon the request of a party, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested;

(vi) summon and examine witnesses;

(vii) establish rules for and direct disclosure at the request of any party or upon the ALJ's own motion pursuant to the procedures set out in section 624.7 of this Part;

(viii) admit or exclude evidence including the exclusion of evidence on grounds of privilege or confidentiality;

(ix) hear and determine arguments on fact or law, except that a purely legal issue involving no factual dispute and which is a matter of first impression or is precedential in nature may be referred to the General Counsel for a determination in accordance with Part 619 of this Title (declaratory ruling) upon motion by any party or upon the ALJ's own initiative;

(x) preclude irrelevant or unduly repetitious, tangential or speculative testimony or argument;

(xi) direct the consolidation of parties with similar viewpoints and input;

(xii) limit the number of witnesses;

(xiii) utilize a panel of witnesses for purposes of direct testimony or cross-examination;

(xiv) allow oral argument, so long as it is recorded;

(xv) take any measures necessary for maintaining order and the efficient conduct of the hearing;

(xvi) take any measures necessary to ensure compliance with SEQRA and UPA not inconsistent with section 624.4 of this Part;

(xvii) in the case of water supply rate disputes, issue directives modifying any incompatible provisions of this Part, consistent with the spirit and intent of these regulations;

(xviii) issue orders limiting the length of cross-examination, size of briefs and similar matters;

(xix) order a site visit, on notice to all parties;

(xx) exercise any other authority available to ALJs under this Part or to presiding officers under article 3 of the SAPA.

(2) Impartiality of the ALJ and motions for recusal.

(i) The ALJ will conduct the hearing in a fair and impartial manner.

(ii) An ALJ must not be assigned to any proceeding in which the ALJ has a personal interest.

(iii) Any party may file with the ALJ a motion in conformance with section 624.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. Such motions will be determined as part of the record of the hearing.

(iv) Upon being notified that an ALJ declines or fails to serve, or in the case of the ALJ's death, illness, resignation, removal or recusal, the Chief ALJ must designate a successor.

(3) The designation of an ALJ as the Commissioner's representative must be in writing and filed in the Office of Hearings.

(c) *Appearances.*

(1) A party may appear in person or be represented by an attorney licensed in New York State or any other jurisdiction, or by a non-attorney chosen by the party. Any representative of a party who is other than an attorney licensed to practice in New York State must disclose his or her qualifications to the party. Nothing in this paragraph authorizes a non-lawyer to engage in the practice of law.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show his or her authority to act in such capacity and must file a notice of appearance with the ALJ.

(d) *Appeals of ALJ rulings.*

(1) Any ALJ ruling may be appealed to the commissioner after the completion of all testimony as part of a party's final brief or by motion where no final brief is provided for.

(2) During the course of the hearing, the following rulings may be appealed to the commissioner on an expedited basis:

(i) a ruling to include or exclude any issue for adjudication;

(ii) a ruling on the merits of any legal issue made as part of an issues ruling;

(iii) a ruling affecting party status; or

(iv) any ruling in which the ALJ has denied a motion for recusal.

(v) by seeking leave to file an expedited appeal, any other ruling of the ALJ may be appealed on an expedited basis where it is demonstrated that the failure to decide such an appeal would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary.

(3) A motion for leave to file an expedited appeal must demonstrate that the ruling in question falls within one of the categories set forth in subparagraph (2)(v) of this subdivision.

(4) The commissioner may review any ruling of the ALJ on an expedited basis upon the commissioner's determination or upon a determination by the ALJ that the ruling should be appealable.

(5) Whenever the commissioner grants leave to file an expedited appeal, the parties must be so notified and provided with an opportunity to file a response to the appeal.

(6) Failure to file an appeal will not preclude appealing the ruling to the commissioner after the hearing.

(7) There will be no adjournment of the hearing during appeal except by permission of the ALJ.

(e) *Joint hearings.* A project may require submission of applications for more than one permit, or to more than one government agency, and public hearings may be required for more than one purpose. Whenever practicable, all such hearings will be consolidated into a single public hearing.

(f) If the department is the lead agency for purposes of SEQRA, the permit hearing shall be consolidated with the hearing on the DEIS.

§624.9 Evidence, burden of proof and standard of proof

(a) *Evidence.*

(1) All evidence submitted must be relevant and all rules of privilege will be observed. However, other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if a reasonable degree of reliability is shown.

(2) Although relevant, evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of repetitious or duplicative evidence.

(3) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence.

(4) Whenever possible, an object that is the subject of testimony will be exhibited at the hearing. It must be properly identified as relevant, and it must be shown that it has not changed substantially due to the passage of time or any other reason.

(5) Each witness must be sworn or make an affirmation before testifying. Opening, closing and other unsworn statements are not evidence but will be considered as arguments bearing on evidence.

(6) The ALJ or the commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party must be given notice thereof and, on timely request, be afforded an opportunity, prior to decision, to dispute the fact or its materiality.

(b) *Burden of proof.*

(1) The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department.

(2) Where the department has initiated modification, suspension or revocation proceedings, the department staff bears the burden of proof to show that the modification, suspension or revocation is supported by the preponderance of the evidence.

(3) Where an application is made for permit renewal, the permittee has the burden of proof to demonstrate that the permitted activity is in compliance with all applicable laws and regulations administered by the department. A demonstration by the permittee that the there is no change in permitted activity, environmental conditions or applicable law and regulations constitutes a prima facie case for the permittee.

(4) The burden of proof to sustain a motion will be on the party making the motion.

(c) *Standard of proof*. Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR article 78.

§624.10 Ex parte rule

(a) Except as provided below an ALJ must not directly or through a representative, communicate with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.

(b) An ALJ may consult on questions of law or procedures with supervisors or other staff of the Office of Hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) ALJs may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

(d) Parties or their representatives must not communicate with the ALJ or the commissioner in connection with any issue without providing proper notice to all the other parties.

§624.11 Payment of hearing costs

(a) Within 30 days of the last day at which testimony is taken, the applicant must pay for the cost of: physical accommodations, if not held in department facilities; publishing any required notices; and any necessary stenographic transcriptions. Except that, when a hearing is held pursuant to a department initiated modification, suspension or revocation, the department will be responsible for the costs listed above.

(b) The ALJ may require that the applicant post a bond or other acceptable financial guarantee for the costs of the hearing. Such guarantee must be provided to the department prior to commencing the hearing or the hearing will be adjourned until the guarantee is made available.

(c) A final decision will not be issued until the applicant has paid the costs of the hearing referred to in subdivision (a) of this section.

§624.12 Record of the hearing

(a) All proceedings at a hearing must be stenographically reported. The ALJ may arrange for a certified reporter to produce a stenographic transcript of the hearing, or may permit the applicant to make such arrangements. When a stenographic transcript is made, an original and two copies of the transcript must be delivered to the ALJ at the expense of the applicant. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.

(b) The record of the hearing must include the application (including the DEIS where applicable) and all notices (including the notice of hearing) and motions; any affidavit of publication of the notice of hearing; the transcript of the testimony taken at the hearing, the exhibits entered into evidence; any motions, appeals or petitions; where applicable, comments on the DEIS and responses thereto; any admissions, agreements or stipulations; a statement of matters officially noticed; offers of proof, objections thereto and rulings thereon; proposed findings; and the hearing report; and briefs as may have been filed including any comments on the hearing report filed pursuant to section 624.13(a)(3) of this Part.

(c) As soon as the record becomes available the ALJ shall assure that a complete and current copy of the record is placed in an accessible location for the parties' reference and/or copying.

§624.13 Final decision

(a) *Hearing report.*

(1) The ALJ will submit a hearing report to the commissioner within 45 days after the close of the record. The report must include findings of fact, conclusions of law and recommendations on all issues before the ALJ.

(2) The hearing report may be circulated to the parties as a recommended decision when:

(i) required by law; or

(ii) directed by the commissioner.

(3) All parties to the hearing have fourteen days after receipt of the recommended decision to submit comments to the commissioner.

(b) *Final decisions.*

(1) Where a recommended decision has not been issued, the final decision of the commissioner, together with the hearing report of the ALJ will be issued 60 days after the close of the record.

(2) Where a recommended decision has been issued, the final decision of the commissioner will be issued within 30 days after the close of the record, such event occurring at the expiration of the time allowed for comment on the recommended decision.

(c) *Actions involving a DEIS.* Where a DEIS has been the subject of the hearing, the hearing report together with the DEIS will constitute the FEIS.

(d) *Stipulations*. A stipulation executed by all parties resolving any or all issues removes such issue(s) from further consideration in the hearing.

(e) *Reopening the record.* At any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

DEC'S NEW HEARING RULES

- By -

Robert H. Feller

On January 10, 1994, a set of new regulations that govern virtually all hearings conducted by the New York State Department of Environmental Conservation ("DEC") became effective. The rules are applicable to all administrative enforcement proceedings that were commenced after that date [6 NYCRR 622.1(c)] and to all permit proceedings where the decision to hold an adjudicatory hearing was made after that date [6 NYCRR 624.1(d)].

The purpose of this article is to review, from DEC's perspective, both the major principles underlying these new rules and some of the more important specific provisions.

Philosophy of new rules

There are two principles that are basic to the philosophy of the changes. First is a commitment to assure that the due process rights of all parties are adequately protected. Second is the desire to ensure efficiency of process.

The minimum amount of due process that agencies must provide in adjudicatory hearings is established by the provisions of Article 3 of the State Administrative Procedures Act ("SAPA") and Executive Order No. 131 ("EO-l3l") . However, over the last ten years, the stakes have steadily increased in both licensing and enforcement proceedings. In enforcement cases, respondents face increased civil fines. In permit cases, applicants risk economic loss through delay, imposition of additional permit conditions or even permit denial while intervening groups face contending with unwanted projects for years to come. With this trend in mind, DEC examined each element of its rules to see if greater protection of process was warranted.

The DEC is also eager to ensure that hearings are conducted as efficiently as possible. The agency recognizes the right of all parties to timely decisions. It further believes that the relative advantages of parties with greater resources should be minimized through efficiency of process.

The DEC's strategy to accomplish these objectives was implemented in several ways:

1. Better definition of standards. The new regulations better define the standards upone which the procedural decisions would be based. Rather than require participants in the process to rely on interpretation of prior decisions, standards were incorporated into the text of the rules. The careful articulation

of many of these standards forced the agency to think through the meaning and value of prior precedent in an effort to provide the public with a workable rule.

2. Preservation of ALJ's flexibility. The rules attempt to define standards in a way that preserves a great deal of discretion in the Administrative Law Judges ("ALJ's"). The ALJs must have the flexibility to deal with particular situations that arise in a way that preserves the overall fairness of the process. As a *quid pro quo* for greater discretion, the rules provide additional opportunities to appeal ALJ rulings on an interlocutory basis. Such appeals are intended as a safety valve and it is hoped that they are not often used.

3. Amplification of rights. The rules not only define the rights of parties but amplify them in situations where necessary to ensure meaningful participation. The rules take great pains to make it clear that the ALJs must take the measures that are necessary to ensure that the parties' rights are not inappropriately abridged. By the same token, the ALJs must ensure that the exercise of those rights is done in a way that is not abusive of the process and does not impinge on the rights of others.

4. "Default" rulings. The rules also establish a set of "default" rulings for commonly occurring situations. These essentially increase the predictability of the proceeding. The ALJs are given the authority to vary these "default" rulings upon the motion of any party for good cause shown.

With the general philosophy of the rules understood, the remainder of this article now examines the specifics of the revisions to 6 NYCRR Parts 622 and 624 ("Part 622" and "Part 624").

Matters in Common to Both Rules

Applicability

EO-l3l requires that any hearing that an agency conducts be governed by a set of regulations that are duly promulgated pursuant to SAPA. Anyone familiar with the Environmental Conservation Law ("ECL") knows that there are innumerable opportunities for adjudicatory hearings. Quite frequently when the Legislature assigns another regulatory function to the DEC, it accompanies it with an opportunity for an adjudicatory hearing to an aggrieved party. It is impractical for the DEC to promulgate a set of rules for each different hearing opportunity in the ECL. Therefore, the decision was made in the new regulations to divide the universe of hearings into two. Hearings that were enforcement in character would fall under Part 622 and those that were licensing in nature

would fall under Part 624.[1]

Because the same rules will apply to a wide variety of hearings, the oversight of the ALJ becomes crucial. While the exercise of a wide range of rights may be appropriate for complex hearings, the attempt to exercise those same rights in a different context may be abusive. Consider, for instance, the specter of extensive motion practice in a very simple case. This is the danger of the one rule fits all approach.

General Rules of Practice

The DEC promulgated a set of rules designed to address service of papers, computation of time limits, motion practice, the role of the Office of Hearings and expedited (interlocutory) appeals. The purpose was to have a basic set of rules that would create uniform expectations among litigants about the conduct of the proceedings in these areas. It also dispenses with the need for ALJ intervention except in unusual cases. For instance, in the absence of any ruling specifying how long a party has to respond to a motion, the general rules of practice provide the party with the required time limits.

These rules generally follow the CPLR. They are not intended to provide substantive standards for any rights held by parties, but merely to state the procedural rules for exercising those rights. For instance, the rules establish procedures for filing an interlocutory appeal, but the substantive bases for considering appeals on an interlocutory basis is found elsewhere.

Following the philosophy discussed above, in order to avoid prejudice to any of the parties, the rules provide ALJs with the authority to modify any of the time periods set out in the general rules. Other modifications can only be made with the approval of the Commissioner.

Expedited (Interlocutory) Appeals

Under past practice of the DEC, the only interlocutory appeals that were explicitly provided for were those that involved appeals of the rulings of the ALJ on issues and party status that were made as a result of the issues conference held for permit proceedings. No provision was made under Part 622 for any interlocutory appeal.

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[1]The only hearings that are not covered by these rules are - regulatory fee hearings governed by 6 NYCRR Part 481; inactive hazardous waste site hearings governed by 6 NYCRR Part 375 (although the Department Staff can elect to proceed under Part 622); and summary abatement hearings, which are jointly governed by 6 NYCRR Part 620 and the new Part 622.

During the course of the 12 years during which these rules were in effect, interlocutory appeals were filed in other situations. Examining the situations in which these appeals arose, the Commissioner found that, although interlocutory appeals of the ALJ rulings were cumbersome and disruptive to the process, there were a few situations where resolving those appeals would have a salutary effect. In fact, the Commissioner asserted an inherent right to entertain such appeals on a discretionary basis and was upheld in a subsequent court challenge (In the Matter of Universal Waste. Inc. v. NYS Department of Environmental Conservation, Index No. 9234-87, Supreme Ct. Albany Court, 1988).

With the dual emphasis on due process and efficiency, the DEC concluded that a specific provision allowing both as-of-right and discretionary interlocutory appeals should be included in the new rules. The rules also contain standards for when the discretion would be exercised.

As a point of departure, the new rules make it clear that all rulings of the ALJ are appealable to the Commissioner [6 NYCRR 622.10(d) (1) and 624.8(d)(l)]. The only issue is the timing. The new rules maintain the opportunity to file an interlocutory appeal as-of-right of any ruling on issues or party status under the Part 624 rules. In addition, interlocutory appeals will be allowed as-of-right regarding the merits of any legal issue that is resolved as part of the ruling on issues (see discussion below) . The only other situation where interlocutory appeals as-of-right are provided for is where an ALJ, in the context of either a Part 622 or Part 624 proceeding, has denied a motion for recusal.

Thus interlocutory appeals are provided for as-of-right where the potential for disruption is outweighed by the potential for prejudice to the parties or for inefficiency of process. For instance, it would be grossly inefficient to adjudicate issues that the Commissioner concludes have no potential to affect the permit decision. Hence, the parties must have the right to appeal an issues ruling on an interlocutory basis.

Other appeals can be made on an interlocutory basis if they meet the same criteria. A party seeking to make such an appeal must file a motion with the ALJ for leave to appeal and demonstrate either undue prejudice or a significant inefficiency in the hearing process. Historically, even when interlocutory appeals were filed under the old rules, except where there was explicit provision to file such an appeal, they were rarely entertained. Although the new rules provide the same safety valve, parties should not expect that this avenue will often yield positive results.

Separation of Functions within the Agency

An issue that has received attention in the field of administrative law is the separation of functions between agency

personnel assigned to regulate, investigate and prosecute, on the one hand, and those who are assigned to act as arbiters of disputes between the agency and outside parties, on the other hand. This distinction has been the focus of a great deal of debate within New York. It was addressed in EO-13l and has also been the subject of a number of pieces of proposed legislation over the past six years.

Although the new rules do not make any fundamental institutional changes, there is a heightened recognition in the new rules of the distinction and of the need to maintain the distinction as unambiguously as possible. The new rules define the terms "Department Staff" and "Office of Hearings" in mutually exclusive terms [6 NYCRR 622.2(e) and 624.2(k)].

Both sets of new rules also make a comprehensive statement of the ex *parte* rule in SAPA as modified by E0-131. Under this rule, ALJs may only consult with supervisors or other members of the Office of Hearings and may do so only on questions of law and procedure. In deciding matters under adjudication, the Commissioner may consult with any staff within the agency so long as any such staff person had no prior involvement in the case. Where uninvolved staff is involved in consultations with the Commissioner, the ex *parte* rule would apply to them as well.

Recommended Decisions

The DEC has included provision for the Commissioner to issue the hearing report as a recommended decision. The Commissioner’s final determination would be reserved until the parties have an opportunity to file comments on the hearing report. In such a situation, the circulation of the hearing report would reopen the record and the Commissioner would have 60 days after the receipt of all comments to make a final decision.

While the recommended decision practice is used routinely in other agencies (e.g., hearings held by the Public Service Commission and the Department of Health), it was only used in DEC practice in the single situation where it is currently required by law, under ECL Article 27 Title 11 - the Siting of New Industrial Hazardous Waste Management Facilities. Under the new rules, the use of this procedure is discretionary with the Commissioner. While it is anticipated that the procedure would, in some circumstances, tend to improve the decision, whether the additional time and process are offset by such an improvement must be looked at on a case-by-case basis. Highly complex cases, those involving novel questions and those where the ALJ recommends an outcome unanticipated by any of the parties, will be considered to determine whether they are appropriate candidates for this treatment.

Standard of Proof

The new rules confirm the Department's view that the preponderance of the evidence standard is the trial-level standard for all cases. The substantial evidence standard referenced in SAPA is, in our view, only intended to apply to judicial review of administrative decisions. This does not change the substantial evidence standard which SAPA sets for judicial review of administrative decisions [6 NYCRR 622.11(c) and 624.9(c)].

Changes Specific to Part 622

Initial Pleadings

Since the new rules expand coverage beyond actions that are commenced by a notice of hearing and complaint, provision is made to cover actions that are commenced through other mechanisms. For instance, where the Department seeks to modify a permit based on an alleged violation, a notice of intent to modify commences the action [6 NYCRR 622.3(b)(2)]. In such cases, the request for a hearing constitutes the answer.

As before, the answer is required to contain a statement of any affirmative defenses asserted. The new rules clarify that a defense based upon the inapplicability of a permit requirement to the complained of activity must be pled as an affirmative defense.

Significantly, the new rules provide that the failure to answer constitutes a default and a waiver of the right to a hearing. Formerly, filing an answer or appearing at the designated date was sufficient to avoid a default. Complaints will now be required to carry a notice that failure to answer is grounds for a default.

Defaults

The new regulations provide for granting defaults upon the motion of the Department Staff. This motion would be made, on notice, to the assigned ALJ or, if none, to the Chief ALJ.

When a respondent has taken any action (or non-action) which constitutes a default under the rules, the Staff has the opportunity to move for a default by providing documentation of proper service and of the circumstances that constitute the default. The Staff would also accompany the motion with a proposed order. No proof of the substance of the allegations is required.

Respondents can move to reopen a default consistent with CPLR '5015. They are required to demonstrate that a meritorious defense exists and that there was good cause for the default.

Prehearing Conference and Statement of Readiness

The new rules add two procedural devices intended to ensure efficiency in the use of judicial resources.

Respondents frequently resist confronting alleged violations in a meaningful way until an ALJ is formally involved, even where settlement is likely. The involvement of an ALJ, particularly when travel to the hearing location is considered, can create a drain on resources. To avoid this undesirable result, the new rules authorize the Staff to schedule a prehearing conference as part of the original notice of hearing. Appearance at such a conference is mandatory and the failure to do so constitutes grounds for a default. The conference is intended as an opportunity to settle matters before they are placed on the hearing docket.

The second device is the statement of readiness for adjudicatory hearing. Principally, it consists of a statement from the Department Staff that discovery is complete or waived, or an explanation as to why it has not been completed, and an affirmative representation that an attempt was made to settle the case. This device is intended to serve as a gatekeeper for cases that are not ready for hearing.

Accelerated Proceedings

The new rules provide for three different types of proceedings that are intended to be decided on an expedited basis. Two of them, the motion for order without hearing (formerly motion for summary order) and the summary abatement/summary suspension orders are carryovers from the prior rules. The rules for these two proceedings have been adapted to conform with the revisions but they remain substantially the same.

A new proceeding, called "expedited fact finding," addresses situations where it is alleged, among other charges, that a respondent is unlawfully conducting an activity without a permit. Upon the request of Department Staff, this charge would be severed and tried first. Since most such allegations will involve few issues of fact, is anticipated that they will be resolved quickly. Following the resolution, an order to desist the activity can be issued, when appropriate, and the remainder of the case can be heard. This allows DEC to address charges with great potential for environmental harm on a prioritized basis.

Discovery

The rules for discovery remain unchanged for the most part. Discovery is as broad as under the CPLR, though discovery devices are more limited. Bills of particulars are not permitted and depositions and written interrogatories require the permission of the ALJ.

The new rules provide the ALJ with some devices to enforce discovery against recalcitrant parties. The ALJ may preclude the introduction of the material demanded or take inferences about the materials that were not released that are unfavorable to the offending party.

The new rules also incorporate decisional law, which has held that the ALJs have the authority to quash or modify attorney-issued subpoenas that arise in the context of the hearing [6 NYCRR 622.10(b) (1) (v); In the matter of Moore v. Sunshine. 126 Misc.2d 284, 286, Supreme Ct., Nassau County, 1984).

Intervention

The new rules establish a standard for admission of third party intervenors to enforcement hearings. Third parties will not be permitted to intervene in order to fulfill a prosecutorial-like role. Only where a petitioning party can show that it has a private interest which is not adequately represented by the Staff will intervention be allowed. Such situations could arise if, for instance, the proposed remediation of a site where violations had allegedly occurred could affect the private property rights of an adjacent landowner.

Changes Specific to Part 624

Revisions to Party Status

Party status is divided into two categories - full parties and amicus. Full party status carries with it the right to participate in all aspects of the hearing. This includes the right to present evidence and cross-examine witnesses; to present arguments on issues of law and fact; to make motions and other similar requests; to receive copies of correspondence sent by the parties or the ALJ; and to appeal adverse rulings of the ALJ [see 6 NYCRR 624.5(e)].

Previously, the rules provided for full party status and limited party status. Full parties had essentially the same rights as those listed above and limited parties had those rights but limited to particular issues. The new rules dispense with any limitation on party status based on a restricted focus in a party’s filing.

The new rules also provide for a new type of participation not previously available, amicus status. This status is intended for interest groups who do not intend to contribute to the evidentiary record but want the opportunity to argue a point of law or policy that might be precedential or otherwise important, Amici will be permitted to file briefs or other forms of argument regarding such matters. To qualify, a group must demonstrate that it has sufficient interest in the resolution of a legal or policy issue

and that its expertise, special knowledge or unique perspective may materially contribute to deciding that issue.

Public Participation

Aside from increasing the opportunities to participate as a party, the new rules also enhance the public noticing which hearings will receive and also provide greater assurances that potential parties will be afforded adequate opportunities to prepare their case.

Provisions are made for the ALJ to direct the publication of additional notices or to provide notice further in advance than the statutory minimums whenever necessary to adequately inform the affected public. There is also direction to publish the notice of hearing in foreign language newspapers when a large segment of the affected public has a principal language other than English.

Issues Conference

The issues conference has traditionally been used as a mechanism to narrow the scope of the hearing to substantive and significant disputes. The issues conference has also been used as an opportunity to determine party status.

The new rules incorporate prior decisional precedent to define the terms "substantive" and "significant." Substantive is defined as "An issue is substantive if there is sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ." Significant is defined as "An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.

The rules also distinguish between issues that are proposed by third party intervenors and those that arise out of differences between the staff and the applicant. The former must meet the substantive and significant test. The latter need not meet that test since applicants have a right to a hearing under the Uniform Procedures Act ("UPA") regarding any dispute with staff over a substantial term or condition of the permit or over the potential denial of the permit [6 NYCRR 624.4(c) (1) (i) and (ii)].

The new rules also establish limitations on adjudicable issues that relate to SEQRA and UPA. The rules are also explicit that the

ALJ may review a negative determination that Staff issued pursuant to SEQRA. Where the ALJ finds that staff's determination was irrational or otherwise affected by an error of law, he or she has the authority to remand the determination to staff with instructions for a redetermination. The Department did not find it appropriate to allow the ALJ to substitute his or her judgment for that of the staff because the ALJ's determination would necessarily be based on offers of proof and not on a full evidentiary record. The greater technical resources available to staff were the principal reason that the rules provide for remanding the defective SEQRA determination back to staff rather than permitting the ALJ to revise it.

No limitation is placed on SEQRA issues where the Department serves as the lead agency. Where another agency fulfills the role of lead agency, the potential SEQRA issues for the hearing are limited to those where the Department notified the lead agency during the comment period of an inadequacy or deficiency and where such problem was not subsequently corrected. The decision to so restrict adjudicable issues is based on a desire to promote the coordination of the SEQRA process by the lead agency.

The new regulations provide that the completeness of an application, as used in the context of the UPA, cannot be an issue for adjudication. That determination triggers an applicant's right to get decisions made within specified time frameworks, but it does not preclude requiring the production of additional supporting documentation for the proposal. Similarly, whether there is adequate information for decisionmaking purposes can be the source of adjudicable issues as well.

Finally, the rules incorporate the principle established in decisional law that all issues in proceedings that arise out of Department-initiated modifications, suspensions or revocations must relate to the bases cited by the Department for taking such action (cite). Pursuant to 6 NYCRR '621.14, the Department is the ultimate arbiter of which modification, suspension and revocation requests are processed, and therefore allowing the adjudication of other issues would be inconsistent with that principle.

Discovery

The rules also provide greater discipline for the discovery process. Until the issues that are to be adjudicated are determined, discovery is limited to what is available under the Freedom of Information Law. Exceptions to this rule may be granted by the ALJ. However, since in raising issues the parties need only show that there is a substantial question (they need not show that there is a likelihood of prevailing on the merits) such a limitation is justified and promotes efficiency.

After the issues are determined, broad discovery is permitted

with respect to those issues. Parties have the right to make a demand for documents, request a list of witnesses including a statement of the content and scope of their testimony, make non-intrusive inspections of property, and request admissions and a list of evidence to be offered at the hearing. With permission of the ALJ, parties may use other CPLR discovery devices (such as interrogatories) and may request intrusive inspections of property, such as for purposes of taking samples.

Conclusion

The new rules do not represent a dramatic departure from their predecessors. However, DEC expects them to perform better because the rights and obligations of all parties will be better defined within limits, creating increased certainty in the process. The rules invest a high degree of discretion in the ALJs in order to ensure that the circumstances of each case can be addressed flexibly within these defined limits. It is expected that this approach will result in the desired improvements in fairness and efficiency.

State Administrative Procedure Act

Laws 1975, Chapter 167, § 1

Effective September 1, 1976

ARTICLE 1--GENERAL PROVISIONS

Section

§ 100. Legislative intent.

The legislature hereby finds and declares that the administrative rulemaking, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public. In order to provide the people with simple, uniform administrative procedures, an administrative procedure act is hereby enacted. This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet the public interest.

It is further found that in the public interest it is desirable for state agencies to meet the requirements imposed by the administrative procedure act. Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition.

§ 101. Short title.

This chapter shall be known and may be cited as the "State Administrative Procedure Act."

§ 102. Definitions.

As used in this chapter,

1. "Agency" means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is

appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of military and naval affairs to the extent it exercises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeal board, and except for purposes of subdivision one of section two hundred two-d of this chapter, the workers' compensation board and except for purposes of article two of this chapter, the department of corrections and community supervision.

2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

(b) Not included within paragraph (a) of this subdivision are:

(i) rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public;

(ii) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(iii) rulings issued under section two hundred four or two hundred five of this chapter;

(iv) forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory;

(v) rules promulgated to implement agreements pursuant to article fourteen of the civil service law;

(vi) rates of interest prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law;

(vii) rules relating to the approval or disapproval of subscriber rates contained in an application to the public service commission, after public hearing and approval by the applicable municipality for a certificate of confirmation or an amendment to a franchise agreement;

(viii) state equalization rates, class ratios, special equalization rates and special equalization ratios established pursuant to the real property tax law;

(ix) rates subject to prior approval by the superintendent of financial services or to section two thousand three hundred forty-four of the insurance law;

(x) any regulation promulgating an interim price and any final marketing order made by the commissioner of agriculture and markets pursuant to section two hundred fifty-eight-m of the agriculture and markets law;

(xi) any fee which is:
(1) set by statute;
(2) less than one hundred dollars;
(3) one hundred dollars or more and can reasonably be expected to result in an annual aggregate collection of not more than one thousand dollars;
(4) established through negotiation, written agreement or competitive bidding, including, but not limited to, contracts, leases, charges, permits for space use, prices, royalties or commissions; or
(5) a charge or assessment levied by an agency upon another agency or by an agency upon another unit of state government.
(xii) changes in a schedule filed by a telephone corporation subject to the jurisdiction of the public service commission;
(xiii) rules relating to requests for authority by a telephone corporation subject to the jurisdiction of the public service commission under sections ninety-nine, one hundred and one hundred one of the public service law and by a public utility subject to the jurisdiction of the public service commission under section one hundred seven of the public service law;
(xiv) any regulation comprised solely of one or more additions to the list of nonprescription drugs reimbursable under the medicaid program pursuant to paragraph (a) of subdivision four of section three hundred sixty-five-a of the social services law.

3. "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

4. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

5. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

6. "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency engaged in the particular rule making, declaratory ruling, or adjudication.

7. "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

8. "Small business" means any business which is resident in this state, independently owned and operated, and employs one hundred or less individuals.

9. "Substantial revision" means any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register; provided, however, if a notice of revised rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published.

10. "Rural area" means those portions of the state so defined by subdivision seven of section four hundred eighty-one of the executive law.

11. "Consensus rule" means a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely (a) repeals regulatory provisions which are no longer applicable to any person, (b) implements or conforms to non-discretionary statutory provisions, or (c) makes technical changes or is otherwise non-controversial.

13. "Data" means written information or material, including, but not limited to, statistics or measurements used as the basis for reasoning, calculations or conclusions in a study.

14. "Guidance document" means any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement, but shall not include documents that concern only the internal management of the agency or declaratory rulings issued pursuant to section two hundred four of this chapter.

§ 102-a. Small business regulation guides.

For each rule or group of related rules which significantly impact a substantial number of small businesses, the agency which adopted the rule shall post on its website one or more guides explaining the actions a small business may take to comply with such rule or group of rules if the agency determines that such guide or guides will assist small businesses in complying with the rule, and shall designate each such posting as a "small business regulation guide". The guide shall explain the actions a small business may take to comply with a rule or group of rules. The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language that it is likely to be understood by affected small businesses. Agencies shall cooperate with other state agencies in developing such guides.

§ 103. Construction; severability.

1. (a) Except with respect to the provisions of paragraph (c) of this subdivision, or of paragraph (b) of subdivision one and subdivision six of section two hundred two of this chapter, the provisions of this chapter shall not be construed to limit or repeal additional requirements imposed by statute or otherwise.

(b) The provisions of section two hundred two of this chapter shall not relieve any agency from compliance with any statute requiring that its rules be filed with or approved by designated persons or bodies before such rules become effective.

(c) Notwithstanding the requirements of any statute, when adopting a consensus rule as defined in this chapter, an agency may in its discretion dispense with any statutory requirement for public hearing or publication of a notice in any newspaper or publication other than the state register, unless such requirement is explicitly directed at the rule which is being adopted.

2. The provisions of this chapter shall not be deemed to repeal section six hundred fifty-nine of the labor law.

3. The provisions of this chapter shall apply only to rule making, adjudicatory and licensing proceedings commencing on or after the effective date of this chapter.

4. If any provision of this chapter or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the chapter or the application thereof to other persons and circumstances.

§ 104. Access to studies and data.

1. An agency, upon request, shall, within thirty days, make available for inspection and copying any scientific or statistical study, report or analysis, including any such study, report or analysis prepared by a person or entity pursuant to a contract with the agency or funded in whole or in part through a grant from the agency that is used as the basis of a proposed rule and any supporting data; provided, however, that the agency shall provide for inspection only of any such study, report or analysis due to copyright restrictions.

2. An agency that contracts with a person or entity for the performance of a study or awards a grant for such purpose shall require as a condition or term of such contract or grant that the person or entity shall provide to the agency the study, any data supporting the study, and identity of the principal person or persons who performed such study for disclosure in accordance with the provisions of this section and of article six of the public officers law.

ARTICLE 3--ADJUDICATORY PROCEEDINGS

Section

§ 301. Hearings.

1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.

2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for violation of the laws, rules or orders enforced by the agency.

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.

5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

§ 302. Record.

1. The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.

2. The agency shall make a complete record of all adjudicatory proceedings conducted before it. For this purpose, unless otherwise required by statute, the agency may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices. Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor.

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 303. Presiding officers.

Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

§ 304. Powers of presiding officers.

Except as otherwise provided by statute, presiding officers are authorized to:

1. Administer oaths and affirmations.

2. Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules.

3. Provide for the taking of testimony by deposition.

4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

5. Direct the parties to appear and confer to consider the simplification of the issues by consent of the parties.

6. Recommend to the agency that a stay be granted in accordance with section three hundred four, three hundred six or three hundred seven of the military law.

§ 305. Disclosure.

Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

§ 306. Evidence.

1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.

3. A party shall have the right of cross-examination.

4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

§ 307. Decisions, determinations and orders.

1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than a rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

(b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

§ 308. Streamlined optional adjudicatory proceedings for small businesses.

Unless otherwise prohibited by law, an agency may adopt regulations providing for use at the option of a small business of streamlined adjudicatory proceedings conducted by mail, electronic mail, telephone conference or videoconference. In adopting such regulations, the agency shall:

1. consider the types of programs and issues for which such streamlined proceedings may reasonably be conducted, taking into account (a) the complexity of the matters to be resolved in the proceeding, (b) the severity of potential sanctions, (c) any necessity for personal appearances, including but not limited to requirements for sworn testimony or cross-examination, and (d) any potential reduction in the costs and burdens of participating in the proceeding for the agency and for other parties, and shall appropriately limit the availability of streamlined proceedings to programs and issues in which the public interest in fair outcomes can continue to be assured;

2. ensure that a streamlined proceeding may only be used at the option of the respondent small business with the consent of the agency and any other necessary party to the proceeding, and that the rights of respondents and other parties will not be diminished in any respect by virtue of participation in a streamlined proceeding;

3. specify the format or formats for remote conduct of streamlined proceedings;

4. establish procedures for requesting and scheduling such proceedings, for the conduct of such proceedings, and for the development of a complete record as provided in section three hundred two of this article; and

5. provide that, in the event that it becomes impractical or inappropriate to continue a proceeding commenced pursuant to this section as a streamlined proceeding, such proceeding may be rescheduled as an adjudicatory proceeding pursuant to section three hundred one of this article without prejudice to any party.

ARTICLE 4--LICENSES

Section

§ 401. Licenses.

1. When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard.

2. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license.

3. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

4. When the hearing seeks the revocation of a license or permit previously granted by the agency, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

ARTICLE 5--REPRESENTATION

Section

§ 501. Representation.

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency.

SEQRA Basics and Recent Amendments to the SEQRA

Lawrence H. Weintraub, Esq.
NYS Department of Environmental Conservation

Panel Description: The presentation will provide an overview of the State Environmental Quality Review Act with a focus on the 2018 amendments to the regulations that implement that law.

Coming on Board: How to Advise New Municipal Officials

Wade Beltramo, Esq.
General Counsel, New York Conference of Mayors and Municipal Officials

Lawyer-Client Privilege & Who is the Client

New York State Rules of Professional Conduct

RULE 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

1. the representation will involve the lawyer in representing differing interests; or
2. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent, confirmed in writing.

RULE 1.13. Organization As Client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

1. asking reconsideration of the matter;
2. advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
3. referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Commentary to Rule 1.13 - Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau

is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope [10].

Proposed Federal Rules of Evidence

Rule 503 - Lawyer-Client Privilege.

The commentary provides that "'client' includes governmental bodies," *citing Connecticut Mutual Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y.1955); *Department of Public Works v. Glen Arms Estate, Inc.*, 230 Cal.App.2d 841 (1965); and *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio App.1942).

Cases

In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005)

The Court reasoned that "the traditional rationale for the privilege applies with special force in the government context" because

- it "is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice."
- "Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business."
- "Abrogating the privilege undermines that culture and thereby impairs the public interest." citing 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:28, at 4 (2d ed. 1999) ("If the government attorney is required to disclose [internal communications with counsel] upon grand jury request, it is sheer fantasy to suggest that it will not make internal governmental investigations more difficult, to the point of being impossible.... To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater.")

However, the Court acknowledged that the "relationship between a government attorney and a government official or employee is not the same as that between a private attorney and his client" because:

- "in the government context, the individual consulting with his official attorney may not control waiver of the privilege."
- "Even if he does control waiver during his time in government, the possibility remains that a subsequent administration might purport to waive the privilege exercised by a predecessor."

The Court concluded that the arguments against privilege in lawyer-government client relationship are "little more than speculation over the way in which the privilege functions in the government context" and thus are "insufficient to jettison a principle as entrenched in our legal tradition as that underlying the attorney-client privilege." In reaching this conclusion, the 2nd Circuit reasoned that government

attorneys require "candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office."

The Court disagreed with the contention that "'the public interest' in disclosure is readily apparent, and that a public official's willingness to consult with counsel will be only 'marginally' affected by the abrogation of the privilege in the face of a grand jury subpoena" and thus declined "to abandon the attorney-client privilege in a context in which its protections arguably are needed most."

Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001)

The law firm representing a tobacco company that was suing the State of New York had, for the previous 25 years, represented various New York State interests with respect to the State's social welfare programs. The contract was between the law firm and the Division of Budget ("DOB") for the firm to provide legal advice and assistance, including representation in litigation, on behalf of the State on issues of federal funding, rate structures and revenue maximization for the State's public assistance programs, including Medicaid, cash assistance, foster care, and child support. The work involved the law firm interacting with several State agencies, including the Office of Mental Retardation and Developmental Disabilities, the Office of Mental Health, the Office of Temporary and Disability Assistance, the Department of Social Services, and the Department of Health.

The State moved to disqualify the tobacco company's counsel as having a conflict of interest. The District Court held that:

1. counsel's representation of various state agencies, pursuant to contract with Division of Budget (DOB), did not establish that counsel represented all of state government, for conflict of interest purposes;
2. in any event, differences in issues involved in suit and in counsel's representation of state agencies precluded finding of conflict requiring disqualification; and
3. even if counsel was deemed to represent all of state government, disqualification was not warranted.

The *B & W* Court began its analysis of determining who the client is by citing *Gray v. Rhode Island Department of Children, Youth and Families*, 937 F.Supp. 153, 157-58 (D.R.I.1996), which noted that ascertaining "who the client really is can be a complex affair when a governmental entity is involved. The definition of 'client' may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice."

The District Court then referenced the 2nd Circuit's decision in *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir.1981), in which the Court of Appeals noted that, in determining whether an attorney-client relationship exists, the issue is "whether there exist sufficient aspects of an attorney-client relationship for purposes of triggering inquiry into the potential conflict involved in [the firm's] role as [the employee's] counsel in this action." *Glueck*, 653 F.2d at 748-49.

The Court acknowledged that the question of client depends upon the degree to which a relationship exists. Specifically, a "substantial relationship" must exist for Canon 5 to apply. Citing *Glueck*, 653 F.2d at 750, which reasoned:

> Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an

> association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant.

The question revolves around whether the two representations "substantially similar" and involve "risks that information gained from one representation could be used to the disadvantage of the client in the other representation."

The District Court then acknowledged two sources of legal authority promoted by the law firm in support of its position:

1. The *Gray* decision cited a position taken by the New York State Bar Association in holding that "the appropriate rule should be that a lawyer representing a governmental agency only represents that agency and not the government as a whole." *Gray*, 937 F.Supp. at 158; and
2. A formal opinion issued by the New York City Bar Association's Committee on Professional and Judicial Ethics which held that "treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes." Formal Op. No.1999-06.

However, the *B & W* court concluded that neither the State's position nor the law firms adequately reflected the attorney-client relationship at issue or "directly addresses the indicia of the attorney-client relationship to determine, for conflict of interest purposes, whether the State as a whole is [the law firm's] client."

In making its findings, the District Court prescribed Glueck "traditional indicia of an attorney-client relationship" test, concluding:

1. In examining the *contract specifics*, although the law firm's contract was with the State's Division of the Budget, the law firm represented relatively narrow State interests, and as such "the agency with which the firm contracts is not determinative of the identity of the client;"
2. The nature of the consultation, specifically that there was no evidence of privileged communications between the law firm and the Governor or Governor's counsel, that there wasn't any evidence of a risk of having common witnesses, and the fact that the Division of the Budget is an arm of the executive branch did not mean that the entire executive branch was a client of the law firm, did not rise to the level of having a prohibited conflict;
3. The fact that the law firm bills the State directly and is paid with State funds was entitled to "little, if any, weight" to support a finding that the State as a whole is the client; and
4. There was no "substantial relationship" between the State and the law firm.

As a result, the *B & W* Court ruled that there was no prohibited conflict of interest.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 919 (8th Cir. 1997)

In a case involving the Whitewater investigation of President Clinton, the 8th Circuit addressed the question of the disclosure of notes taken by an Associate and a Special Counsel to the President during meetings with the First Lady, the First Lady's personal attorney, and Counsel to the President . In addressing the question of governmental attorney-client privilege in civil actions, the Court recognized the relatively dearth of jurisprudence on the issue before reasoning, "Even if we were to conclude that the governmental attorney-client privilege ordinarily applies in civil litigation pitting the federal

government against private parties, a question that we need not and do not decide, we believe the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue."

The Court then cited *United States v. Nixon* which "recognized that the need for confidential presidential communication 'can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties'" and "that the privilege for presidential communications 'is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution'" but nonetheless "concluded that it had to give way to the special prosecutor's subpoena:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 919, *citing* US v. Nixon, at 712–13, 94 S.Ct. at 3110.

The 8th Circuit acknowledged that the claim of presidential privilege in *Nixon* was not the same as the issue attorney-client privilege before and thus not controlling, but nevertheless found that reasoning persuasive and the *Nixon* rationale "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes."

The 8th Circuit went on to flesh out important differences between private individuals and public servants, notable that "executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. See 28 U.S.C. § 535(b) (1994). Even more importantly, however, the general duty of public service calls upon government employees and agencies to favor disclosure over concealment."

The Court analogized public servants to accountants, for whom the Supreme Court had rejected the concept of work product immunity because they assume a "public responsibility transcending any employment relationship with the client" and thus owe ultimate allegiance to many stakeholders, including investing public. *Citing United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984)

The implication is that a public officer's responsibility to the public weakens the normally inviolable lawyer-client privilege.

The Municipal Attorney

Overview

The "municipal attorney" is generally the primary attorney for the local government, although each municipality must refer to its own local laws or resolutions to determine if the position of "municipal

attorney" has been created explicitly and, if so, what the duties and responsibilities of the "municipal attorney" are. The role of any municipal attorney is the source of much discussion among municipal lawyers and bar associations across the country. Because the chief executive officer and the local legislative body maintain separate responsibilities, they can have independent interests and needs when seeking legal advice. Consequently, there are three clients which a municipal attorney may be called on to serve: the local government as a corporate entity, the chief executive officer, and the local legislative body. The relationship of the municipal attorney with these various clients is directly impacted by the ethical rules that govern lawyers.

Retaining the Municipal Attorney

If the local government has established the position of municipal attorney as a public officer with a term of office or as an employee, the local government would follow same process appointing (or hiring) the municipal attorney as it does other municipal offices/positions of employment. Civil Service Law § 22 must be followed to create the position of municipal attorney as either an employee or a public office. In addition, appellate courts have held that a public officer exercises some of the sovereign power of the municipality.[1] Few municipal attorneys have the authority to exercise a municipal sovereign power, however. As a result, the overwhelming majority of municipal attorneys who are on a municipal payroll are public employees who do not serve a term of office and thus are not subject to reappointment, but whose termination from employment is subject to Civil Service procedures. As a general rule, municipal attorneys are classified as an exempt class, but local officials should consult with county Civil Service to confirm the classification.

Many local government retain their lawyer not as an employee or as an appointed officer, but rather as an independent contractor to serve as counsel to the village. Thus the local government would need to enter into the contract like it would for any other professional contract. For example, pursuant to Village Law § 4-412, all contracts must be approved by the village board. Generally, contracts entered into by the village require only a majority vote of the fully constituted board of trustees, without the approval of the mayor. Consequently, retaining a village attorney as an independent contractor has the potential to create a situation in which the village board hires a "village attorney" that the mayor does not approve. However, care must be exercised in retaining an attorney as a contractor. The Internal Revenue Service (IRS) and other governmental agencies review decisions to retain a worker as a contractor as opposed to placing the individual on a municipal payroll. For issues related to payroll and taxation, the IRS will determine whether a worker is a contractor or is properly placed on the payroll. Villages may complete IRS Form SS-8 to obtain such a determination without charge.

The "village attorney" is generally responsible for advising and representing the mayor in carrying out his or her statutorily-imposed responsibilities and duties. Thus, even if a village retains a village attorney as an independent contractor approved by the board, the village mayor should also approve the individual hired. A village board of trustees that would force the mayor to use an attorney whom (s)he does not approve of or consent to use would be unworkable, creating a conflict between the mayor and the attorney. Such an outcome would appear to violate Rules 1.2 and 1.7 of the Rules of Professional Conduct for Lawyers in New York State. Consequently, if the mayor and the board of trustees cannot agree on hiring the "village attorney" as an independent contractor, it is the opinion of

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[1] Haller v. Carlson, 42 A.D.2d 829 (4th Dep't. 1973).

the staff of the New York State Conference of Mayors that the mayor and the board of trustees should consider retaining separate legal counsel.

Retaining Separate Counsel

To the extent that the mayor and a majority of the board of trustees cannot agree on the hiring, appointing, or contracting of one lawyer to represent both the mayor and the board, separate counsel could be retained. Moreover, even for the vast majority of villages that retain one attorney to serve as "village attorney" who is then responsible for representing the village and advising both the mayor and the board, a conflict of interest may arise, requiring the board of trustees and the mayor to retain separate lawyers to represent them in the performance of their statutory responsibilities.

Several cases address the need and propriety of retaining separate counsel. As the Court of Appeals has noted,

> *Notwithstanding lack of specific statutory authority*, a municipal board or officer possesses implied authority to employ counsel in the good faith prosecution or defense of an action undertaken in the public interest, and in conjunction with its or his official duties where the municipal attorney refused to act, or was incapable of, or was disqualified from, acting.[2] [emphasis added]

Perhaps the most illustrative case on this issue involved a situation where a city council in a Second Class City sought to retain its own counsel. Pursuant to Second Class Cities Law § 12, the corporation counsel is appointed solely by the mayor. However, pursuant to Second Class Cities Law § 201, the corporation counsel is the "legal adviser of the common council and of the several officers, boards and departments of the city" including the mayor. The court acknowledged, "How can [the corporation counsel] be expected to serve two masters?" before concluding,

> It is further clear that the courts in this state have recognized an implied authority in municipalities for various boards or branches to appoint independent counsel in cases where there is a clear conflict of interest *despite the fact that applicable statutes make no such provision.*[3] [emphasis added]

Municipal officials must use caution, however, when retaining legal counsel without prior board approval, because doing so runs the risk of incurring an expense which the board may not approve of as an appropriate municipal expense and which a court may disallow as reimbursable from the village.

In addition, villages frequently hire other lawyers to provide specific legal services to the village, such as bond or labor counsel or to provide counsel to the zoning board of appeals (ZBA) or the planning board. The retention of these other attorneys via an independent contract may or may not warrant mayoral approval. When the responsibility of a lawyer is to advise the mayor with respect to one of his or her statutory responsibilities, the mayor's approval is generally warranted.

Factors to consider when deciding whether to retain separate lawyers are the added cost of paying two lawyers versus the confusion, conflict, and uncertainty that could arise if a single attorney becomes enmeshed in a disagreement between the mayor and the board of trustees. If a single attorney is

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2 Cahn v. Town of Huntington, 29 N.Y.2d 451, 455 (1972).

3 Hanna v. Rewkowski, 81 Misc.2d 498 (Sup. Ct. Oneida Co. 1975).

retained to represent the mayor and the board, it is recommended that village officials have frank and open discussions about the process for retaining separate counsel should the need arise. Mayors and boards that are unable to agree on whether separate lawyers will be hired and on the scope of those legal services, run the risk of having to resolve the dispute in court; a proposition that is generally not inexpensive and which could potentially defeat the cost-savings of using only one attorney. Failure to do so can result in confusion about the ability to retain counsel without board approval and appropriation, an issue that was addressed in greater detail in the article, **"A Legal Conundrum: When Can a Municipal Official Retain Outside Counsel at the Expense of the Municipality Without Prior Approval?,"** ***NYCOM Municipal Bulletin*****, March-April 2009, pp 25-26, also available to download from the members only section of the NYCOM website.** In addition, defense and indemnification of employees is a separate but related issue (see Chapter 13, **Error! Reference source not found.** on page **Error! Bookmark not defined.** for a detailed understanding of this issue).

Defining Scope of Legal Services

To avoid confusion and the accumulation of unnecessary legal fees, village officials should address the scope of the services to be provided by the "village attorney" or separately retained lawyers at the outset of retaining legal counsel. Questions to address when defining a lawyer's scope of services are: who is the client, who may contact the lawyer, how may contact with the lawyer be initiated (e.g., via phone, email, and/or in writing), what topics may be covered in the correspondence, what is the extent of the services provided (e.g., attending meetings, drafting proposed laws and resolutions, legal advice, litigating cases, prosecuting cases, etc.), and what are the maximum number of hours that may be billed per month without additional prior approval? It is essential to address these issues at the outset of legal representation to avoid confusion, conflict, and higher-than-expected legal bills.

The duties of the village attorney are not specifically set forth in statute, but the attorney usually works closely with most village departments, officers, and bodies, especially the board of trustees. The specific services which a village attorney performs are assigned by the board and may include:

- Attending regular and special board meetings;
- Preparing legal notices, contracts, and opinions;
- Acting as local or general bonding counsel;
- Providing services in connection with the acquisition of easements and title to real property, including negotiations with property owners;
- Preparing local laws, ordinances, and resolutions;
- Representing the village in eminent domain, assessment, and other court proceedings, including appeals;
- Consulting with village officials, employees, and members of the public regarding matters involving the village;
- Attending meetings of the ZBA, planning board, and other village boards and commissions and preparing legal notices and opinions for them;
- Reviewing insurance coverage; and
- Giving legal advice in contract negotiations with employee groups or acting as chief negotiator if requested to do so by the board of trustees.

Alternatively, the county district attorney is responsible for prosecuting criminal cases, district attorneys rarely involve themselves with prosecutions in village justice courts. Thus, the village

attorney may, with the district attorney's permission, prosecute violators of village laws or any person accused of committing an offense, infraction, or criminal act within the village. Additionally, the village may retain additional counsel to prosecute these cases. The board of trustees may pay reasonable compensation to either the village attorney or outside counsel for prosecuting criminal cases.

Qualifications of Village Attorney

Regardless of how a village attorney is retained, whether as an employee, a public officer, or an independent contractor, the village board of trustees, should expressly address (via local law or resolution) whether the "village attorney" or any other lawyer retained must reside in the village. If a village does not expressly provide that an attorney position is a public officer of the village who serves a term of office, it is likely to be considered a position of employment.[4]

[4] Senecal v. City of Cohoes, 27 A.D.2d 773 (3d Dep't. 1967); Rappel v. Roberts, 79 Misc.2d 201 (Sup. Ct. Nassau Co. 1973); see also Fisher v. City of Mechanicville, 225 N.Y. 210 (1919).

Being a Public Officer: What Does that Mean?

Qualifications of Office Holders

Public Officers Law § 3(1), to be eligible to hold an elective or appointive village office, an individual must be:

- Eighteen years of age or older;
- A citizen of the United States; and
- A resident of the village.

The Oath of Office

Public Officers Law § 10 requires all public officials, both elected and appointed, to take and file an oath of office within 30 days of the commencement of their term of office. Failure to take and file an oath within the time required by law creates a vacancy in the office. Each time an official is reelected or reappointed, a new oath of office must be filed.

Pursuant to Election Law § 15-128, the village clerk must, within three days of the conclusion of the election, notify the winners of the village election that they must file an oath of office and an undertaking, if required, to qualify for office. The notice must set forth that the oath and undertaking must be filed with the village clerk. It should be noted that in addition to the ceremonial swearing-in which generally takes place at the village's organizational meeting, village officials must file a written oath of office with the village clerk within 30 days of taking office.

While the oath of office is generally administered at the organizational meeting, the oral recitation of the oath of office is for ceremonial purposes only. For the oath of office to be effective, a written signed oath of office must be filed with the village clerk. A village justice must also file an oath of office with the county clerk and the Office of Court Administration.[5] The registrar of vital statistics, deputy registrars and sub-registrars must also file their oaths of office with the county clerk.[6]

Pursuant to New York State Constitution Article 13, § 1, the oath of office reads as follows:

> I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of_, according to the best of my ability.

Public Officers Law § 10 sets forth that the oath of office may be administered by:

- A judge of the Court of Appeals;
- The New York State Attorney General;
- Any officer authorized to take, within the State, the acknowledgment of the execution of a deed of real property (this includes a notary public);[7]
- An officer in whose office the oath is required to be filed (i.e., the village clerk) or by his or her duly designated assistant; and

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5 Uniform Justice Court Act § 104.

6 Public Health Law § 4123.

7 See Real Property Law § 298.

- In the case of a member of a body of officers (e.g., the board of trustees), by the presiding officer (e.g., the mayor) or clerk of the body of officers who has already taken an oath of office.

In addition, Village Law § 4-402(h) specifically authorizes village clerks to administer the oath of office to all village officers.

Real Property Law § 298 provides that certain other persons are permitted to administer the oath of office:

- Within the entire State of New York:
  - Justices of the Supreme Court;
  - Official examiners of title;
  - Official referees; and
  - Notaries public.
- Within the district in which the officer is authorized to perform his or her official duties:
  - Judges and clerks of a court of record;
  - Commissioners of deeds outside the City of New York;
  - Mayors and recorders of a city;
  - Surrogates, special surrogates, and special county judges; and
  - County clerks and other recording officers of a county.
- Additional officers:
  - Town justices;
  - Town council members;
  - Village justices; and
  - Judges of any court of inferior local jurisdiction anywhere within the county containing the town, village or city in which he or she is authorized to perform official duties.

Vacancies in Office

Causes of Vacancies

Pursuant to Public Officers Law § 30, a vacancy in elective or appointive office that is not due to the expiration of the term of office occurs when any of the following events take place:

- Death of the incumbent;
- Resignation;
- Removal from office;
- Ceasing to satisfy the applicable residency requirements;
- Conviction of a felony, or a crime involving a violation of their oath of office;
- Declaration of incompetency by a court of law;
- A court judgment declaring their election or appointment void; and
- Failure to file the oath of office within 30 days of the commencement of their term of office.

Public Officer or Employee?

Local officials are frequently faced with the question of whether a particular position is a public office. Individuals may serve a local government in one of three ways: they may be public officers, employees, or independent contractors. Each type of service is governed by its own set of rules. Adding confusion to this issue, however, is that some public officers are employees whose employment is governed by

civil service rules, while other public officers serve a term of office and are exempt under civil service rules.

To understand this issue fully, one must first understand how a public officer is defined. New York State's courts have described public officers as those governmental positions whose duties involve the exercise of some sovereign power or powers of the municipality. Stated differently, "A position is a public office when it is created by law with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned and which is continuing in its nature and not occasional or intermittent."[8]

Even courts have had difficulty distinguishing between public officers and those employees who are not public officers. The table below compares the similarities and differences between (a) public officers who serve a term of office, (b) public officers who do not serve a term of office, and (c) employees who are not public officers:

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Must Be a Citizen of the United States;	• Must Be a Citizen of the United States;	• Is Not Required to Be a Citizen of the United States;
• Must Be at Least 18 Years Old;	• Must Be at Least 18 Years Old;	• Must Meet Minimum Age Requirements Under Labor Laws;
• Must Be a Resident of the City or Village, Unless a Local Law Has Expanded the Residency Requirement;[9]	• Must Be a Resident of the City or Village, Unless a Local Law Has Expanded the Residency Requirement;[10]	• Is Not Required to Reside in the Village Unless the Municipality Has Passed a Local Law Requiring Residency;
• Is Entitled to the Salary as an Emolument of the Office;	• Compensation is Set by Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;	• Compensation is Set by Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;

8 Smith v. Jansen, 85 Misc. 2d 81, 83 (Sup. Ct. Suffolk Co. 1975).

9 See Public Officers Law § 3 and Village Law § 3-300.

10 See Public Officers Law § 3 and Village Law § 3-300.

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Is Required to File an Oath of Office Within 30 Days of Appointment;	• Is Required to File an Oath of Office Within 30 Days of Appointment;	• Is Not Required to Take or File an Oath of Office;
• Serves a Specific Term of Office (e.g., 1, 2 or 4-Year Term);	• May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;	• May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;
• May Hold Over in Office After the Expiration of the Term of Office;	• Hold Over in Office is Inapplicable;	• Hold Over in Office is Inapplicable;
• May Vacate the Office if One of the Events Identified in Public Officers Law § 30 Occurs; and	• May Vacate the Office if One of the Events Identified in Public Officers Law § 30 Occurs; and	• Is Not Subject to Public Officer's Law § 30; Serves Until Either Voluntarily or Involuntarily Separated From Service; and
• May Be Removed From Office During the Term Pursuant to Public Officers Law § 36, Unless a Local Law Providing for the Discipline of a Public Officer Has Been Adopted.	• May Be Removed From Office Pursuant to Public Officers Law § 36, Unless a Local Law Providing for the Discipline of a Public Officer Has Been Adopted.	• Serves at the Pleasure of the Appointing Authority, Subject to the Protections Potentially Provided by Statute (i.e., Civil Service Law) or a Labor Contract.
• Examples include: • Mayor/Supervisor • City/Town Council Member • Legislator • Village Trustee • Clerk • Treasurer	• Examples include: • Police Officer • Code Enforcement Officer • Building Inspector • Parking Enforcement Officer	• Examples include: • DPW Staff • Clerical/ Administrative Staff

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Deputy Clerk • Deputy Treasurer • Comptroller/Controller		

The Open Meetings Law

The Open Meetings Law, Article 7 of the Public Officers Law (§§ 100-111), is a powerful tool which outlines basic requirements for the conduct of meetings by public bodies.

The Open Meetings Law (OML) defines a "public body" as any entity consisting of two or more members who perform a governmental function and for which a quorum is required to conduct public business.[11] This definition encompasses local legislative bodies[12] such as village boards of trustees, as well as planning boards[13] and zoning boards of appeals.[14]

Pursuant to Public Officers Law § 108 [1] and [2], courts, public bodies holding quasi judicial proceedings such as disciplinary hearings, and political caucuses are specifically exempted from the definition of "public body."

Also exempt from the OML are matters made confidential by federal or State law.[15] For villages, perhaps the most important matter made confidential by State law are meetings with an attorney, which are covered by attorney-client privilege.[16] While a village board may establish a privileged relationship with its attorney, this relationship is operable only when the village board or official seeks the attorney's legal advice acting in his or her capacity as their attorney, and the client does not waive the privilege.[17]

Public Officers Law § 102[1] defines a "meeting" as "the official convening of a public body for the purpose of conducting public business." Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be open to the public, whether or not the body intends to take action.[18] This includes "workshops," "work sessions," and "agenda sessions."[19] Chance meetings or social gatherings are not covered by the law since these are not official meetings; however, public officials should not discuss public business at chance meetings or social gatherings.[20]

Notice of Meetings

Public Officers Law § 104 requires public bodies to notify the public of the time and place of every meeting. The OML requires notice of every meeting to be:

1. Conspicuously posted in one or more public locations;
2. Given to the news media (television, radio and newspaper); and
5. Conspicuously posted on the village's website, if it has the ability to do so.

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11 Public Officers Law § 102(2).
12 N.Y. St. Comm. Open Gov't. OML-AO-3026.
13 N.Y. St. Comm. Open Gov't. OML-AO-3048.
14 N.Y. St. Comm. Open Gov't. OML-AO-2982.
15 Public Officers Law § 108(3).
16 CPLR § 4503.
17 N.Y. St. Comm. Open Gov't. OML-AO-2448.
18 Orange Co. Publications v. City of Newburgh, 60 A.D.2d 409 (2d Dep't. 1978), aff'd. 45 N.Y.2d 947.
19 N.Y. St. Comm. Open Gov't. OML-AO-4506.
20 Kissel v. D'Amato, 97 Misc.2d 675 (Sup. Ct. Nassau Co. 1979), mod on other grounds, 72 A.D.2d 790 (2d Dep't. 1979).

The OML does NOT require public bodies to pay for an official advertisement in a newspaper. Rather, the OML merely requires that the news media be notified. NYCOM recommends that public bodies fax or email the meeting notice to the news media.

The timing for the notice requirement in Public Officers Law § 104 is written in a rather confusing way. In essence, the OML provides that, if notice of a public body's meeting is given at least 72 hours prior to the meeting, then the meeting may be held for any reason.[21] However, if notice of a meeting can only be given less than 72 hours in advance of that meeting, then it may be held only if there is an exigent/emergency need for conducting the meeting on less than 72 hours' notice.[22] What constitutes an emergency in purposes of the OML is not defined in law.

Documents Scheduled for Discussion at a Meeting

Public records which are subject to disclosures under the Freedom of Information Law (FOIL), in addition to any proposed resolution, law, rule, regulation, policy or any amendment, that a public body is scheduled to discuss at an open meeting, must be made available – upon request – to the public prior to or at the meeting to the extent that the public body determines it is practicable. Municipalities have the option of charging fees consistent with FOIL for copies of the records. In addition, villages that maintain a "regularly and routinely updated website and that utilize a high speed internet connection" must post the documents on the municipal website prior to the meeting to the extent that it is practicable.[23]

Minutes

Minutes must be taken of every meeting of a public body.[24] The minutes must indicate which members of the public body were present at the meeting.[25] Additionally, the minutes must contain a summary of all motions, proposals, resolutions, and any other matters voted upon, and the actual votes.[26] The minutes of an open meeting, as opposed to an executive session, must be made available to the public within two weeks of the meeting.[27] The minutes of an open meeting during which the public body entered into executive session must indicate who made the motion to enter into executive session, the reason given for entering into the executive session, and which members of the body were present when the body entered into executive session.[28] Minutes of an executive session must be made available to the public within one week of the executive session.[29] Meeting minutes must be made available to the public within the specified period regardless of whether the board requires

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21 Public Officers Law § 104(1).

22 Public Officers Law § 104(2).

23 Public Officers Law § 103(e). Enacted by Chapter 603 of the Laws of 2011.

24 Public Officers Law § 106(1).

25 Op. State Comp. No. 90-52, which concerns a provision of the Town Law specifically requiring entry of the names of those present. Although there is no comparable provision of law applicable to villages generally, NYCOM would recommend that all villages do the same as a best practice.

26 Public Officers Law § 106(1).

27 Public Officers Law § 106(3).

28 N.Y. St. Comm. Open Gov't. OML-AO-1197.

29 Public Officers Law § 106(3).

minutes to be "approved." Approval of meeting minutes by the members of a public body at a subsequent meeting is a local procedure and not required by State law.

The State's OML requires minutes to include an accurate and complete record or summary of all:

1. Motions,
2. Proposals,
3. Resolutions, and
4. Any other matter formally voted upon by the board as well as the actual vote of each member of the public body.[30] It is a recommendation of NYCOM that a copy of any resolution or local law acted on should be appended to the minutes.

While not expressly required by the OML, it is implied that minutes must begin by noting the time, date, and location of the meeting and which members of the public body are present.[31] Although the minutes must reflect which of the public body's members are present, there is no requirement to identify all of the individuals present.[32]

Minutes are not required to be and should not be a verbatim account of the meeting. Nor should the minutes include a reference to each comment made during the meeting. However, the public body may require that an audio or video tape be made of its meetings to ensure accuracy and to resolve any disputes. Furthermore, the public body may, *by a majority vote of its membership*, require that a specific statement, text of a resolution or agreement, etc., be included verbatim in the minutes.[33]

State Law does not require the clerk to record an individual's remarks made during an open meeting or an executive session merely because the speaker so requests.[34] Without a resolution or board directive requiring the clerk to include more information in the minutes, a trustee may not require the clerk to correct or amend the minutes to include any more detailed information.[35] Boards interested in expanding the scope of what is included in the minutes should amend their rules of procedure to outline the clerk's additional responsibilities.

There is no specific statutory procedure for amending meeting minutes. **Minutes may never include a statement that was not made at the meeting nor may it include record of an action that was not taken at the meeting, as this is tantamount to creating a false record.**

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30 Public Officers Law § 106(1).

31 Op. State Comp. No. 90-52; note that this opinion discusses provisions of the Town Law that are not applicable to villages. However, the principles expressed therein apply to villages as well.

32 Id.

33 N.Y. St. Comm. Open Gov't. OML-AO-3886 and 3658.

34 N.Y. St. Comm. Open Gov't. OML-AO-1176.

35 "There is, however, no statutory requirement for the town clerk to record in the minutes the names of persons attending the meeting, other than the members of the town board." Op. State Comp. No. 90-52. Although that Opinion deals specifically with town boards. The same conclusion would apply to village board meetings.

Executive Session

Although the OML requires that all meetings of public bodies be open to the public,[36] the law also authorizes municipal boards to enter into executive session, which is defined as "that portion of a meeting not open to the general public."[37] Public bodies may only enter into executive sessions for very specific reasons, which are set forth below.

The Procedure for Entering into Executive Session

All meetings of a public body must begin as open meetings. Executive sessions may only be entered into from a properly noticed open meeting. A motion to enter into an executive session must be made during an open meeting.[38] The person making the motion must specify the subject area or areas for which the public body is entering into the executive session. The subject matters which are grounds for entering into executive session are set forth in Public Officers Law § 105(1)(a)-(h) (listed below). Any motion to enter into executive session must be carried by a majority vote of the total membership of the body.[39] At its discretion, the public body may, via a majority vote of the board, allow any person or persons to attend an executive session.[40]

The following constitutes a complete list of the subject areas for which a public body may enter into an executive session:

- Matters which, if disclosed, will imperil the public safety;
- Matters which may disclose the identity of a law enforcement agent or informer;
- Information regarding current or future investigations or prosecutions of a criminal offense which would imperil effective law enforcement if disclosed;
- Discussions of proposed, pending or current litigation;
- Collective negotiations pursuant to the Taylor Law;
- The medical, financial, credit, or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal, or removal of a particular person or corporation;
- The preparation, grading, or administration of examinations; and
- The proposed acquisition, sale, or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by the public body, but only when publicity would substantially affect the value thereof.[41]

Voting on Matters in Executive Session

A public body may vote in executive session on any of the above-referenced matters. However, a public body may never vote to appropriate public funds in executive session.[42] A public body may not discuss or vote on any matter that is not the subject of the motion which is the basis for entering into the executive session.

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36 Public Officers Law § 103(a).
37 Public Officers Law § 105(1).
38 Daily Gazette Co., Inc. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct., Schoharie Co. 1981).
39 Public Officers Law § 105(1).
40 Public Officers Law § 105(2).
41 Public Officers Law § 105.
42 Public Officers Law § 105(1).

Executive Session Minutes

If a public body takes any action by formal vote while in executive session, minutes must be taken.[43] Executive session minutes need not contain the contents of the discussion during the executive session, but must include a record, including the date and vote, of any final determinations. If no action is taken while in executive session, minutes are not required, although public officials may wish to note in the minutes that no action was taken in the executive session. Unlike minutes of regular open meetings, executive session minutes must be made available to the public within one week of the executive session.[44] Executive session minutes may be taken by a member of the public body, or the body may choose to allow the clerk to be present to take minutes.

Use of Recording Devices by the Public

Pursuant to Public Officers Law § 103(d),[45] any meeting of a public body may be recorded, broadcast, webcast, and/or photographed, provided that it is done in a way that does not disrupt the meeting. Each public body may adopt rules governing the location of equipment and personnel for such purposes, so that the meeting may be conducted in an orderly manner. Previously, several courts have ruled that the public may use recording devices as long as the use does not disrupt the meeting.[46] Thus, public bodies may not impose blanket prohibitions against the use of recording devices. However, if the use of a recording device becomes disruptive, the public body may take reasonable action to end the disruption. A member of the public body or a member of the public attending the meeting being uncomfortable with being recorded does not constitute a disruption.[47]

Public Participation

Although the OML requires that the public be allowed to attend meetings, it is silent with respect to public participation at meetings. Therefore, the public body may, at its discretion, allow the public to speak, but State law does not require that the public be allowed to do so.[48] Whatever rule a public body imposes regarding public participation, the rule must be applied equitably, with all attendees being afforded the same opportunity to participate.

Reasonable Accommodations and Program Accessibility

As the Committee on Open Government has observed, "the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies. [Accordingly,] . . . meetings should be held in locations in which those likely interested in attending have a reasonable opportunity to do so."[49] In line with that

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43 Public Officers Law § 106(2).

44 Public Officers Law § 106(3).

45 As added by L. 2010, c.43, effective on April 1, 2011.

46 Csorny v. Shoreham Wading River Central School District, 305 A.D.2d 83 (2d Dep't. 2003); Peloquin v. Arsenault, 162 Misc.2d 306 (Sup. Ct., Franklin Co. 1994); and People v. Ystuela, 99 Misc.2d 1105 (Sup. Ct., Suffolk Co. 1979).

47 Peloquin v. Arsenault, supra.

48 DeSantis v. City of Jamestown, 193 Misc.2d 197 (Sup. Ct., Chautauqua Co. 2002); see also, N.Y. St. Comm. Open Gov't. OML-AO-2894.

49 N.Y. St. Comm. Open Gov't. OML-AO-3111.

Opinion and others like it, the OML now requires[50] public bodies to make a "reasonable effort" to hold public meetings in a room which can accommodate members of the public who wish to attend.

The OML also requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit barrier free physical access to physically disabled persons.[51] In addition, the Americans with Disabilities Act (ADA)[52] requires that when programs, services, or activities are located in facilities that existed prior to January 26, 1992, the municipality must make sure that they are also available to persons with disabilities, unless to do so would fundamentally alter a program, service, or activity or result in undue financial or administrative burdens. This requirement is called "program accessibility." When a service, program, or activity is located in a building that is not accessible, a village may achieve program accessibility in several ways.[53]

It may:

- Relocate the program or activity to an accessible facility;
- Provide the activity, service, or benefit in another manner that meets ADA requirements; or
- Make modifications to the building or facility itself to provide accessibility.

Thus, to achieve program accessibility, a village need not make every existing facility accessible.[54] It may relocate some programs to accessible facilities and modify other facilities, avoiding expensive physical modifications to village facilities. **More information on ADA requirements is available at www.ada.gov.**

Violating the Open Meetings Law

If a public body holds a meeting without complying with the OML's notice requirement or without allowing the public to attend and observe the meeting, any actions taken at the meeting or as a result of that meeting may be nullified by a court. Additionally, if a public body enters into executive session for an unauthorized purpose or if, having properly entered into an executive session, the public body discusses issues or takes action on issues that are not proper for executive session, the action taken may be nullified by a court.[55] Any successful legal challenge to an OML violation may result in the court directing the offending village to pay the petitioner's costs and reasonable attorney's fees.[56]

Moreover, if a court finds a violation of the OML, it may also require that members of the public body participate in a training session to be conducted by staff of the Committee on Open Government, concerning the "obligations" imposed by the OML.[57]

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50 Public Officers Law § 103(d), as added by L. 2010, c. 40, effective April 14, 2010.

51 Public Officers Law § 103(b), see also, Public Officers Law § 74-a , and Public Buildings Law § 50(5), the latter defining "physically handicapped."

52 42 USC, Chap. 126, and 47 USC, Chap. 5.

53 Fenton v. Randolph, 92 Misc.2d 514 (Sup. Ct., Suffolk Co. 1977).

54 N.Y. St. Comm. Open Gov't. OML-AO-2865.

55 Public Officers Law § 107(1).

56 Public Officers Law § 107(2).

57 Public Officers Law § 107(1), as amended by L. 2010, c. 44.

The Committee on Open Government

The Committee on Open Government is responsible for issuing advisory opinions to agencies, the public, and the news media; issuing regulations; and annually reporting its observations and recommendations regarding the operation of the OML to the Governor and the State Legislature.[58] The Committee provides written and oral advice on questions arising under the OML or FOIL. Additionally, the Committee mediates controversies in which rights may be unclear. Municipal officers and employees needing advice regarding the OML or FOIL may, in addition to contacting NYCOM, contact the Committee at: **Committee on Open Government, NYS Department of State, One Commerce Plaza, Suite 650, 99 Washington Avenue, Albany, NY 12231, Ph (518) 474-2518, Fax (518) 474-1927, www.dos.ny.gov/coog/.**

Most of the Committee's publications are available online, including ***Your Right to Know, FOIL FAQs,*** and ***Open Meetings Law FAQs,*** as well as the actual statutory language of the FOIL and the OML. The Committee's Advisory Opinions are available online, with the opinions listed alphabetically by key phrase. If you have a question about a specific issue, such as whether building plans are subject to FOIL (which they are)[59] or whether members of a public body may vote by telephone (they may not),[60] chances are that an advisory opinion has already been written on the subject and is available online.

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58 Public Officers Law § 109.

59 N.Y. St. Comm. Open Gov't. FOIL-AO-7821.

60 N.Y. St. Comm. Open Gov't. OML-AO-4306.

Records Management

While certain local officials are specifically tasked with the responsibility of (a) handling requests for copies of public records (the records access officer), and (b) managing the retention and destruction of local public records (the records management officer), ***every public officer and employee*** is mandated by New York State Law to properly handle public records that are in their custody and control.

An Overview of "The Local Government Records Law"

The State of New York has established comprehensive rules regarding the retention and disposition of local government records. The regulations, codified in "The Local Government Records Law," NYS Arts and Cultural Affairs Law Article 57-A, not only set forth the minimum requirements for retaining and disposing of local government records, but also mandate every local government's governing body (e.g., city council, village board of trustees, town council, county legislature) and chief executive officer to have a local government records management program.

The Local Government Records Management Program

Pursuant to Arts & Cultural Affairs Law § 57.19, every local government must have a "program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research." While there is no one-size-fits-all local government records management program, the New York State Archives has identified seven attributes of effective records management programs:

1. **Creates the records it needs, but none that it doesn't** - "Records are efficiently created in the normal course of business for all functions sufficient to satisfy legal, fiscal, administrative, and other recordkeeping requirements;"
2. **Retains records that are necessary and disposes of obsolete records** - "Records are retained and usable for as long as required for legal or business purposes, and then efficiently disposed of or preserved as archives to support secondary uses;"
3. **Safely and securely stores its records (especially archival records)** - "Records are stored and maintained in a safe, secure, cost-effective fashion to support retention, access, and archival preservation where applicable;"
4. **Retrieves information quickly through efficient access and retrieval systems** - "Records systems provide effective and efficient retrieval and access to records, to support use by the creating organization and by the public as appropriate under law;"
5. **Uses the right information technology for the right reasons** - "Appropriate uses are made of information technology to store, retrieve, make available, and use records;"
6. **Promotes and supports archival records as a community resource** - "Appropriate secondary use of records by public and other entities is supported and promoted;" and
7. **Recognizes, through policy and procedure, that records management is everyone's job** - "Ongoing records management goals and priorities are integrated through the organization and its operations as part of the normal course of business."

The New York State Archives' full report on effective records management programs, which fleshes out these attributes in greater detail, can be found online at www.archives.nysed.gov/a/records/mr_pub61.pdf.

The Records Management Officer

In addition to the Local Government Records Management Program, Arts & Cultural Affairs Law § 57.19 requires every local government to have a records management officer who is responsible for coordinating the legal disposition of records, including the destruction of obsolete records.

The records management officer has an independent, statutorily-mandated responsibility to oversee the municipality's records management program. This responsibility includes initiating, coordinating, and promoting the systematic management of the municipality's records in conjunction with other local officers, and may include providing training to the municipality's other officials and employees about properly handling of records. The records management officer needs to work with the mayor, manager (if applicable), and local legislative body to insure that the necessary resources are dedicated to implementing local government's records management program.

The Records Retention Schedule: The Guide to When Local Records May be Disposed

The New York State Education Department has been tasked with the responsibility of creating a schedule outlining when records may be disposed. Consequently, the Education Department has promulgated Records Retention and Disposition Schedule MU-1. Last revised in 2003, Schedule MU-1 is an exhaustive list of the various types of records that are created by, and come into the custody of, local governments.

The schedule identifies each type of local government record and states when it may be disposed of. For example, "[o]fficial minutes and hearing proceedings of governing body or board, commission or committee thereof including all records accepted as part of minutes" must be kept permanently. Other types of records require more extensive analysis to determine when they may be disposed of. For example, correspondence (whether it be via email or paper), may be required to be kept (a) permanently if it is "[d]ocumenting significant policy or decision making or significant events, or dealing with legal precedents or significant legal issues," (b) for six years if the correspondence is "[c]ontaining routine legal, fiscal or administrative information," or (c) not at all if the correspondence is "[o]f no fiscal, legal or administrative value (including letters of transmittal, invitations and cover letters)."

Each municipality is required to review and adopt by resolution Records Retention and Disposition Schedule MU-1, although failure to adopt the resolution does not obviate a municipality's obligation to comply with Schedule MU-1. **A copy of MU-1 is available online at www.archives.nysed.gov/a/records/mr_pub_mu1.shtml.** The records management officer may only dispose of records pursuant to Schedule MU-1, and other municipal officials may only dispose of local government records when authorized to do so by the records management officer and pursuant to the local government's records management program.

Proper Records Management: Every Municipal Official and Employees' Responsibility

The proper handling of local government records is not solely the responsibility of the municipality's records management officer. To the contrary, Arts and Cultural Affairs Law § 57.25 imposes the following responsibilities on ***every local government official and employee***:

- Maintain records to adequately document the transaction of public business and the services and programs for which the officer is responsible;

- Retain and have custody of such records for so long as the records are needed for the conduct of the business of the office;
- Adequately protect such records;
- Cooperate with the records management officer on programs for the orderly and efficient management of records;
- Dispose of records in accordance with legal requirements; and
- Pass on to his or her successor records needed for the continuing conduct of business of the office.

In addition, Arts and Cultural Affairs Law § 57.25(2) provides that "[n]o local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education." Every local official and employee should be trained that they may not destroy any local record, except pursuant to State law, the local government records management program, and the local records management officer.

Moreover, Public Officers Law § 80 requires every public officer to "demand from [his or her] predecessor in office or any person in whose possession they may be, a delivery to such officer of all books and papers, money and property belonging or appertaining to such office. If such demand is refused, such officer may make complaint thereof to any justice of the Supreme Court of the district, or to the county judge of the county in which the person refusing resides." Upon assuming office, every officer or employee should familiarize themselves with the records under their custody and control. If at any point an officer or employee determines that records are missing or have been destroyed, they should report it to the records management officer.

An official or employee's failure to properly handle public records within their custody and control is not merely a violation Arts and Cultural Affairs Law or the Public Officers, but it is also potentially a crime. Tampering with and improperly destroying local government records is a crime as outlined below:

- Pursuant to Penal Law § 175.20, a "person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant." Tampering with public records in the second degree is a Class A misdemeanor.
- Pursuant to Penal Law § 175.25, a "person is guilty of tampering with public records in the first degree when, knowing that [he or she] does not have the authority of anyone entitled to grant it, and with intent to defraud, [he or she] knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant." Tampering with public records in the first degree is a class D felony.

Local officials and employees who become aware of improper tampering with or destruction of local public records should report the occurrence to superior officers and local law enforcement.

If a local official or employee is not certain about how they should handle a record, they should consult with the local records management officer.

If there is concern that permanent records have been destroyed, local officials or employees should contact the State Education Department, Archives and Records Administration at (518) 474-6926 or visit the State Archives website at www.archives.nysed.gov/aindex.shtml.

Handling Electronic Records

Email: A Public Record Warranting a Separate Account

Email are records under State law and are subject to both the Freedom of Information Law (FOIL) and New York's records management/retention requirements. In order to more effectively and efficiently handle emails that are local government records, it is highly recommended that local officials and employees be assigned and use official email accounts that are administered and maintained by the local government for official local government business. Using personal email accounts for public business complicates the process of handling FOIL requests and retaining and disposing of emails that are public records.

Separate Accounts and Passwords

Access to electronic records should be protected. Consequently, access to information technology systems, both hardware and software, should be password protected, requiring each municipal official to access the systems with their own unique username and password. Local officials should never share account usernames or passwords. To the extent that multiple municipal officials need access to the same systems and records, each official should be assigned their own user account.

Backups and Archives

Local records management programs should provide for secure, offsite backup and archiving of electronic records. The benefits of digitizing existing hardcopy records and using electronic methods for records management are substantial. However, because electronic records can be destroyed (either deliberately or accidentally), local officials need to implement policies and procedures that protect against the loss of historic and necessary local government records.

Grants

The State has provided funding to assist local governments in managing their records. Local governments may also apply for Local Government Records Management Improvement Fund (LGRMIF) Grants to help finance the cost involved in records management. **For more information on these grants and for other information on records management and retention, contact the State Education Department, State Archives and Records Administration, Albany, NY 12230; (518) 474-6926.**

Local Government Records Checklist

The following are some questions local government officials can ask to implement effective local records management:

- Has the local government adopted a local records management plan and does the municipality review it on an annual basis to determine if it is meeting the municipality's needs?
- Does the municipality periodically review and adopt the Records Retention and Disposition Schedule MU-1?

- Has the municipality empowered the records management officer to develop and administer a local government records training program for the municipal officers?
- Does the municipality train officials and employees when they take office and then periodically thereafter?
- When a local official or employee leaves service, does the municipality conduct an exit interview to insure that the official or employee understands their obligations to turn over all local government records within their custody and control?
- Has the municipality established a reporting program so that officers and employees may report when local government records have been improperly disposed of or destroyed?

Local government records are integral for running a local government. Consequently, local government officials need to make establishing and implementing an effective local government records management program a priority that is regularly reviewed to insure that it is meeting not only the requirements of State law, but also the needs of the municipality.

2019 Election Law Update

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I. Overview

a. 2019 was a significant year for election reform in New York State.
    i. The Assembly and the Senate passed 37 substantive changes to the Election Law touching all aspects of how elections and campaigns are conducted in New York. Out of that number, 14 bills have been signed by the Governor so far.
b. New York State adopted reforms that brought the state more in line with the rest of the country. For example:
    i. New York is now one of 39 states that allows for in-person early voting.[i]
    ii. New York took steps to amend its constitution to allow voters to vote absentee without an excuse. If the amendment is approved, the New York would join the 28 other states that permit no-excuse absentee voting.[ii]
c. According to a Brennan Center study, many of the reforms enacted in New York State have been linked to higher registration rates, greater voter roll accuracy, and savings in public dollars.iii
d. These reforms are in part a response to New York's recent history of consistently low voter turnout.[iv]
    i. In the 2018 General Election, New York State ranked 10th from the bottom, with 45.2% of eligible voters turning out.[v]
    ii. In the 2016 Presidential Election, New York State ranked 13th from the bottom, with 56.8% of eligible voters casting a ballot for President.[vi]
e. This outline will discuss the most significant election reforms passed in both houses of the Legislature and signed by the Governor, and breakdown which reforms will be effective for the 2020 general election. It will also provide a preview of legislation that will likely be considered in 2020.

II. Reforms in place for the 2020 General Election or earlier.

a. **<u>Early Voting</u>**
    i. A.780/S.1102 - Ch. 6 of the laws of 2019 (effective for 2019 general election).

ii. *Early voting period*. Provides for nine days of in-person early voting starting on the second Saturday before Election Day and ending on the Sunday before Election Day. The early voting period for the 2019 general election will be October 26 – November 3. N.Y. ELEC. L. § 8-600.

iii. *Elections.* Applies to all general, primary, and special elections starting with the general election in 2019, except for village elections held pursuant to title 2 of art. 6 or art. 15 of the Election Law. *Id*.

iv. *Early voting sites.* Each board of elections shall at a minimum designate one polling place for every fifty thousand registered voters in each county, provided that no county will be required to have more than seven polling places, and that the number of polling places may be reduced by the local board of elections for primary and special elections based upon need. Examples of designations as of September 13, 2019:

1. New York City: 57 sites. 11 in The Bronx, 18 in Brooklyn, 7 in Manhattan, 14 in Queens, and 7 in Staten Island.
2. Suffolk County: 10 sites.
3. Erie County: 37 sites.
4. Saratoga County: 3 sites.

v. *County-wide voting.* The early voting law creates a presumption that all qualified voters in a county will be able to vote at any early voting poll site in said county. However, a board of elections may assign voters to different poll sites within a county if: (i) it is impractical to provide all election district ballots at each site or (ii) it would be difficult to prevent double voting. N.Y. ELEC. L. § 8-600.

b. **State/Local and Federal Primary Consolidation**

i. A.779/S.1103 - Ch. 5 of the laws of 2019 (effective for 2019 primary election).

ii. *Primary election date.* As of 2019, the legislation requires that all local, state, and federal primary elections (except for the presidential primary and primaries for village offices) be held on the fourth Tuesday in June.

iii. *Relationship with federal law*. As recently as 2010, state/local and federal primaries in New York occurred on the same date in September. In 2012, a federal district court ordered New York to move its federal (non-presidential) primary to the fourth Tuesday in June because the state was in violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA) as amended by the Military and Overseas Voter Empowerment Act (MOVE), which requires that absentee ballots for military and overseas voters be transmitted 45 days in advance of federal elections.[vii]

iv. *Military and overseas ballots*. To further comply with federal law, the legislation increased the number of days prior to a primary or general election that a military ballot or overseas ballot must be transmitted to a voter from 32 days to 46 days in advance of such elections. ELEC. L. §§ 10-108(a); 11-204(4).

v. Other notable changes:

1. *Vacancies*. The legislation extended the period before which an occurring vacancy in certain elective offices must be filled at a general election in the same year (if not previously filled by an election). This has the effect of potentially postponing more vacancy elections to the following year. PUB. OFF. L. §42(1).
2. *Local Referenda*. The legislation moved up the deadline by which the board of elections must receive a local referendum proposal from the municipal clerk for it to appear on a general election ballot. ELEC. L. § 4-108(1)(b). Confusingly, related deadlines in other statutes, such as MUN. HOME RULE L. § 36 on city charter revision commissions, were not conformed to this change.

c. **<u>Statewide Registration Transfer</u>**

i. A.775/ S.1099 - Ch. 3 of the laws of 2019 (effective March 25, 2019).

ii. *Statewide transfers*. Allows for voter registration records to be transferred from one county or city to another and updated if a registered voter submits a notice of a change of address or for any voter who submits an

affidavit ballot with a new address. Prior to the legislation's effective date, a voter would have to re-register to vote if he or she moved in or out of New York City or from one county to another outside of New York City.

iii. *Effect on registration deadlines*. The legislation will make fewer voters subject to the deadline for new registrations.

1. New registrations must be postmarked on or before the 25th day before the next ensuing primary, general or special election, and received no later than the 20th day before such election (e.g. Oct. 11 – Oct. 16 for the 2019 general). *See* N.Y. ELEC. L. § 5-210(3).
2. Registration transfers must be received 20 days before the ensuing primary, general or special election (e.g. Oct. 16 for the 2019 general). *See* N.Y. ELEC. L. § 5-208(3), but affidavit ballots can be used at the election in the case of transfers within the state even if transfers were not received.

d. **Pre-Registration for 16 and 17 year-olds**

i. A.774/ S.1100 - Ch. 2 of the laws of 2019 (effective January 1, 2020).

ii. Allows eligible voters who are at least sixteen years of age to submit a voter registration application which will become automatically effective when the applicant turns eighteen years of age. Pre-registration records will be stored alongside other registration records in the central file and marked "pending."

iii. *Rationale*. In New York registration of persons 18 to 29 years of age has traditionally lagged registration for all other age groups.[viii] Moreover, the state is in a better position to collect pre-registration data at sixteen and seventeen years of age because school attendance is mandatory and young people tend to first apply for their driver's licenses at such ages.

e. **E-Poll Books**

i. Part XX, Ch. 55 laws of 2019 (effective April 12, 2019).

ii. Updates the Election Law to clarify that counties may use computer generated lists of eligible voters, also known as "e-poll books," to verify

voter eligibility at poll sites rather than using printed paper lists. E-poll books are used in some jurisdictions in New York but have not explicitly been authorized by statute until now. *See* ELEC. L. § 1-104.

iii. *Security*. State Board of Elections will promulgate minimum security standards for e-poll books and will approve any e-poll book technology before it can be used. *Id.*

iv. *Relationship with early voting*. The State Board of Elections has indicated that e-poll books will be necessary to implement early voting and has approved a vendor to provide e-poll book technology.[ix]

f. **Paid Voting Leave**

i. Part YY, Ch. 55 of the laws of 2019 (effective April 12, 2019).

ii. Requires all public and private employers in the state to permit their employees at the beginning or end of a work shift to take up to three hours of compensated time off from work as needed to vote at any election. Employees must notify their employers at least two days before the election prior to taking the time off.

iii. Previously, the law would only permit an employee compensated time off to vote if the employee did not have "sufficient time" outside their working hours to vote. An employee was deemed to have sufficient time if he or she had four consecutive hours either between the opening of the polls and the start of the work shift or between the end of the work shift and the closing of the polls. Such a voter needed to notify the employer at least ten days in advance, and was only allotted up to two hours of leave.

g. **Uniform Polling Hours during Primary Elections**

i. Part BBB, Ch. 55 of the laws of 2019 (effective January 2020).

ii. Creates uniform polling hours for primary elections in the state. In such elections, polling places are to be open from 6:00am to 9:00pm.

iii. Previously, only polling places for primary elections held in the city of New York and the counties of Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Dutchess and Erie were required to be open from 6:00am

to 9:00pm. All other counties were required to be open from 12:00pm to 9:00pm.

III. Awaiting Governor's signature

As of September 13, 2019, the following bills have passed both the Assembly and the Senate but have not yet been presented to the Governor for signature.

a. **Change of Enrollment Deadline**

   i. A.8228B/S.6532A (effective immediately upon signature).

   ii. This bill would allow an already registered voter change his or her party enrollment or newly enroll in a party up until February 14 in a calendar year. Any change of enrollment received after February 14 would be effective seven days after the Primary election that year.

   iii. Under current law, if a voter with an existing registration record wishes to change his or her party enrollment or newly enroll in a party to be eligible to vote in a primary election, he or she must submit a change of enrollment at least 25 days prior to the general election in the year prior to that primary. *See* ELEC. L. § 5-304(3).

b. **Voter Friendly Ballot Act**

   i. A.2682A/S.2300A (effective July 2020 if signed this year).

   ii. This makes several technical changes to ballot design, such as placing voting ovals to the left of a candidate's name, ensuring no more than three languages appear on a single ballot, streamlining ballot instructions, requiring multiple envelopes for absentee ballots returnable by mail, and minimum standards for font size, as well as removing unnecessary symbols and outdated terminology.

c. **Affidavit Ballot Canvassing**

   i. A.1320A/S.3045B (effective immediately upon signature).

   ii. This bill is intended to prevent a voter's affidavit ballot from being disqualified simply due to minor technical errors such as failing to indicate a previous voting address. Affidavit ballots cast by a person entitled to

vote are to be counted if the ballot "substantially complies" with the requirements in the Election Law.

IV. Effective after the 2020 General Election

a. **Online Voter Registration**

i. Part CCC, Chapter 55 of the laws of 2019 - Voter Enfranchisement Modernization Act of 2019 ("VEMA") (effective April 2021 or date of State Board certification of online platform).

ii. *Online platform*. By April 2021, the State Board of Elections will create an online platform that will allow all eligible voters to complete a voter registration application online. Such applications are then electronically transmitted to the relevant local board of elections for processing and eligibility verification.

iii. *Signatures*. The legislation permits applicants to sign the online application with an electronic or manual signature, or with a signature used with a DMV application. Signatures are used in New York State for voter identification purposes. *See* N.Y. CONST. ART. II, § 7; ELEC. L. § 8-304. VEMA expressly permits use of electronic signatures for voter registration purposes, but only in compliance with the State's Electronic Signature and Records Act (ST. TECH. L. Art. 3) and State Board of Elections regulations.

iv. *MyDMV*. Since 2012, the State has had an online registration platform for persons who have a driver's license or non-driver ID through the Department of Motor Vehicles—known as MyDMV. The New York State Bar Association Special Committee on Voter Participation found that 64 percent of New York City residents lack DMV IDs.[x] VEMA would allow these residents and other non-DMV customers to register to vote online.

v. *Affidavit ballots*. Voters that cast affidavit ballots and submitted an application via the State Board's online platform will have their ballots counted.

V. Pending Constitutional Amendments

These pieces of legislation are concurrent resolutions of the Senate and Assembly approved by both chambers this legislative session. The resolutions must be passed again in the 2020-21 session before they can go before the voters for approval.

a. **Authorizing Same-Day Voter Registration**

   i. A.777/S.1048 (2019-20). Eliminates the state constitutional requirement that voter registration be completed at least ten days prior to any election (N.Y. CONST. ART. II, § 5), authorizing the legislature to enact a statute for same-day voter registration.

b. **Authorizing No-Excuse Absentee Ballots**

   ii. A.778/S.1049 (2019-20). Under current law, a voter may only cast an absentee ballot if he or she expects to be absent from the county in which they live, or the City of New York, or because of illness for physical disability. This constitutional amendment would eliminate those preconditions on absentee voting, and allow the Legislature to enact a statute permitting voting by mail.

VI. Looking Ahead to the 2020 Legislative Session

a. **Automatic Voter Registration (AVR)**

   i. (A. 8280/S. 6457 (2019-20))

   ii. This bill would register or update registration information of eligible citizens who interact with government agencies unless they affirmatively decline. The bill would also direct the Board of Elections to implement a system where registration information is transferred electronically between government agencies and election officials.

   iii. The bill would implement automatic voter registration at the Department of Motor Vehicles, the Office of Children and Family Services, the Office of Temporary and Disability Assistance, and the Department of Health. Furthermore, the Board of Elections would be allowed to designate other government agencies as AVR agencies.

iv. A Brennan Center study of states that have adopted AVR found that AVR markedly increases the number of voters being registered.[xi]

b. **Voting Rights Restoration**

i. (A.4987/S.1931 (2019-20)).

ii. This bill would restore voting rights to people on parole. Under current law, persons convicted of a felony are denied the right to vote for the term of their incarceration and parole. The bill would also require courts to notify individuals about the loss of voting rights prior to accepting a guilty plea for a felony, and would require correctional facilities to register persons to vote upon release from incarceration.

iii. *Governor Cuomo's Executive Order*. A.4987/S.1931 would codify a voting rights restoration process that began with an executive order from the Governor. On April 18, 2018 Governor Cuomo announced that he would use his executive authority to restore voting rights to New Yorkers under supervision by the New York State Department of Corrections and Community Supervision following release from a New York State prison.[xii] In May 2018, the Governor announced that 24,000 New Yorkers have had their voting rights restored, and more would be restored on a rolling basis.[xiii]

iv. *Jim Crow in New York*. The history of criminal disenfranchisement in New York State is linked to a nearly two-centuries-old effort to deprive African Americans the right to vote.[xiv]

VII. Campaign Finance

a. **The Public Campaign Financing and Election Commission**

i. Part XXX, Ch. 59 of the laws of 2019.

ii. The Legislature and the Governor, as part of the budget, created a commission tasked with recommending a new voluntary public financing system for statewide and state legislative offices.

iii. *Jurisdiction*. The Commission may consider all aspects and components reasonably related to the administration of a public financing system

including the ratio of matching funds, contribution limits, eligible uses of matching funds, and candidate eligibility.

iv. *Members*. The Commission has nine members: two appointed by the Governor; two appointed by the Senate Majority Leader; two appointed by the Assembly Speaker; one at large seat jointly selected by the Governor, the Assembly Speaker and the Majority Leader; and one appointee each for the two minority leaders.[xv]

v. *Final Recommendations*. The Commission is required to hold a public hearing on its findings and recommendations and to produce a public report by December 1, 2019. The Commission's recommendations "shall have the force of law" unless they are modified or abrogated by statute enacted before December 22, 2019.

vi. *The Fair Elections Act*. In crafting is final recommendations, the Commission may consider past public financing proposals introduced in the Assembly and the Senate. The Fair Elections Act (S.7593 (2017-18)), for example, would provide a $6-to-$1 match on each private contribution of up to $250, and is similar to the match rate seen in New York City's public financing program.

vii. *Pending Legal challenges.* In July, the Working Families Party[xvi] and the Conservative Party,[xvii] alongside voters and candidates, brought suits against the Commission. Both suits were filed in Niagara County Supreme Court and both seek a declaratory judgment finding the Commission's enabling statute unconstitutional to the extent it empowers the Commission to interfere with plaintiffs' state constitutional right to "fusion voting." Plaintiffs also assert that the statute unconstitutionally delegates legislative authority to the Commission.

    1. *Right to Fusion Voting.*

        a. The Commission is empowered to make recommendations concerning "multiple party candidate nominations and/or designations" i.e. "fusion voting."

b. It is unclear if the Commission or the Legislature may end fusion voting by statute, in light of past skepticism by the Court of Appeals of statutory limitations in this area. *See Devane v. Touhey*, 33 N.Y.2d 48, 53 (1973); *see also In re Callahan*, 200 N.Y. 59, 63 (1910).

2. *Delegating Legislative Authority.*

a. If the Legislature takes no action after December 1, the Commission's recommendations will have "the force of law, and shall supersede . . . inconsistent provisions of the election law."

b. It is reasonable to anticipate a possible broader challenge to the delegation of legislative authority that has been made to the Commission.

c. Other Commissions with arguably similar delegations of authority have been challenged, such as the "Commission on Prosecutorial Conduct" (Ch. 202 of the laws of 2018 and Chapter 23 of the Laws of 2019)[xviii] or the "Committee on Legislative and Executive Compensation" (Part HHH of Ch. 59 of the laws of 2018).[xix] Litigation concerning both of these commissions is pending.

b. **<u>Closing the "LLC Loophole"</u>**

i. Ch. 4 of the laws of 2019 (effective January 31, 2019).

ii. This legislation makes political contributions made by Limited Liability Companies (LLCs) or other corporate entities subject to the aggregate contribution limits for corporations. Such entities will only be able to donate up to $5,000 in the aggregate in any calendar year. ELEC. L. § 14-116.

1. Prior to this enactment, LLCs were instead treated as individuals under the Election Law and allowed to donate up to $65,100 to every statewide candidate per election cycle.

iii. LLCs that make political contributions will have to report all direct and indirect owners and the proportion of each owner's interest in the LLC. The LLC's contribution will then be attributed to such owners in proportion to the member's ownership interest.

VIII. New York City 2019 Charter Revision Commission

a. 2019 New York City Charter Revision Commission was created by Local Law 91 of 2018, and is the first charter revision commission in New York City's history that was not either entirely appointed by the Mayor or appointed under special state legislation.

b. The Commission consists of 15 members appointed by nine separately elected officials: four members were appointed by the Mayor, four by the Speaker of the Council, and one apiece by the Public Advocate, the Comptroller, and each Borough President.

c. The Commission conducted multiple hearings in all five boroughs and took public comment for over a year before voting to approve its proposed revisions to the City Charter on July 24, 2019.[xx]

d. Every eligible New York City voter will be able to vote on the proposals on November 5, 2019. The revisions are enacted into law with a simple majority of the votes cast on Election Day.

e. Elections Proposals -- Ballot Question 1:

i. **Ranked Choice Voting**: The Charter Revision Commission proposed instituting ranked choice voting, also known as instant runoff voting, for all primary and special elections for Mayor, Public Advocate, Comptroller, Borough President, and City Council Member. General elections would remain unchanged and use the traditional plurality method of "first past the post."

1. *How it works*. Voters would be able to rank in order of preference up to five candidates, including a write-in candidate. If no candidate receives a majority of first-choice votes, the candidate with the least number of first choice votes would

be eliminated and the voters who chose that candidate would have their votes transferred to their selected second-choice candidate. This process would repeat until two candidates remain, and the candidate with the most votes at that point would win the election.

2. *Home Rule*
    a. Article IX of the State Constitution and section 10 of the Municipal Home Rule Law authorize the City to adopt local laws relating to its government and the mode of selection of its officers, provided that these laws are consistent with the State Constitution and general State laws.
    b. The Court of Appeals, in *Bareham v. City of Rochester*, 246 N.Y. 140 (1927), interpreted the power to adopt local laws related to the mode of selection of officers as meaning that "a municipality may define the precise method by which either an election or appointment shall be effected." Although that decision invalidated the relevant local law concerning nonpartisan elections for its failure to specify its relationship to state law, it also preserved considerable flexibility for municipalities in experimenting with local democracy.

ii. **City Council Redistricting**: The Charter Revision Commission proposed changes to the City's redistricting process in order to compensate for changes in the election calendar caused by the consolidation of the state/local and federal primaries.

1. *Background*. New York City Council redistricting is carried out by a Districting Commission appointed by the Mayor and the City Council. The redistricting process following the 2020 Census will begin in 2022 after a new City Council and Mayor assume office. *See* N.Y.C. Charter § 50.

2. *Proposal*. The proposed new redistricting timeline is more accelerated so that the redistricting process can conclude three months before the start of petition gathering for the June 2023 primary ballot. Newly elected officials will need to appoint commissioners to the City's Districting Commission in the first few months after taking office.

iii. **City Special Elections**: The Charter Revision Commission proposed changes to the City's special election calendar (N.Y.C. Charter §§ 10, 24, 25, 81, 95), to ensure there is enough time for the Board of Elections to transmit military and overseas ballots to voters.

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[xii] Exec. Order No. 181, Office of the Governor (April 18, 2018), https://www.governor.ny.gov/news/no-181-restoring-right-vote-new-yorkers-parole.

[xiii] Press Release, Office of the Governor (May 22, 2018), https://www.governor.ny.gov/news/governor-cuomo-issues-first-group-conditional-pardons-restoring-right-vote-new-yorkers-parole.

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[xvii] Verified Complaint, *Jastrzemski et al. v. Public Campaign Fin. and Elec. Comm'n et al.*, No. 169561-19 (Sup. Ct., Niagara Co., July 22, 2019), https://www.courthousenews.com/wp-content/uploads/2019/07/Jastrzemski-niagara.pdf.

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Alcoholic Beverage Regulation and Local Governments

Paul Karamanol, Esq.
New York State Liquor Authority

2006 N.Y. AG LEXIS 4

Office of the Attorney General of the State of New York

2006 N.Y. Op. (Inf.) Att'y Gen. 2;

Reporter
2006 N.Y. AG LEXIS 4 *; 2006 N.Y. Op. (Inf.) Att'y Gen. 2;;

Informal Opinion No. 2006-2; INFORMAL OPINION

February 15, 2006

Core Terms

alcoholic beverage, local law, preempt, state law, municipal, regulatory scheme, home rule, underage, local legislation, vending machine, consume, obscene, tobacco, ban

Syllabus

[*1]

N.Y. CONST. Art. IX, § 2(c)(10); PENAL LAW §§ 260.20(2), *260.21(1)*; ALCOHOLIC BEVERAGE CONTROL LAW §§ 65(1), 65(5), 65-a, 65-b(2)(a),(b), 65-c, 65-d, 79-c(l), 99-f, 100(2-a), (2-b), 106(17), 126(2); GENERAL OBLIGATIONS LAW §§ 11-100(1), 398-C, 399-d; MUNICIPAL HOME RULE LAW § 10(1)(ii)(a)(12); TAX LAW § 480-a; PUBLIC HEALTH LAW Art. 13-E; CH. 799, 1992 N.Y. LAWS 4202; *PUBLIC HEALTH LAW §§ 1399-aa - 1399-mm*.

Enactment of "teen party host" local law is not preempted by state law.

Request By: Michael L. Klein

Town Attorney

Town of Ramapo

237 Route 59

Suffern, New York 10901

Opinion By: KATHRYN SHEINGOLD, Assistant Solicitor General, In Charge of Opinions

Opinion

You have requested an opinion regarding the authority of the Town to enact **[*2]** a local law that would prohibit any person over 16 years of age from hosting a party at a premises under his or her control where five or more minors

(meaning any person under 21 years of age) are present and alcohol is being consumed by any minor. The penalty for violating the local law would be a fine ranging from $ 250 to $ 1000. You have explained that the purpose of the proposed local law is to prevent underage drinking. You have asked whether the local law is preempted by state law.

The Legislature has enacted a number of statutes generally restricting access to alcoholic beverages by underage individuals. Several of these provisions are directed towards persons other than the underage drinker: a person is prohibited from giving, selling, or causing to be given or sold any alcoholic beverage to a person less than 21 years old, [1] *Penal Law § 260.20(2)*; see also *Alcoholic Beverage Control Law § 65(1)* (prohibiting selling, delivering, or giving away, or causing or permitting or procuring to be sold, delivered, or given away any alcoholic beverage to any person actually or apparently under the age **[*3]** of 21 years); and from misrepresenting the age of a person under the age of 21 years for the purpose of inducing the sale of any alcoholic beverage to such person, *Alcoholic Beverage Control Law § 65-a*. Moreover, a person who knowingly causes the intoxication or impairment of ability of a person under the age of 21 years by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for that minor may be civilly liable to a third party who is injured by reason of that intoxication. [2] *General Obligations Law § 11-100(1)*. Related provisions of the Alcoholic Beverage Control Law direct that an entity licensed to sell alcoholic beverages may accept as written evidence of age only certain types of documentation. [3] *Alcoholic Beverage Control Law § 65-b(2)(b)*. Licensees also must conspicuously display a notice regarding the illegality of the sale or giving of alcoholic beverages to persons under the age of 21 years and of the presentation of identification that is false, fraudulent, or not that of the presenter for the purpose of purchasing or **[*4]** attempting to purchase alcoholic beverages. Id. § 65-d.

Other statutes are directed towards the underage persons themselves: an underage person is prohibited from presenting or offering to a licensee under the Alcoholic Beverage Control Law any written evidence of age that is false, fraudulent, or not actually his or her own for the purpose of purchasing or attempting to purchase any alcoholic beverage, *Alcoholic Beverage Control Law § 65-b(2)(a)*; and from possessing any alcoholic beverage with the intent to consume it, id. § 65-c. **[*6]** [4]

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[1] The exceptions to this prohibition are (1) the parent or guardian of a person under the age of 21 years or (2) a person who gives an alcoholic beverage to a person under the age of 21 years who is a student in a curriculum licensed by the State Education Department and who is required to taste or imbibe alcoholic beverages in courses that are part of the required curriculum; the alcoholic beverages must be used only for instructional purposes during classes. *Penal Law § 260.20(2)*; see also *Alcoholic Beverage Control Law § 65(5)*. The Town's proposed law appears to recognize the parent-child exception, as it does not apply to "conduct between a minor child and his or her parent or guardian." Proposed Ramapo Teen Party Local Law § 2(B). Moreover, the "teen party host" prohibition applies "except as otherwise permitted by law." Id. § 2(A).

[2] The supplier of the alcoholic beverage must have had knowledge or reasonable cause to believe that the drinker was under the age of 21 years. *General Obligations Law § 11-100(1)*.

[3] A licensee may accept only (1) a valid driver's license or non-driver identification card issued by the Commissioner of Motor Vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States, or a provincial government of the dominion of Canada, (2) a valid passport issued by the United States government or any other country, or (3) an identification card issued by the armed forces of the United States. *Alcoholic Beverage Control Law § 65-b(2)(b)*.

[4] Also restricted are the entrance onto business premises on which alcoholic beverages are sold or given away, ***Penal Law § 260.21(1)***; see also *General Business Law §§ 398-c* and *399-d*; the ability to place an order for an out-of-state direct shipment of wine, *Alcoholic Beverage Control Law § 79-c(l)*; access to alcoholic beverages through vending machines in hotel rooms, id. § 106(17); and employment by establishments dealing with alcoholic beverages, id. §§ 99-f, 100(2-a) and (2-b), 126(2).

The Town's proposed local law is directed towards a third group of persons: a host providing access to premises under his or her control, whether or not he or she is supplying or consuming alcoholic beverages. [5] As explained below, we are of the opinion that the State has not preempted this type of local legislation.

[*7]

ANALYSIS

A town has broad power to enact local laws pursuant to the law of municipal home rule, including those relating to the safety, health, and well-being of persons within the town. [6] See *N.Y. Constitution article IX, § 2(c)(10)*; *Municipal Home Rule Law § 10(1)(ii)(a)(12)*. The town may adopt these local laws pursuant to its home rule power as long as they are "not inconsistent with the provisions of the constitution or not inconsistent with any general law" [7] and "except to the extent that the legislature shall restrict the adoption of such a local law. " *Municipal Home Rule Law § 10 (1)(ii)*.

The preemption doctrine constitutes a fundamental limitation on home rule powers. *Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377 (1989).* Where the Legislature has expressed an intent to preempt a field of regulation, a municipality may not legislate in that field absent clear and specific authorization. *Robin v. Incorporated Village of Hempstead, 30 N.Y.2d 347, 350-51 (1972).* This limitation "embodies the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern." *Albany Area Builders, 74 N.Y.2d at 377,* quoting *Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 497 (1977).* Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's interest, even if the terms of the local law do not directly conflict with a state statute. Id. at 377. Such laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding **[*9]** policy concerns. *Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 97 (1987).* The mere fact, however, that the state law and the proposed local law would touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area. *Id. at 99.*

The Legislature's intent to preempt a field of regulation need not be express, but may be implied from the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme, including the need for statewide uniformity in a given area. *Albany Area Builders, 74 N.Y.2d at 377.* Typically, courts have relied upon an expression of policy or the presence of a comprehensive and detailed regulatory scheme to find that an area of law has been preempted. [8] See *Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983).*

As discussed above, under state law, a person under 21 years may not present false identification for the purpose of purchasing alcoholic beverages, nor may he or she possess an alcoholic beverage with the intent to consume it. *Alcoholic Beverage Control Law §§ 65-b(2)(a)*, *65-c*. No person, except a person who fits within a statutory exception, may provide an alcoholic beverage to a person under the age of 21 years, nor may any person misrepresent the age of a person under the age of 21 years for the purpose of inducing a sale of an alcoholic beverage to that person. *Penal Law § 260.20(2)*; *Alcoholic Beverage Control Law §§ 65(1)* and *65-a*. Supplying a minor with

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[5] A "host" under the proposed local law may well simultaneously fall into one of the other groups, either by providing alcoholic beverages to persons under the age of 21 years, or by him- or herself being a person under the age of 21 years who possesses an alcoholic beverage with the intent to consume it.

[6] You have indicated that the proposed local law would serve this purpose.

[7] See Op. Att'y Gen. (Inf.) No. 86-74 (a municipality may not enact a local law banning consumption of alcoholic beverages in public or private places by anyone under the age of 21 years because it would be inconsistent with state law) .

[8] We note that the Alcoholic Beverage Control Law has been held to be preemptive with respect to the "field of regulation of establishments which sell alcoholic beverages. " ***People v. De Jesus, 54 N.Y.2d 465, 467 (1981).*** The Town's proposed law appears to fall outside the scope of that field of preemption, as it does not apply to "any location or place regulated by the New York State Liquor Authority." Proposed Ramapo Teen Party Local Law § 2(C).

alcoholic beverages may render a person civilly liable to a third party injured as a result the minor's intoxication. General Obligations Law § 11-100(1). We are of the opinion that this regulatory scheme does not preempt a local law of the type proposed by the Town.

With respect to access **[*11]** to alcoholic beverages by underage persons, the state statutes do not include an express statement of preemption. Moreover, none of them include a statement of policy indicating an intent to preempt local regulation or an expression of need for uniform control of access to alcoholic beverages by minors.

The more difficult question is whether the statutes constitute a comprehensive and detailed regulatory scheme indicating that the Legislature has "evinced its desire to preclude the possibility of local regulation, " Jancyn, 71 N.Y.2d at 98. On balance, we believe that they do not. Rather, we believe that the state legislation is "not so broad in scope or so detailed as to require a determination" that it has superseded all local legislation. Id. at 99. We are of the opinion that the regulatory scheme is comparable to others that have been found by New York courts to have no preemptive effect. See, e.g., id. (state scheme regulating the sale and use of certain sewer system cleaning additives in Suffolk and Nassau Counties not sufficiently broad in scope or detailed as to require conclusion of preemption where **[*12]** only certain toxic chemicals were banned, the Commissioner of Environmental Conservation was not vested with exclusive jurisdiction, and no direct controls at local level were imposed); People v. Judiz, 38 N.Y.2d 529 (1976) (state law prohibiting possession of toy gun with intent to use it unlawfully against another did not preempt local law prohibiting possession of toy guns resembling in specific ways real guns); Zorn v. Howe, 276 A.D.2d 51, 54 (3d Dep't 2000) (state law governing eviction from leased premises because of illegal business activity conducted on premises did not preempt local law establishing illegal drug use and possession as basis for eviction; "the mere fact that the Legislature chose to address illegal business activity . . . in no way evidences an intent to preclude a municipality from exercising its municipal home rule power by similarly addressing illegal private activities"); People v. Ortiz, 125 Misc. 2d 318, 329 (state law regulating weapons did not preempt local law proscribing possession or carrying of knives with blades at least four inches long without a lawful **[*13]** purpose; "silence by the State on a particular issue should not be interpreted as an expression of intent to preempt"); but see Matter of Penny Lane/East Hampton, Inc. v. County of Suffolk, 191 A.D.2d 19 (2d Dep't 1993) (Penal Law provisions dealing with obscenity preempted local law prohibiting display of obscene materials where state law established complete ban on obscene material and on dissemination to minors of obscene materials, provided for the seizure and destruction of obscene materials, and established criminal penalties for the public display of offensive sexual materials); Dougal v. County of Suffolk, 102 A.D.2d 531 (2d Dep't 1984) (State enacted comprehensive and detailed regulatory scheme in the field of drug-related paraphernalia and thus preempted local law regulating the sale of certain merchandise characterized as drug paraphernalia; legislative scheme included total ban on sale of drug-related paraphernalia, prescribing criminal and civil penalties for selling or offering to sell such items, authority for the commencement of injunctive actions by local officials against violators, and authority for the **[*14]** destruction of specified items seized, as well as detailed instructions concerning the procedures to be employed locally in implementing the ban), aff'd, 65 N.Y.2d 668 (1985).

We find particularly instructive the decisions in Vatore v. Commissioner of Consumer Affairs, 154 Misc. 2d 149 (N.Y. Sup. Ct. 1992), rev'd, 192 A.D.2d 520 (2d Dep't 1993), rev'd, 83 N.Y.2d 645 (1994), in which state laws regulating access to tobacco products by minors were ultimately held not to preempt local legislation in the field. At issue in Vatore was a New York City law prohibiting the siting of tobacco-product vending machines in public places other than taverns. 83 N.Y.2d at 647. The purpose of the local law was to reduce the access of minors to tobacco products. Id. The local law was challenged, in part on the ground that it was preempted by state law. Id. at 648. In support of this argument, the plaintiffs cited four state statutes, including Penal Law § 260.20, [9] prohibiting **[*15]** the sale of tobacco to a person under 18 years. [10] Id. at 648 n.1; 154 Misc. 2d at 152. Supreme Court concluded that the

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[9] The plaintiffs also cited Tax Law § 480-a, requiring the registration of dealers and vending machines with the State Department of Taxation and Finance; ***General Business Law § 399-e***, requiring the posting of a notice on the machine regarding the prohibition of the sale of cigarettes to minors; and Public Health Law article 13-E, regulating smoking indoors in buildings open to the public. 154 Misc. 2d at 152.

[10] This provision was subsequently recodified at ***Penal Law § 260.21***.

Legislature had not adopted a comprehensive scheme of regulation that preempted the local law. *154 Misc. 2d at 152.* In 1992, while an appeal of the Supreme Court's decision was pending, the State enacted the *Adolescent Tobacco-Use Prevention Act. 83 N.Y.2d at 648.* Based on this enactment, the Appellate Division found that the local law was preempted and thus invalid. *192 A.D.2d at 521.* The Appellate Division agreed, however, with Supreme Court that, prior to the 1992 enactment, the local law had not been preempted. Id.

The Court of Appeals addressed only the issue of whether the local law was preempted by the Adolescent Tobacco-Use Prevention Act, [11] and held that it was not. *83 N.Y.2d at 647, 650.* The Act did not express any general preemptive intent. *Id. at 649.* Moreover, the Court found absent from the Act any expression of need for uniform statewide control of tobacco-product vending machines. *Id. at 650.* The Court also concluded that the statutory scheme was not so "broad and detailed in scope as to require a determination that it has precluded all local regulation in the area, particularly where, as here, the local law would only further the State's policy interests." Id.

As the Court of Appeals found in Vatore with respect to the Adolescent Tobacco-Use Prevention Act, we have found no expression of need for uniform statewide control in the legislation regulating access to alcoholic beverages by minors. Moreover, like the Court of Appeals in Vatore, we believe that the regulatory scheme is not so broad and detailed so as to require the conclusion that the Legislation has precluded local regulation in the area. Indeed, the state regulatory scheme with respect to access to alcoholic beverages by minors is similar to that determined by Supreme Court and affirmed by the Appellate Division not to be preemptive in Vatore. It regulates and prohibits particular behavior of specified individuals but does not constitute a comprehensive scheme regulating all aspects of access to alcoholic beverages by minors, and it is silent with respect to providing access to private premises on which alcohol is available. Because we believe the legislative scheme contains no clear indication of an intent to preclude local legislation in the field of access to alcoholic beverages by minors, we are of the opinion that local legislation of the type proposed by the **[*18]** Town is not preempted by state law.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

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[11] The Act regulates the distribution of tobacco products without charge or by vending machine; requires the posting of notices announcing the illegality of selling tobacco products to minors; and provides procedures for the enforcement at the local level of the provisions of the Act. Act of Aug. 7, 1992, ch. 799, 1992 N.Y. Laws 4202 (codified as amended at ***Public Health Law §§ 1399-aa*** - ***1399-mm***).

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DJL Rest. Corp. v. City of New York

Court of Appeals of New York

February 15, 2001, Argued ; March 29, 2001, Decided

No Number in Original

Reporter
96 N.Y.2d 91 *; 749 N.E.2d 186 **; 725 N.Y.S.2d 622 ***; 2001 N.Y. LEXIS 944 ****

DJL Restaurant Corp., Doing Business as Shenanigans, et al., Appellants, v. City of New York et al., Respondents.

Prior History: [**1]** Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 13, 2000, which affirmed an order and judgment (one paper) of the Supreme Court (Stephen G. Crane, J.), entered in New York County, converting a motion by defendants to dismiss the complaint into a motion for summary judgment for a declaration in favor of defendants, granting the motion, and declaring that application of the Amended Zoning Resolution of the City of New York to plaintiffs, licensees of the New York State Liquor Authority, is not barred by the doctrine of ***preemption*** as a matter of law.

DJL Rest. Corp. v City of New York, 271 AD2d 275, affirmed.

Disposition: Affirmed.

Core Terms

zoning, local law, establishments, ***Municipal***, ***preempted***, adult, local government, Alcoholic, alcoholic ***beverage***, regulating, City's, adult entertainment, ordinance, state statute, liquor

Case Summary

Procedural Posture
Plaintiffs adult establishments appealed an order of the Appellate Division (New York), upholding a grant of summary judgment in favor of the defendant city, contending that the New York City, N.Y., Amended Zoning Resol. § 12-10 was ***preempted*** by the New York Alcoholic ***Beverage*** Control (ABC) Law.

Overview

Adult establishments sued the city seeking a declaratory judgment that the ABC law ***preempted*** § 12-10. The trial court granted summary judgment to the city and the appellate court affirmed. The establishments appealed as of right pursuant to *N.Y. C.P.L.R. 5601(b)(1)* to the Court of Appeals of New York. After reviewing the ABC law and § 12-10, the Court of Appeals held that § 12-10 was a local law of general application. Because its thrust was zoning and not the regulation of ***alcohol***, § 12-10 applied across the board to all adult establishments, whether they sold alcoholic ***beverages*** or not. Section 12-10 was directed at alleviating the secondary effects of adult establishments, and any impact on those that happened to sell alcoholic ***beverages*** was merely incidental to the city's land use scheme.

Outcome
The order upholding the grant of summary judgment was affirmed.

LexisNexis® Headnotes

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

HN1[] **Local Governments, Duties & Powers**

In general, local governments have only the lawmaking powers the legislature confers on them. Zoning is an

exercise of that power.

Governments > Local Governments > Duties & Powers

HN2 **Local Governments, Duties & Powers**

See N.Y. Const. art. IX, § 2(c)(ii).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

HN3 **Local Governments, Duties & Powers**

The New York ***Municipal*** Home Rule Law specifically gives a municipality, such as the City of New York, the power to enact local laws for the protection and enhancement of its physical and visual environment and for the government, protection, order, conduct, safety, health, and well-being of persons or property therein. N.Y. ***Mun.*** Home Rule Law § 10(1)(ii)(a)(11)-(12). In keeping with N.Y. Const. art. IX, however, the ***Municipal*** Home Rule Law prohibits a city from adopting local laws inconsistent with the state constitution or any general law of the state. N.Y. ***Mun.*** Home Rule Law § 10(1)(ii).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

HN4 **Local Governments, Duties & Powers**

See N.Y. ***Mun.*** Home Rule Law § 2(5).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

HN5 **Local Governments, Duties & Powers**

N.Y. ***Mun.*** Home Rule Law § 11 expressly prohibits local governments from legislating on various subjects.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Governments > Local Governments > Ordinances & Regulations

Environmental Law > Land Use & Zoning > Constitutional Limits

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN6 **Zoning, Constitutional Limits**

N.Y. ***Mun.*** Home Rule Law § 10(6) explicitly authorizes cities to adopt, amend, and repeal zoning regulations. Thus, the constitutional and statutory scheme authorizes the City of New York to adopt zoning resolutions, as long as the action is consistent with the state constitution and state statutes.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Relations With Governments

HN7 **Constitutional Law, Supremacy Clause**

Local laws that conflict with state statutes are ***preempted***.

Governments > Local Governments > Duties & Powers

Governments > State & Territorial
Governments > Legislatures

Governments > State & Territorial
Governments > Relations With Governments

HN8 **Local Governments, Duties & Powers**

State ***preemption*** occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a state statute and second, when a local government legislates in a field for which the state legislature has assumed full regulatory responsibility. The New York State Legislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Governments > State & Territorial
Governments > Legislatures

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

Governments > State & Territorial
Governments > Relations With Governments

HN9 **Legislative Controls, Implicit Delegation of Authority**

An implied intent to ***preempt*** may be found in a declaration of state policy by the state legislature or from the fact that the legislature has enacted a comprehensive and detailed regulatory scheme in a particular area. In that event, a local government is precluded from legislating on the same subject matter unless it has received clear and explicit authority to the contrary. More specifically, a local law regulating the same subject matter is deemed inconsistent with the state's overriding interests because it either (1) prohibits conduct which the state law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe, or (2) imposes additional restrictions on rights granted by state law.

Banking Law > Consumer Protection > State Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN10 **Consumer Protection, State Law**

It is well settled that the New York Alcoholic ***Beverage*** Control Law impliedly ***preempts*** its field.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > General Overview

HN11 **Zoning, Ordinances**

The New York City Amended Zoning Resolution requires a minimum of 500 feet between an adult establishment and a school or place of worship, while the New York Alcoholic ***Beverage*** Control Law requires only 200 feet. New York City, N.Y. Zoning Resol. §§ 32-01(b), 42-01(b), with *N.Y. Alco. Bev. Cont. Law § 64(7)(a)*.

Governments > Local Governments > Ordinances & Regulations

HN12 **Local Governments, Ordinances & Regulations**

The New York Alcoholic ***Beverage*** Control Law has its own provisions governing nudity in licensed premises. *N.Y. Alco. Bev. Cont. Law § 106(6-a)*.

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial
Governments > Legislatures

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Relations With Governments

HN13 **Alcohol Related Offenses, Distribution & Sale**

The New York State Legislature enacted the New York Alcoholic ***Beverage*** Control (ABC) Law to promote temperance in the consumption of alcoholic ***beverages*** and to advance respect for the law. In carrying out its objectives, the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor.

Governments > Legislation > Interpretation

Real Property Law > Zoning > General Overview

Governments > Local Governments > Ordinances & Regulations

HN14 **Legislation, Interpretation**

Alcohol is not land. The control of ***alcohol*** involves considerations very different from the use of land. Indeed, the New York Alcoholic ***Beverage*** Control Law and the New York City A mended Zoning Resolution are directed at completely distinct subject matters.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > General Overview

HN15 **Zoning, Ordinances**

One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.

Governments > Legislation > Interpretation

Real Property Law > Zoning > General Overview

HN16 **Legislation, Interpretation**

The purpose of a ***municipal*** zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally.

Real Property Law > Zoning > General Overview

HN17 **Real Property Law, Zoning**

By regulating land use, a zoning ordinance inevitably exerts an incidental control over any of the particular uses or business that may be allowed in some districts but not others. Nevertheless separate levels of regulatory oversight can coexist.

Governments > State & Territorial
Governments > Relations With Governments

HN18 **State & Territorial Governments, Relations With Governments**

State statutes do not necessarily ***preempt*** local laws having only tangential impact on the state's interests.

Banking Law > Consumer Protection > State Law > General Overview

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial
Governments > Relations With Governments

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Local Governments > Ordinances & Regulations

HN19 **Consumer Protection, State Law**

Local laws of general application--which are aimed at legitimate concerns of a local government--will not be ***preempted*** if their enforcement only incidentally

infringes on a ***preempted*** field. Thus, an establishment selling alcoholic ***beverages*** will not be exempt from a local law requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Governments > Local Governments > Ordinances & Regulations

HN20[] **Zoning, Comprehensive Plans**

The New York City, N.Y., Amended Zoning Resol. § 12-10 applies not to the regulation of ***alcohol***, but to the locales of adult establishments irrespective of whether they dispense alcoholic ***beverages***.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN21[] **Zoning, Comprehensive Plans**

A municipality has a legitimate, legally grounded interest in regulating development within its borders.

Headnotes/Syllabus

Headnotes

Municipal Corporations - Zoning - Regulation of "Adult Establishments" - No Conflict with Alcoholic ***Beverage*** Control Law

The Amended Zoning Resolution (AZR) of New York City, to the extent that it regulates the location of "adult establishments," does not conflict with and, thus, is not ***preempted*** by the Alcoholic ***Beverage*** Control (ABC) Law. The AZR is a local law of general application. Because its thrust is zoning and not the regulation of ***alcohol***, it applies across the board to all adult establishments, whether they sell alcoholic ***beverages*** or not. Further, the AZR is directed at alleviating the secondary effects of adult establishments, and any impact on those that happen to sell alcoholic ***beverages*** is merely incidental to the City's land use scheme. While the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor, the AZR applies not to the regulation of ***alcohol*** but to the locales of adult establishments, irrespective of whether they dispense alcoholic ***beverages***.

Counsel: *Zane & Rudofsky,* New York City (*Edward S. Rudofsky* and *Arlene H. Schechter* of counsel), for appellants. I. Application of the anti-adult entertainment amendments to the Zoning Resolution of the City of New York to State Liquor Authority-regulated adult liquor licensees featuring adult entertainment is barred by the doctrine of ***preemption***. (*California v LaRue, 409 US 109*; *New York State Liq. Auth. v Bellanca, 452 US 714*; **[****2]** *Matter of 17 Cameron St. Rest. Corp. v New York State Liq. Auth., 48 NY2d 509*; *Seagram & Sons v Hostetter, 16 NY2d 47, 384 US 35*; *People v De Jesus, 54 NY2d 465*; *Matter of Ames v Smoot, 98 AD2d 216*; *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 133 Misc 2d 206, 141 AD2d 468, 74 NY2d 761*; *Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372*; *Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441*; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*.) II. Topless dancing in liquor licensed premises is a constitutionally protected and harmless form of entertainment exclusively regulated by the State with "community input" pursuant to *Alcoholic **Beverage** Control Law § 64*. (*Matter of Beal Props. v State Liq. Auth., 45 AD2d 906, 37 NY2d 861*; *Salem Inn v Frank, 364 F Supp 478, 501 F2d 18*, *mod sub nom. Doran v Salem Inn, 422 US 922*; *Salem Inn v Frank, 522 F2d 1045*; *Jay-Jay Cabaret v State of New York, 164 Misc 2d 673, 215 AD2d 172, 87 NY2d 802, 918*; **[****3]** *Tunick v Safir, 209 F3d 67*; *Crane Neck Assn. v New York City/Long Is. County Servs. Group, 61 NY2d 154*.)

Michael D. Hess, Corporation Counsel of New York City (*Julian L. Kalkstein* and *Larry A. Sonnenshein* of counsel), for respondents. The New York City Zoning Law adult establishment amendments are not ***preempted*** by the *New York State Alcoholic **Beverage** Control Law. (People v De Jesus, 54 NY2d 465*; *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d 761*; *Stringfellow's of N. Y. v City of New York, 91 NY2d 382*; *Buzzetti v City of New York, 140 F3d 134*; *Hickerson v City of New York, 146 F3d 99*; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*; *Matter of Town of Islip v Caviglia, 73 NY2d 544*; *Good Humor Corp. v City of New York, 290 NY 312*; *Pomeranz v City of New York, 1 Misc 2d 486, 7 AD2d 752*; *People v*

Hardy, 47 NY2d 500.)

Judges: ROSENBLATT, J. Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY **[****4]** and GRAFFEO concur.

Opinion by: ROSENBLATT

Opinion

[*93] [188] [***623]** Rosenblatt, J.

In 1995, the New York City Council approved an amendment to the City's Zoning Resolution to regulate the location of "adult establishments." Plaintiffs are adult establishments licensed to dispense alcoholic ***beverages***. [1] They contend that the Amended Zoning Resolution conflicts with and is therefore ***preempted*** by the Alcoholic ***Beverage*** Control Law. We disagree.

I.

In the mid-1960s, the adult entertainment industry in New York City began experiencing significant growth. This trend continued and by the early 1990s there were hundreds of such establishments located throughout the City. In 1993, the New York City Department of City Planning **[****5]** commissioned its study on the impact of this industry on the quality of urban life (*see generally, Stringfellow's of N. Y. v City of New York, 91 NY2d 382, 392-394)*. The City concluded that adult establishments produced adverse **[***624]** secondary effects such as increased crime rates, reduced property values, neighborhood deterioration and inappropriate exposure of children to sexually oriented environments (*see,* 1994 Dept of City Planning Report on Adult Entertainment Study; *see also, City of New York v Stringfellow's of N. Y., 96 NY2d 51* [decided today]).

After conducting public hearings and amassing an extensive legislative record, in 1995 the City amended its Zoning Resolution to combat the problem and improve **[**189]** the quality of urban life (*see,* NY City Amended Zoning Resolution ["AZR"] § 12-10 ["Adult establishment"]). Among other provisions, the AZR requires that adult establishments be confined to the City's manufacturing and high density commercial zoning districts (*see,* NY City Amended Zoning Resolution § 32-01 [b]; § 42-01 [b]).

Plaintiffs sued the City, seeking a declaratory judgment that the **[****6]** Alcoholic ***Beverage*** Control Law ("ABC Law") ***preempts*** the AZR. In lieu of answering, the City moved to dismiss. Supreme Court treated the City's motion as one for summary judgment and granted it. Plaintiffs appealed and the Appellate Division **[*94]** affirmed. Plaintiffs appeal to this Court as of right (*see, CPLR 5601 [b] [1]*), and we now affirm.

II.

We begin by reviewing the relationship between the State and its local governmental units in connection with their respective exercise of legislative power. We have noted that ***HN1***[] in general, local governments "have only the lawmaking powers the Legislature confers on them" (*Kamhi v Town of Yorktown, 74 NY2d 423, 427*; *see also, People v De Jesus, 54 NY2d 465, 468)*. Zoning is an exercise of that power (*see, Trustees of Union Coll. v Members of Schenectady City Council, 91 NY2d 161, 165*; *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 NY2d 406, 412)*. **[****7]** *Article IX, § 2 (c) (ii) of the New York State Constitution* provides that ***HN2***[] "every local government shall have power to adopt and amend local laws *not inconsistent* with the provisions of this constitution or any general law … except to the extent that the legislature shall restrict the adoption of such a local law" (emphasis added).

To implement article IX, the Legislature enacted the ***Municipal*** Home Rule Law (*see generally, Kamhi v Town of Yorktown, 74 NY2d, at 428-429*, *supra;* Analysis of the ***Municipal*** Home Rule Law, Mem of Office for Local Government, reprinted in McKinney's Cons Laws of NY, Book 35C, at XV). ***HN3***[] It specifically gives a municipality, such as the City of New York, the power to enact local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (*see, **Municipal** Home Rule Law § 10 [1] [ii] [a] [11]-[12]*). In keeping with article **[****8]** IX, however, the ***Municipal*** Home Rule Law prohibits the City from adopting local laws inconsistent with the State Constitution or any general law of the State (*see,*

[1] Plaintiffs are DJL Restaurant Corp., doing business as "Shenanigans," WESJOE Restaurant Corp., doing business as "New York Dolls" and 320 West 45th St. Restaurant Inc., doing business as "Private Eyes." All feature adult entertainment in the form of topless dancing.

Municipal Home Rule Law § 10 [1] [ii]). [2]

[*625]** *Section 10 (6)* of the Statute of Local Governments *HN6*[] **[****9]** explicitly authorizes cities to "adopt, amend and repeal zoning regulations." Thus, this constitutional and statutory scheme authorizes the City to adopt zoning resolutions, as long as they are **[*95]** consistent with the State Constitution and State statutes. *HN7*[] Local laws that conflict with State statutes are ***preempted*** (*see, Matter of Ardizzone v Elliott, 75 NY2d 150, 155*; **[**190]** *Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 96)*.

Broadly speaking, *HN8*[] State ***preemption*** occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a State statute (*see, e.g., Consolidated Edison Co. v Town of Red Hook, 60 NY2d 99, 107)* and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility (*see, e.g., New York State Club Assn. v City of New York, 69 NY2d 211, 217*, *affd 487 US 1*). The State Legislature may expressly **[****10]** articulate its intent to occupy a field, [3] but it need not. It may also do so by implication.

HN9[] An implied intent to ***preempt*** may be found in a "declaration of State policy by the State Legislature … or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (*see, Consolidated Edison Co. v Town of Red Hook, 60 NY2d, at 105*, *supra; see also, Robin v Incorporated Vil. of Hempstead, 30 NY2d 347, 350)*. In that event, a local government is "precluded from legislating on the same subject matter unless it has received 'clear **[****11]** and explicit' authority to the contrary" (*see, People v De Jesus, 54 NY2d, at 469*, *supra* [quoting *Robin v Incorporated Vil. of Hempstead, 30 NY2d, at 350-351*, *supra*]). More specifically, "a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe … or (2) imposes additional restrictions on rights granted by State law" (*Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d, at 97*, *supra*).

HN10[] It is now well settled that the State's ABC Law impliedly ***preempts*** its field (*see, Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d 761, 762-763*; *People v De Jesus, 54 NY2d, at 469*, *supra*).

Accordingly, plaintiffs argue that the City's AZR makes impermissible inroads in a ***preempted*** field. They contend that **[*96]** the AZR conflicts with the ABC Law in several important respects. They note, for example, that **[****12]** *HN11*[] the ABC Law has its own provisions governing nudity in licensed premises (*see, Alcoholic **Beverage** Control Law § 106 [6-a]*). **[***626]** They also point out that *HN12*[] the AZR requires a minimum of 500 feet between an adult establishment and a school or place of worship, while the ABC Law requires only 200 feet (*compare,* NY City Amended Zoning Resolution § 32-01[b]; § 42-01 [b], *with Alcoholic **Beverage** Control Law § 64 [7] [a]*). Thus, plaintiffs argue, owing to these and similar points of conflict the AZR is unenforceable against them.

The City, on the other hand, contends that the AZR is a local law of general **[**191]** application. Because its thrust is zoning and not the regulation of ***alcohol***, the AZR applies across the board to all adult establishments whether they sell alcoholic ***beverages*** or not. The City also emphasizes that the AZR is directed at alleviating the secondary effects of adult establishments, and any impact on those that happen to sell alcoholic **[****13]** ***beverages*** is merely incidental to the City's land use scheme. We agree with the City.

HN13[] The Legislature enacted the ABC Law to promote temperance in the consumption of alcoholic ***beverages*** and to advance "respect for [the] law" (*see, Alcoholic **Beverage** Control Law § 2*). In carrying out its objectives, the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor (*see, Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d, at 762-763*, *supra; People v De Jesus, 54 NY2d, at 469*, *supra; see generally,* New York State Moreland Commission Reports on the Alcoholic ***Beverage*** Control Law). *HN14*[] ***Alcohol***,

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[2] *HN4*[] The ***Municipal*** Home Rule Law defines a "general law" as a "state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (*Municipal Home Rule Law § 2 [5]*). *HN5*[] *Section 11 of the **Municipal** Home Rule Law* also expressly prohibits local governments from legislating on various subjects.

[3] *See e.g., Environmental Conservation Law § 23-2703 (2)* (stating that "this title shall supersede all … local laws relating to the extractive mining industry"); *see generally, Matter of Gernatt Asphalt Prods. v Town of Sardinia (87 NY2d 668, 680-683)*.

however, is not land. Indeed, the ABC Law and the AZR are directed at completely distinct activities.

HN15[] One of the most significant functions of a local **[****14]** government is to foster productive land use within its borders by enacting zoning ordinances (*see generally,* 1 Anderson, American Law of Zoning § 2.16 [Young 4th ed]; 6-A McQuillin, ***Municipal*** Corporations §§ 24.123.20, 24.123.30, 24.123.40 [3d rev ed]; Crocca, Annotation, *Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses,* 10 ALR5th 538). In Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126, 131), we held that HN16[] the "purpose of a ***municipal*** zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally." The AZR does just **[*97]** that, and stands in contrast to laws that regulate alcoholic ***beverages***.

To be sure, HN17[] by regulating land use a zoning ordinance "*inevitably exerts an incidental control* over any of the particular uses or businesses which … may be allowed in some districts but not in others" **[****15]** (Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d, at 131, *supra* [emphasis added]; *see also,* Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d, at 681-682, *supra*). Nevertheless, as we have observed, "separate levels of regulatory oversight can coexist" (*see,* Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d 500, 507). HN18[] State statutes do not necessarily ***preempt*** local laws having only "tangential" impact on the State's interests (*see, id., at 506*). HN19[] Local laws of general application--which are aimed at legitimate concerns of a local government--will not be ***preempted*** if their enforcement only incidentally infringes on a ***preempted*** field (*see, Matter of Lansdown Entertainment* **[***627]** Corp. v New York City Dept. of Consumer Affairs, 74 NY2d, at 763, *supra; Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d, at 506, supra*). Thus, as we stated in *People v* **[****16]** *De Jesus,* an establishment selling alcoholic ***beverages*** would not be exempt from a local law "requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness" (54 NY2d, at 471, *supra*). We recognized of course that there are limits to the reach of local law, and held **[**192]** that the ABC Law ***preempted*** a provision of the Rochester ***Municipal*** Code because that local law dealt "solely with the actions of patrons of establishments which sell alcoholic ***beverages***." (54 NY2d, at 471.) [4] The AZR, however, does nothing of the sort. To the contrary, HN20[] it applies not to the regulation of ***alcohol***, but to the *locales* of adult establishments irrespective of whether they dispense alcoholic ***beverages***. In short, plaintiffs come under both regulatory schemes because they simultaneously engage in two distinct activities, each involving an independent realm of governance.

[**17]** In *Incorporated Vil. of Nyack v Daytop Vil.* (78 NY2d, at 508, *supra*) we held that HN21[] the Village of Nyack had "a legitimate, legally grounded interest in regulating development within its borders." This principle applies here. A liquor licensee wishing to provide adult entertainment must do so in a location authorized **[*98]** by the AZR--not because it is selling liquor, but because it is providing adult entertainment. Conversely, if an adult establishment wishes to sell liquor, it must obtain a liquor license and comply with the ABC Law. That the ABC Law and the AZR have some overlapping requirements is merely peripheral and involves no more than what we described in *Frew Run* as a zoning ordinance's inevitable exertion of some incidental control over a particular business.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.

Order affirmed, with costs.

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[4] There are instances in which a zoning ordinance could conflict with a State law, as for example, where the Mental Hygiene Law expressly limits a municipality's zoning authority (*see,* Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d, at 506-507, *supra* [comparing Mental Hygiene Law art 19 with Mental Hygiene Law, art 41, § 41.34]). That of course is not the case before us.

Lansdown Entertainment Corp. v. New York City Dep't of Consumer Affairs

Court of Appeals of New York

June 6, 1989, Argued ; July 11, 1989, Decided

No Number in Original

Reporter
74 N.Y.2d 761 *; 543 N.E.2d 725 **; 545 N.Y.S.2d 82 ***; 1989 N.Y. LEXIS 885 ****

In the Matter of Lansdown Entertainment Corporation, Doing Business as The Limelight, Respondent, v. New York City Department of Consumer Affairs et al., Appellants

Prior History: [**1]** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 30, 1988, which modified, on the law, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (David B. Saxe, J.), entered in New York County, which declared that respondents have failed to demonstrate that the purpose of Administrative Code of the City of New York § B32-303.0 is to regulate subject matter within the locality's police power and that the ordinance only incidentally infringes on the sale of liquor, declared that section B32-303.0 is an improper intrusion into an area within the exclusive province of the State, renders illegal what is specifically allowed by State law and is thereby invalid, enjoined respondents from enforcing section B32-303.0, and annulled a determination of respondents prohibiting petitioner to remain open to the public after the hour of 4:00 a.m. and requiring petitioner to pay a fine of $ 100. The modification consisted of (1) vacating that part of the order and judgment holding that section B32-303.0 is invalid, enjoining enforcement of the ordinance, (2) declaring **[****2]** that such ordinance is inapplicable to establishments which are also licensed pursuant to the State Alcoholic ***Beverage*** Control Law to sell liquor at retail for consumption on premises and that section B32-303.0 (renum *§ 20-367*) is otherwise valid, and (3) enjoining respondents from enforcing that section of the Administrative Code against such establishments.

Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 141 AD2d 468.

Disposition: Order affirmed, with costs, in a memorandum.

Core Terms

local law, Alcoholic, alcoholic ***beverage***, ***preempted***, establishments, regulation, ordinance, consumption, licensed, premises, Cabaret, consume, patrons

Case Summary

Procedural Posture
Appellant, New York City Department of Consumer Affairs (City), sought review of a decision of the Appellate Division of the Supreme Court in the First Judicial Department (New York), which enjoined it from enforcement of New York, N.Y. Admin. Code § B32-303.0 (Cabaret Law) and from imposition of a fine upon respondent discotheque.

Overview

The discotheque contended that the Cabaret Law was ***preempted*** by *N.Y. Alco. Bev. Cont. Law § 106* (state law) because the cabaret law conflicted with state law concerning the hours during which it was permitted to sell ***alcohol***. The City contended that the Cabaret Law was enforceable because it was a statute of general application in that its object was to maintain the peace. The court agreed with the discotheque's contention, finding that the ***preemption*** rule was applicable because the Cabaret Law applied to local establishments that were also licensed by the state. The court ruled that the ***preemption*** doctrine applied although the Cabaret Law was not explicitly directed at the sale of ***alcohol*** because the Cabaret Law nevertheless rendered illegal the consumption of

alcohol during the time allowed by the state law.

Outcome
The court affirmed the judgment of the lower court. The court held that the Cabaret Law was ***preempted*** because it concerned the same subject matter of hours of operation, distribution, or consumption of ***alcohol*** as a state statute.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

Torts > ... > Types of Negligence Actions > ***Alcohol*** Providers > General Overview

HN1[] **Criminal Offenses, Alcohol Related Offenses**

The Alcoholic ***Beverage*** Control Law is preemptive of local law because the regulatory system is both comprehensive and detailed.

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > Local Governments > Ordinances & Regulations

Torts > ... > Types of Negligence Actions > ***Alcohol*** Providers > General Overview

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

HN2[] **Alcohol Related Offenses, Distribution & Sale**

Establishments selling alcoholic ***beverages*** are not exempt from local laws of general application.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

Even where the local goal does not conflict with state legislative objectives, the locality must still tailor its ordinance to ensure that its impact upon the ***preempted*** field is merely incidental.

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

HN4[] **Local Governments, Ordinances & Regulations**

The ***preemption*** doctrine does not turn on semantics. Rather, the direct consequences of a local ordinance should be examined to ensure that it does not render illegal what is specifically allowed by state law.

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

HN5[] **Local Governments, Ordinances & Regulations**

Where a state law indicates a purpose to occupy an entire field of regulation, local regulations are ***preempted*** regardless of whether their terms conflict with provisions of the state statute or only duplicate them.

Headnotes/Syllabus

Headnotes

IIntoxicating Liquors -- State *Preemption* of Regulatory Field -- Closing Hours of New York City Cabaret

Administrative Code of the City of New York § 20-367 (formerly § B32-303.0), which requires licensed cabarets to close between the hours of 4:00 a.m. and 8:00 a.m., is ***preempted*** by *Alcoholic **Beverage** Control Law § 106 (5) (b)*, which permits patrons of premises licensed by the State to sell alcoholic ***beverages*** for on-premises consumption to continue to consume alcoholic ***beverages*** upon such premises until 4:30 a.m., although both laws prohibit the sale of ***alcohol*** past 4:00 a.m., since there is a conflict between the two laws and the State regulatory system is both comprehensive and detailed. Although the State law does not exempt licensed establishments from local laws of general application, *section 20-367* does not qualify as such a local law since its legislative history does not indicate a specific intent to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods; rather, the local law merely mirrored the State law. Moreover, even if the local law was adopted for the asserted purpose, there is still a head-on collision between the State law and the ordinance as the latter is applied to establishments licensed by the State, and since the State has ***preempted*** any local regulation concerning the subject matter of hours of operation, distribution or consumption, local laws which concern the same subject matter must give way to the State law.

Counsel: *Peter L. Zimroth, Corporation Counsel (Julian L. Kalkstein* and *Larry A. Sonnenshein* of counsel), for appellants.

James M. Felix and *Stephen E. Powers* for respondent.

Judges: Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur; Judge Bellacosa dissents and votes to reverse in an opinion.

Opinion

[*762] [*82] [**725] OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Petitioner operates the Limelight, a popular discotheque, which is licensed as a "cabaret" by respondent New York City Department of Consumer Affairs pursuant to subchapter **[****3]** 20 of chapter 2 of title 20 of the Administrative Code of the City of New York (the Cabaret Law). The Limelight is also licensed to sell liquor for consumption **[***83]** on its premises pursuant to the New York **[**726]** State Alcoholic ***Beverage*** Control Law (*Alcoholic **Beverage** Control Law § 106*). The Cabaret Law requires licensed cabarets to close between the hours of 4:00 a.m. and 8:00 a.m. (Administrative Code of City of New York § B32-303.0 [renum *§ 20-367*]). The applicable State law prohibits the sale of ***alcohol*** after 4:00 a.m., but permits patrons to continue to consume alcoholic ***beverages*** upon the premises until 4:30 a.m. (*Alcoholic **Beverage** Control Law § 106 [5] [b]*). Although both laws prohibit the sale of ***alcohol*** past 4:00 a.m., the State law thus permits patrons to remain on the premises consuming ***alcohol*** until 4:30 a.m., while the Cabaret Law does not. Relying on this conflict, petitioner maintains that this provision of the Cabaret Law is ***preempted*** by the State law. We agree.

In *People v De Jesus (54 NY2d 465)* this court held that ***HN1***[↑] the Alcoholic ***Beverage*** Control Law is preemptive of local law **[*763]** because the regulatory system is both "comprehensive **[****4]** and detailed" *(id., at 469)*. Consequently, we held that a Rochester City ordinance prohibiting persons from patronizing an establishment selling alcoholic ***beverages*** after 2:00 a.m. was ***preempted*** by the State law because "by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law" *(id., at 472)*.

In *De Jesus*, however, we noted that ***HN2***[↑] establishments selling alcoholic ***beverages*** are not exempt from local laws of general application. Such laws are principally aimed at legitimate concerns of local government and do not directly affect the field ***preempted*** by the State law. For example, laws "requiring smoke alarms in all business premises, or * * * forbidding dumping of refuse on city sidewalks, or * * * prohibiting disorderliness at any 'place of public resort'" *(People v De Jesus, 54 NY2d 465, 471, supra*, citing *People v Hardy, 47 NY2d 500*), would not be ***preempted*** if their enforcement incidentally infringed on the State Alcoholic ***Beverage*** Control Law.

Relying on this exception to the **[****5]** ***preemption*** rule, respondent argues that section B32-303.0 of the Administrative Code is a statute of general application because it is founded upon a legitimate exercise of local police power in that it seeks to maintain the peace, comfort and decency of residential neighborhoods by controlling noise and traffic. Additionally, respondent maintains that this ordinance is not ***preempted*** because it does not explicitly regulate the sale of ***alcohol*** as did the regulation in *De Jesus*. These contentions are without merit.

As Supreme Court concluded, the legislative history of the City ordinance does not "indicate a specific intent * * * to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods." Rather, "historical analysis indicates that for most of its life, the local law merely mirrored the State law." (*133 Misc 2d 206, 210*.) In fact, there is a dearth of legislative history to support respondent's claim.

Nevertheless, even assuming that this local ordinance was adopted for the claimed purpose, this conclusion would not alone be sufficient to surmount the ***preemption*** hurdle. ***HN3***[⬆] Even where the local goal does not conflict with State **[****6]** legislative objectives, the locality must still tailor its ordinance to ensure **[*764]** that its impact upon the ***preempted*** field is merely incidental. Compelling a business licensed by the State Liquor Authority to close at a time at which customers are otherwise permitted to remain on the premises and consume alcoholic ***beverages*** directly regulates subject matter within the exclusive jurisdiction of the State *(see, People v De Jesus, 54 NY2d 465, 470, n 3, supra)*. In this regard, there is a head-on collision between the City ordinance as it is applied to establishments also licensed by the State. Since the State has ***preempted*** any local regulation concerning **[***84]** the subject matter of hours of operation, **[**727]** distribution, or consumption, local laws which concern the same subject matter must give way to the State law *(see, Dougal v County of Suffolk, 102 AD2d 531, 532-533*, *affd 65 NY2d 668*; *Robin v Incorporated Vil. of Hempstead, 30 NY2d 347, 350-351)*.

That the City ordinance is not explicitly directed at the sale or consumption of alcoholic ***beverages*** is of no consequence since application of ***HN4***[⬆] the ***preemption*** doctrine does not turn on semantics. **[****7]** Rather, the direct consequences of a local ordinance should be examined to ensure that it does not "render illegal what is specifically allowed by State law" *(People v De Jesus, 54 NY2d 465, 472, supra; see, e.g., Wholesale Laundry Bd. of Trade v City of New York, 12 NY2d 998*, *affg 17 AD2d 327*).

The suggestion raised in the dissenting opinion that the State Alcoholic ***Beverage*** Control Law ***preempts*** only those local laws which pertain to the sale and distribution of ***alcohol***, as opposed to the consumption of ***alcohol***, ignores both the plain wording of the State law at issue (*Alcoholic **Beverage** Control Law § 106 [5] [b]* ["Nor shall any person be permitted to *consume* any alcoholic ***beverages*** upon any such premises"; emphasis supplied]), as well as this court's decision in *De Jesus (see, People v De Jesus, supra, at 470, n 3*; *see also, id., at 472* [Gabrielli, J., dissenting] [the State has ***preempted*** the field "'for the purpose of fostering and promoting temperance in (the public's) *consumption* and respect for and obedience to law'"; emphasis supplied]). In addition, the argument that the local law is not inconsistent with the State statute (dissenting **[****8]** opn, at 766) is founded on the view that the local law does not prohibit "an act which has been *specifically permitted* by State law." *(Id., at 767* [emphasis supplied].) To the contrary, the State law specifically allows patrons to remain on the premises consuming ***alcohol*** until 4:30 a.m., while the local law does not. This is not a tiny overlap *(see, id.)*, but a direct **[*765]** conflict. ***HN5***[⬆] Where a State law indicates a purpose to occupy an entire field of regulation, as exists under the Alcoholic ***Beverage*** Control Law, local regulations are ***preempted*** regardless of whether their terms conflict with provisions of the State statute or only duplicate them *(see, Consolidated Edison Co. v Town of Red Hook, 60 NY2d 99, 106-107*; *People v De Jesus, 54 NY2d 465, 468-469*, *supra; Dougal v County of Suffolk, 102 AD2d 531, 532-533*, *affd 65 NY2d 668*, *supra)*. If a local ordinance which merely duplicates a State law is ***preempted***, assuredly a local law which conflicts with the State law must also be ***preempted***.

Dissent by: BELLACOSA

Dissent

Bellacosa, J. (dissenting). I disagree that the City of New York's local legislative effort to close all cabarets, dance halls **[****9]** and catering establishments for four hours, between 4:00 a.m. and 8:00 a.m., is ***preempted*** by the State Alcoholic ***Beverage*** Control Law.

No one challenges the New York State Alcoholic

Beverage Control Board's comprehensive authority to regulate the sale and distribution of alcoholic ***beverages***. That State law overrides any local legislation which would purport to regulate the sale and distribution of ***alcohol***. Thus, if the purpose or effect of Administrative Code of the City of New York § B32-303.0 were to regulate the hours of *sale* of alcoholic ***beverages***, it would be invalid and unenforceable *(People v De Jesus, 54 NY2d 465, 472)*. But that is not what this local law does in the context of local governments' prerogatives to enact local laws of general application which are aimed at other legitimate concerns of local government so long as they do not intrude essentially on the State's exclusive control **[***85]** over the sale or distribution of ***alcohol*** *(People [**728] v De Jesus, supra, at 471*).

Administrative Code § B32-303.0 (renum *§ 20-367*) provides, without any reference whatsoever to the sale or distribution of alcoholic ***beverages***, that all cabarets, **[****10]** catering establishments and public dance halls in the City of New York must be closed to the public between the hours of 4:00 a.m. and 8:00 a.m. The local law is generally applicable in the City of New York to every establishment, whether it is licensed to sell alcoholic ***beverages*** or not. *Alcoholic **Beverage** Control Law § 106 (5)* affects only those establishments licensed to sell alcoholic ***beverages*** for on-premises consumption and prohibits sale or distribution of alcoholic ***beverages*** between 4:00 a.m. and 8:00 a.m. (to noon on Sundays). It further forbids such establishments from permitting customers to continue to consume alcoholic ***beverages*** on premises any later than 4:30 a.m.

[*766] In a not unrelated development with respect to a similarly directed New York City statute, the United States Supreme Court, on June 22, 1989, said: "It can no longer be doubted that government '[has] a substantial interest in protecting its citizens from unwelcome noise.' This interest is perhaps at its greatest when government seeks to protect 'the well-being, tranquility, and privacy of the home,' but it is by no means limited to that context, for the government may act to protect even such **[****11]** traditional public forums as city streets * * * from excessive noise." *(Ward v Rock Against Racism, 491 U.S. , 109 S Ct 2746,* [citations omitted].) If that New York City quality-of-life noise control law could pass constitutional muster measured against the *First Amendment of the United States Constitution*, surely the similarly targeted local law under challenge here ought not fall before that hardly comparable paragon, the State Alcoholic ***Beverage*** Control Law.

The local law serves the legitimate local government concern of maintaining the peace and quiet of its ***municipal*** neighborhoods for a brief and relevant portion of each day. It makes no effort to control the sale of and distribution of alcoholic ***beverages***. To be sure, the local law may incidentally affect the *consumption* of ***alcohol*** for one overlapping half hour in the wee hours when most people are turning over for the last time before getting up to go to work. It is that one-half hour during which the Alcoholic ***Beverage*** Control Law itself forbids sale and merely tolerates patrons taking their final gulps to finish "last call" drinks purchased prior to 4:00 a.m. The local law therefore does not clash **[****12]** with the State sale regulation and affects consumption only in the most de minimis fashion and in a manner no greater than is needed to further the general and broader local interest in maintaining tranquility in its neighborhoods for the good of all its citizens and residents. It can legitimately be characterized as not a direct regulatory proposition in the strict legal sense of that word. In any event, the mere fact "that the State and local laws touch upon the same area is insufficient to support a determination that the State has ***preempted*** the entire field of regulation in a given area" *(Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 99* [citations omitted]; *see also, Frew Run Gravel Prods. v Town of v Carroll, 71 NY2d 126, 131)*.

As noted, Administrative Code § B32-303.0 is not inconsistent with the Alcoholic ***Beverage*** Control Law. A local law will be deemed inconsistent with a State statute if the local law permits an act which has been specifically prohibited by **[*767]** State law or, conversely, if the local law prohibits an act which has been specifically permitted by State law *(New York State Club Assn. v City of New York, 69 NY2d 211*, *affd* **[****13]** *487 U.S. 1, 108 S Ct 2225*). Administrative Code § B32-303.0 clearly does not permit an act which has been prohibited by State law because the local law does not authorize anything between the hours of 4:00 a.m. and 8:00 a.m. -- except some peace and quiet. Nor does the local law prohibit an act which has been *specifically permitted* by **[***86]** State law. *Alcoholic **Beverage** Control [**729] Law § 106 (5)* prohibits establishments with State liquor licenses from selling or distributing alcoholic ***beverages*** between 4:00 a.m. and 8:00 a.m. -- that part is four-square consistent with the closing hours mandated by the local law. It is only the failure to forbid the customers from finishing their earlier purchased alcoholic ***beverages*** until 4:30 a.m. that creates the tiniest overlap *(see, Jancyn Mfg. Corp. v*

County of Suffolk, supra, at 99). That, however, does not qualify as a legal ***preemption*** collision. The State law does not specifically authorize any conduct during that period; it rather forebears regulation, tolerates a transition instead of an abrupt ending, and it expressly prescribes the kind of conduct that is unlawful. The State law is actually silent on **[****14]** the precise subject of alleged controversy here and that silence should not be elevated, transformed or implied into a superseding interest *(* *People v Judiz, 38 NY2d 529, 532*; *People v Cook, 34 NY2d 100*).

The majority's invalidation of this local law creates the anomaly that the City can order nonalcoholic-dispensing establishments to close and be quiet, but it is powerless as to those in which patrons are allowed to down their drinks for an extra half hour. It also strikes me as a bit incongruous to have the regulated licensees defending the honor and power of their regulatory protagonist, the State Liquor Authority -- which appears to have little or no interest in defeating this small effort by the City of New York to improve ever so incrementally the quality of life of all its residents.

I dissent and would reverse and declare the local law valid.

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People v. De Jesus

Court of Appeals of New York

November 16, 1981, Argued ; December 22, 1981, Decided

No Number in Original

Reporter
54 N.Y.2d 465 *; 430 N.E.2d 1260 **; 446 N.Y.S.2d 207 ***; 1981 N.Y. LEXIS 3205 ****

The People of the State of New York, Appellant, v. Luis De Jesus, Carlos Lopez, Maria Ortiz, Samuel Pagan, Edwin Torres (And 120 Additional Defendants), Respondents

Prior History: [**1]** Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Monroe County Court (Hyman T. Maas, J.), entered April 8, 1980, which affirmed an order of the Rochester City Court (Charles T. Maloy, J.) dismissing the information against defendants on the ground that the local ordinance on which the prosecutions were based was ***pre-empted*** by the Alcoholic ***Beverage*** Control Law and, therefore, void.

Criminal prosecutions based on informations charging the named defendants, 125 patrons of an unlicensed "after hours" club, with violating a City of Rochester ordinance prohibiting any person from patronizing an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m. were dismissed by the Rochester City Court. On appeal, the Monroe County Court affirmed.

The Court of Appeals affirmed, holding, in an opinion by Judge Fuchsberg, that the informations were properly dismissed since the State, by enacting the Alcoholic ***Beverage*** Control Law, has ***pre-empted*** the field of regulation of establishments which sell alcoholic ***beverages*** and the local ordinance upon which the informations are based impermissibly impinges upon the exclusive State-wide **[****2]** scheme set forth therein.

Disposition: Order affirmed.

Core Terms

alcoholic ***beverage*** control, regulation, ordinance, establishments, alcoholic ***beverage***, patrons, local law, liquor, sell alcoholic ***beverages***, local government, consumption, ***pre-empted***

Case Summary

Procedural Posture
Defendants were charged with violating a city ordinance prohibiting the purchase of ***alcohol*** after hours, and the Monroe County Court (New York) entered a judgment that affirmed an order of the city court dismissing the information against defendants on the ground that the local ordinance, on which the prosecutions were based, was ***pre-empted*** by the Alcoholic ***Beverage*** Control Law.

Overview
The appeal required the court to determine the extent to which the State, by enactment of N.Y. Alco. Bev. Cont. Law ch. 478 had ***pre-empted*** the field of regulation of establishments that sold alcoholic ***beverages***. The court found that the Alcoholic ***Beverage*** Control Law was pre-emptive because the regulatory system it installed was both comprehensive and detailed. Of particular relevance, it endowed the State Liquor Authority with the power to grant licenses under defined circumstances, and it provided for criminal sanctions against unauthorized purveyors of alcoholic ***beverages*** and carried its own provision against disorderliness being permitted on such premises. Moreover, the state's statutory structure imposed its own direct controls at the local level by creating local alcoholic ***beverage*** control boards. The court also found that a distinction argued by the State between the local and state regulations was not show. By dealing solely with the actions of patrons of establishments which sell alcoholic ***beverages***, the ordinance impinged impermissibly on the exclusive Alcoholic ***Beverage*** Control Law.

Outcome
The order of the county court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > Elements

Governments > Police Powers

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

HN1[] **Distribution & Sale, Elements**

Section 44-14 of the ***Municipal*** Code of the City of Rochester states that no person shall patronize an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m. in violation of the Alcoholic ***Beverage*** Control Law.

Governments > Legislation > Enactment

Governments > Local Governments > Police Power

Governments > State & Territorial Governments > Relations With Governments

HN2[] **Legislation, Enactment**

Since the fount of the police power is the sovereign state, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority. As pertinent here, in the spirit of this broad principle, *N.Y. Const. art. IX § 2(c)(ii)* specifies that any local law be not inconsistent with any general law and that the legislative power of local government is limited to the extent that the legislature shall restrict the adoption of such a local law. That such inconsistency or restriction is not limited to cases of express conflict between local and State laws.

Headnotes/Syllabus

Headnotes

Intoxicating Liquors -- State *Pre-emption* of Regulatory Field

The Alcoholic ***Beverage*** Control Law (L 1934, ch 478) is exclusive and State-wide in scope and, thus, no local government may legislate in the field of regulation of establishments which sell alcoholic ***beverages***. Accordingly, criminal prosecutions based upon informations charging defendants, 125 patrons of an unlicensed "after hours" private club, with violating a local ordinance that prohibits any person from patronizing an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m., were properly dismissed; said ordinance impermissibly impinges upon the Alcoholic ***Beverage*** Control Law since it prohibits persons from patronizing such establishments at times when the pre-emptive State-wide scheme, which allows the sale of alcoholic ***beverages*** at retail for on-premises consumption until 4:00 a.m. (*Alcoholic **Beverage** Control Law, § 106*, *subd 5*), would permit them to do so.

Counsel: *Donald O. Chesworth, Jr., District Attorney (Kenneth R. Fisher* and *David L. Pogue* of counsel), for appellant. I. The rights of all respondents were scrupulously **[****3]** honored on appeal and records have been painstakingly maintained to substantiate this protection of respondents' rights. II. Since the State Alcoholic ***Beverage*** Control Law did not ***pre-empt*** the local ordinance, the Trial Judge improperly dismissed the informations. *(* *People v Judiz, 38 NY2d 529*; *People v Cook, 34 NY2d 100*; *Myerson v Lentini Bros. Moving & Stor. Co., 33 NY2d 250*; *People v Lewis, 295 NY 42*; *Belle v Town Bd. of Town of Onondaga, 61 AD2d 352*; *People v Winner's Circle Flea Market, 102 Misc 2d 355*; *People v Hardy, 47 NY2d 500*; *People v Shelley, 103 Misc 2d 1087*; *People v Sentella, 83 Misc 2d 515*; *People v Corie, 196 Misc 1029*; *People v O'Neil, 280 App Div 145*.) III. Section 44-14 of the ***Municipal*** Code of the City of Rochester is not unconstitutionally overbroad or vague. *(* *People v Smith, 44 NY2d 613*; *People v Bergerson, 17 NY2d 398*; *People v Cornish, 104 Misc 2d 72*; *United States v Harriss, 347 U.S. 612*; *People v Byron, 17 NY2d 64*; *Grayned v City of Rockford, 408 U.S. 104*; *People v Wood, 93 Misc 2d 25*; *People v Pagnotta, 25 NY2d 333*; *People ex rel. Lichtenstein v Langan, 196 NY 260*.)

Edward **[****4]** *J. Nowak, Public Defender (Brian Shiffrin* of counsel), for respondents. I. The courts below were correct in ruling that the State of New York has ***pre-empted*** the City of Rochester from passing and enforcing an ordinance seeking to regulate establishments which sell alcoholic ***beverages***, such as the one respondents were accused of having violated. *(* People v Judiz, 38 NY2d 529; Matter of Albert Simon, Inc. v Myerson, 36 NY2d 300; People v Cook, 34 NY2d 100; Myerson v Lentini Bros. Moving & Stor. Co., 33 NY2d 250; Robin v Incorporated Vil. of Hempstead, 30 NY2d 347; People v Hardy, 47 NY2d 500; Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*; Grundman v Town of Brighton, 5 Misc 2d 1006; Matter of Cannon v City of Syracuse, 72 Misc 2d 1072.) II. This court is without jurisdiction to review the constitutional issues raised in respondents' pretrial motion to dismiss, because the lower court, explicitly and at the People's request, made no decision on the constitutional issues. *(* Matter of Attorney General, 155 NY 441; Curtin v Barton, 139 NY 505.) III. **[****5]** Assuming, *arguendo*, that this court chooses to consider the issue of vagueness, section 44-14 of the ***Municipal*** Code of the City of Rochester is impermissibly vague in violation of the constitutional guarantees of due process and freedom of association. *(* Matter of Sussman v New York State Organized Crime Task Force, 39 NY2d 236; People v Berck, 32 NY2d 567; Papachristou v City of Jacksonville, 405 U.S. 156; People v Diaz, 4 NY2d 469; People v Pagnotta, 25 NY2d 333; Fenster v Leary, 20 NY2d 309; People v Firth, 3 NY2d 472; People v Vetri, 309 NY 401; United States v Brewer, 139 U.S. 278; Winters v New York, 333 U.S. 507.) IV. Assuming, *arguendo*, that this court chooses to consider the issue of overbreadth, section 44-14 of the ***Municipal*** Code of the City of Rochester is impermissibly overbroad in violation of defendants' rights to due process and freedom of association. *(* People v Pagnotta, 25 NY2d 333; People v Bunis, 9 NY2d 1; People v Gillson, 109 NY 389; People v Estreich, 297 NY 910; People v Kuc, 272 NY 72; Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441; Healy v James, 408 U.S. 169; *Mine* ***[****6]*** *Workers v Illinois Bar Assn., 389 U.S. 217*.)

Judges: Chief Judge Cooke and Judges Jones, Wachtler and Meyer concur with Judge Fuchsberg; Judge Gabrielli dissents and votes to reverse in a separate opinion in which Judge Jasen concurs.

Opinion by: FUCHSBERG

Opinion

[*467] [1262] [***208] OPINION OF THE COURT**

This appeal calls upon us to decide the extent to which the State, by enactment of the Alcoholic ***Beverage*** Control Law (L 1934, ch 478), has ***pre-empted*** the field of regulation of establishments which sell alcoholic ***beverages***.

The issue arises in the context of criminal prosecutions based on informations charging the named defendants, 125 patrons of an unlicensed "after hours" club, [1] **[****7]** with violation of section 44-14 of the ***Municipal*** Code of the City of Rochester. ***HN1***[↑] The ordinance states that "[no] person shall patronize an establishment which is selling or offering for **[*468]** sale alcoholic ***beverages*** after 2:00 a.m. in violation of the Alcoholic ***Beverage*** Control Law". [2]

After thorough briefing and extensive oral argument by both sides on a motion defendants brought on under CPL 170.30, the Criminal Division of the Rochester City Court, of the view that the State had not delegated "the power to restrict and regulate the sale of alcoholic ***beverages***", dismissed the accusatory instruments against all the defendants. On the People's appeal to the Monroe County Court, that tribunal affirmed. Certification by a Judge of this court, acting pursuant to CPL 460.20, now brings the matter before us for review. For the reasons which follow, we believe the courts below were correct in the decisions they reached.

Our analysis begins with the general observation that, ***HN2***[↑] since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority (56 Am Jur 2d, ***Municipal*** Corporations, Counties **[****8]** and Other Political Subdivisions, § 428). As pertinent here, in the spirit of this broad principle, article IX (§ 2, subd [c], par [ii]) of the New York State Constitution specifies that any

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[1] A private club incorporated pursuant to State law as a nonprofit corporation which sells liquor only to members is not exempt from regulation under the Alcoholic ***Beverage*** Control Law *(* People v Hardy, 47 NY2d 500, 504).

[2] The balance of this local law reads: "The terms 'selling' and 'sale' shall have the same definitions as found in Section 3 (28) of the Alcoholic ***Beverage*** Control Law".

local law be "not inconsistent with * * * any general law" and that the legislative power of local government is limited "to the extent that the legislature shall restrict the adoption of such a local law".

That such "inconsistency" or "restriction" is not limited to cases of express conflict between local and State laws is apparent from our decision in *Robin v Incorporated Vil. of Hempstead (30 NY2d 347)*, a case which posed a like issue regarding the State's statutory scheme for the regulation of medicine. In *Robin*, the nature of the subject matter being regulated, the lack of any perceived "real distinction" between any particular locality and other parts of the State in this regard, and the accompanying legislative declaration that the State's Department of Health "'shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services'" combined to **[*469]** demonstrate a "design to ***pre-empt*** **[****9]** the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities" **[***209]** *(id., at p 350)*.

On these bases, *Robin* struck down a village law which did not deviate in the slightest from the State statute's definition of a "justifiable abortional act", but merely added the precaution that such an act "be performed only in a hospital duly licensed and accredited under the New York State Department of Health, and having equipment and facilities acceptable to the State Hospital Review and Planning Council". So holding, we emphasized that, in the presence of factors akin to those found in *Robin*, a local government is precluded from legislating on the same subject matter unless it has received "clear and explicit" authority to the contrary *(id., at pp 350-351; Matter of Kress & Co. v Department of Health of City of N. Y., 283 NY 55, 60* [State's Agriculture and Markets Law's regulation of the manufacture and sale of frozen desserts held pre-emptive]).

Measured against these criteria, the Alcoholic ***Beverage*** Control Law is surely pre-emptive. For one thing, the regulatory system it installed is both comprehensive **[****10]** and detailed. Of particular relevance here, it endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic ***beverages*** (*Alcoholic* ***Beverage*** *Control Law, §§ 17*, 55-99, *100*, *130*). Among other details, it specifies that such ***beverages*** may be sold "at retail for on-premises consumption" daily until 4 a.m. and that the actual consumption thereof may be permitted for one-half hour thereafter (*Alcoholic* ***Beverage*** *Control Law, § 106, subd 5*). It also carries its own provision against disorderliness being permitted on such premises (*Alcoholic* ***Beverage*** *Control Law, § 106, subd 6*). Moreover, the State's statutory structure imposes its own direct controls at the local level by creating local alcoholic ***beverage*** control boards and by, for example, granting these administrative instrumentalities the power to further restrict the hours during which alcoholic ***beverages*** may be sold at retail (Alcoholic ***Beverage*** Control Law, §§ 30-43, *43*, *subd 3*).

[*470] Nor is the policy behind the legislation left to the imagination. *Section 2 of the Alcoholic* ***Beverage*** *Control Law* declares **[****11]** it the goal of the State "to regulate and control the manufacture, sale and distribution within the state of alcoholic ***beverages*** for the purpose of fostering and promoting temperance * * * and obedience to law". It is not necessary to weigh these objectives qualitatively against the considerations of health with which the court dealt in *Robin* to appreciate that implicitly here too no "real distinction" is to be drawn between the parochial interest of a particular city or other locality on the one hand and that of the State as a whole on the other. In short, the State made a studied decision that the problems to which the statute was directed, and which the Federal Government has failed to solve (see US Const, 18th, 21st Amdts), would be more effectively met not at the local community level but by State action alone.

It should come then as no surprise that the courts (see *Tad's Franchises v Incorporated Vil. of Pelham Manor, 35 NY2d 672*, affg *42 AD2d 616*; *Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441*), [3] **[****13]** the New York State Moreland Commission on the **[**1263]**

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[3] The People's reliance on *People v Hardy (47 NY2d 500, supra)* for its contention that the State has not ***pre-empted*** the field of regulation of sale and consumption of alcoholic ***beverages*** is misplaced. In fact, review of the original record in that case indicates that no ***pre-emption*** issue was ever raised in this court. Accordingly, we did not discuss or decide whether the City of Rochester was ***pre-empted*** from including establishments which sell alcoholic ***beverages*** in a ban on the maintenance of a "public resort" which disturbs the peace, comfort or decency of a neighborhood. In any event, unlike the one here, the ordinance in *Hardy* was not directed at and did not regulate the sale or consumption of alcoholic ***beverages***. Rather, it was a general ban on disturbances of the peace at any "place of public resort".

[*210]** Alcoholic ***Beverage*** Control Law (Study Paper No. 1, Relationship of the Alcoholic **[****12]** ***Beverage*** Control Law and the Problems of ***Alcohol***, p 2 [1963]); [4] New York State's Attorney-General (1972 Opns Atty Gen 97, Feb. 22, 1972) and its Comptroller (31 Opns St Comp, 1975, p 100, No. 75-729) all have recognized that the Alcoholic ***Beverage*** Control Law is exclusive and Statewide in scope and that, thus, no local government may legislate in this field.

[*471] Nevertheless, the People urge that, even conceding its pre-emptive character, the Alcoholic ***Beverage*** Control Law is applicable only to licensed clubs whereas the local law regulates unlicensed ones. Noting that the ordinance contains no such limitation, we believe the short and yet more sweeping answer to this argument is that the State statute embraces all sellers of ***alcohol***. Lest there be any doubt, as indicated earlier, the Alcoholic ***Beverage*** Control Law includes a provision making it a crime to sell such ***beverages*** without a license. It also contemplates the enjoining of unlicensed sales and the seizure and forfeiture of the property of establishments which evade **[****14]** this ban (*Alcoholic **Beverage** Control Law, § 123*). Further, while the Alcoholic ***Beverage*** Control Law in part speaks of "licensees", in its punitive and prohibitory provisions it is targeted in the main to "any person" (e.g., *Alcoholic **Beverage** Control Law, § 130*, *subds 3*, 5; see *People v O'Neil, 280 App Div 145*).

We also reject the People's related attempt to erect a barrier between the State law and the local ordinance by contending that the former is aimed exclusively at the improper activities of operators of alcoholic ***beverage*** dispensing businesses and the latter at the conduct of their patrons. Such a distinction, even if it otherwise existed, became irrelevant once the State carved out this area of regulation for itself. And, this is nonetheless true because the State consciously decided that to concentrate on sellers and selling rather than drinkers and drinking would be the most "effective and appropriate" means of carrying out its self-appointed mission (New York State Moreland Commission on the Alcoholic ***Beverage*** Control Law, pp 2, 53).

Finally, all this is not to say that establishments selling alcoholic ***beverages*** are exempt from local laws of general application **[****15]** such as, to take several examples, one requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness at any "place of public resort" *(* *People v Hardy, 47 NY2d 500*). But, contrary to the People's position, the ordinance here is not of this sort. By dealing solely with the actions of patrons of establishments which sell alcoholic ***beverages***, it impinges impermissibly on the exclusive **[*472]** Alcoholic ***Beverage*** Control Law. Further, by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law (see, e.g., *Wholesale Laundry Bd. of Trade v City of New York, 12 NY2d 998*, affg *17 AD2d 327*).

Consequently, the order of the County Court should be affirmed. [5]

[**16]**

Dissent by: GABRIELLI

Dissent

Gabrielli, J. (dissenting). I agree with the majority that the State has ***pre-empted*** the field of "regulation of **[**1264]** **[***211]** establishments which sell alcoholic ***beverages***" (p 467), and that the goal of the Alcoholic ***Beverage*** Control Law is "to regulate and control the manufacture, sale and distribution within the state of alcoholic ***beverages*** for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law" (*Alcoholic **Beverage** Control Law, § 2*). The Legislature has seen fit to achieve these purposes primarily through regulation of the sale of liquor, rather than by regulating the conduct of the consumers of liquor.

[4] The New York State Moreland Commission on the Alcoholic ***Beverage*** Control Law was appointed by Governor Nelson A. Rockefeller by executive order to conduct "a thorough study and reappraisal" of the Alcoholic ***Beverage*** Control Law (see Public Papers of Governor Nelson A. Rockefeller, pp 572-574 [1963]). The nature and authority of the Moreland Commission are discussed in *Seagram & Sons v Hostetter (16 NY2d 47*).

[5] Aside from their ***pre-emption*** point, defendants also grounded their motion to dismiss the informations on what they deemed to be the ordinance's unconstitutional vagueness and overbreadth in contravention of due process and freedom of association guarantees. As was the case with the courts below, in view of our finding of ***pre-emption***, we have no occasion to consider or pass on either question.

I disagree, however, with the majority's conclusion that the local ordinance challenged on this appeal (City of Rochester ***Municipal*** Code, § 44-14), which penalizes only the patrons of after-hours establishments, operates in an area the Legislature has reserved to the State under the Alcoholic ***Beverage*** Control Law. This ordinance is aimed, not at liquor regulation, but at the protection of the peace, comfort and decency of the neighborhood -- surely, a legitimate goal of local government **[****17]** (cf. *People v Hardy, 47 NY2d 500*). In his memorandum in support of the ordinance, the acting police chief noted the various police problems caused by the patronizing of after-hours drinking establishments. In my view, the City of Rochester certainly has the power to enact ordinances to deal with such purely local problems, in a manner which does not interfere with **[*473]** the State's power to regulate liquor. I believe that this is all the challenged ordinance sought to accomplish.

Accordingly, I would reverse and hold the ordinance to be a valid and lawful exercise of local government power.

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MEMORANDUM

New York
State Liquor Authority

Office of Counsel

TO: NYSBA Local and State Government Law Section
FROM: Paul Karamanol, Senior Attorney
SUBJECT: Preemption Doctrine and the Alcoholic Beverage Control Law
DATE: September 13, 2019

Gentlepersons,

As a result of the 21st Amendment that ended Prohibition, all 50 states are responsible for implementing their own alcoholic beverage regulatory regime. The New York Alcoholic Beverage Control Law (ABCL) has been deemed by the Court of Appeals to be comprehensive and detailed in nature, thereby demonstrating that the New York Legislature had what's known as "preemptive intent" in the drafting of the ABCL. As a result, the preemption doctrine constitutes a fundamental limitation on home rule powers and local municipal governments may exercise only those home rule regulatory powers over liquor licensed businesses in their jurisdictions that are not prohibited via operation of the preemption doctrine or that are otherwise provided for within the ABCL itself.

The preemption doctrine is enshrined in Article 9 of the New York State Constitution to guard against local municipal intrusion upon regulatory matters that the state has carved out for itself via preemptive intent, as follows:

> "(c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, **except to the extent that the legislature shall restrict the adoption of such a local law relating to other**

than the property, affairs or government of such local government…." [NY CLS Const, art IX, §2(c)] (Emphasis mine.)

Regarding the determination of "preemptive intent," by the state, the Court of Appeals set forth in People v. De Jesus, 54 N.Y.2d 465 (1981), that "since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority [internal citations omitted]." Furthermore, the Court of Appeals in the De Jesus case specifically found that no local government may legislate in the field of alcoholic beverage regulation or of establishments which sell alcoholic beverages in the state because the state has enacted a regulatory system for alcoholic beverages manufacture, distribution and sales that was both comprehensive and detailed – thereby demonstrating "preemptive intent" in the field of alcoholic beverage regulation, as follows:

> "…the Alcoholic Beverage Control Law is surely pre-emptive. For one thing, the regulatory system it installed is both comprehensive and detailed. Of particular relevance here, it endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic beverages. Among other details, it specifies that such beverages may be sold at retail for on-premises consumption daily until 4 a.m. and that the actual consumption thereof may be permitted for one-half hour thereafter. It also carries its own provision against disorderliness being permitted on such premises [Internal quotes and citations omitted]." [People v. De Jesus, 54 N.Y.2d at 469].

The De Jesus Court thereby invalidated a Rochester City ordinance prohibiting persons from patronizing any establishment selling alcoholic beverages after 2:00 a.m. because "by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law." [People v. De Jesus at 472].

The De Jesus Court did, however, set up an exception to the Preemption Doctrine for local laws of "general application" that do not directly impinge upon the exclusive domain of the ABCL, as follows:

> "…this is not to say that establishments selling alcoholic beverages are exempt from local laws of general applications such as, to take several examples, one requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness at any place of public resort [Internal quotes and citations omitted]." [People v. De Jesus at 472].

The Court of Appeals again struck down a local law concerning the same subject matter of hours of operation, distribution, or consumption of alcoholic beverages in the case of Lansdown Entertainment Corp. v. NYC Dep't of Consumer Affairs, 74 N.Y.2d 761 (1989). The Lansdown Court struck down a New York City Cabaret License requirement that cabarets needed to be closed between the hours of 4:00 a.m. and 8:00 a.m. because existing ABCL §106(5)(b) allowed alcoholic beverages to be sold for on-premises consumption at licensed premises right up until 4:00 a.m., with patrons allowed to remain on the premises consuming their alcoholic beverages until 4:30 a.m. [Lansdown v. NYC Dep't of Consumer Affairs, 74 N.Y.2d at 761]. Since the local statute made illegal what the state statute specifically allows and the legislative history did not give any indication that the local law was

intended as a law of general application it was struck down under the Preemption Doctrine, as follows:

> "Although the State law does not exempt licensed establishments from local laws of general application, section 20-367 does not qualify as such a local law since its legislative history does not indicate a specific intent to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods; rather the local law merely mirrored the State law. Moreover, even if the local law was adopted for the asserted purpose, there is still a head-on collision between the State law and the ordinance as the latter is applied to establishments licensed by the State, and since the State has preempted any local regulation concerning the subject matter of hours of operation, distribution or consumption, local laws which concern the same subject matter must give way to the State law." [Lansdown, 74 N.Y.2d at 761].

The limits of the Preemption Doctrine in the ABCL context were established in the case of a New York City zoning ordinance governing the operation of adult entertainment establishments in DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91 (2001). In upholding a New York City zoning ordinance governing permissible locations of adult entertainment establishments, the DJL Rest Corp Court found that the local law "applies not to the regulation of alcohol but to the locales of adult establishments irrespective of whether they dispense alcoholic beverages." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97]. The DJL Rest Corp Court further distinguished the ruling as follows:

> "A liquor licensee wishing to provide adult entertainment must do so in a location authorized by the AZR- not because it is selling liquor, but because it is providing adult entertainment. Conversely, if an adult establishment wishes to sell liquor, it must

> obtain a liquor license and comply with the ABC Law. That the ABC Law and the AZR have some overlapping requirements is merely peripheral and involves no more than…a zoning ordinance's inevitable exertion of some incidental control over a particular business." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97, 98].

Due to the foregoing, the Doctrine of Preemption operates to strike down most, but not all, local laws that impact the sale of alcoholic beverages since the Court of Appeals has repeatedly determined that the state has enacted a comprehensive and detailed regulatory scheme in this area via the ABCL. That said, local laws that merely exert some "incidental control" over liquor licensees such as requiring smoke alarms in all business premises, or forbidding the dumping of refuse on city sidewalks, or which serve a general public safety purpose are likely to survive scrutiny by the courts under current caselaw precedent.

LOCAL OPTION UNDER THE ABCL

The ABCL does provide for local input into alcoholic beverage regulation and control in several ways. First, all applicants for on-premises retail licenses such as restaurants, hotels, or taverns must provide the State Liquor Authority (Authority) with proof that they have notified their local municipal clerk of their intent to file the application at least 30 days prior to the actual filing date, pursuant to ABCL §110-b(1)(a), which states in pertinent part as follows:

> "1. Not less than thirty days before filing any of the following applications, an applicant shall notify the municipality in which the premises is located of such applicant's intent to file such an application: (a) for a license issued pursuant to section fifty-five, fifty-

> five-a, sixty-four, sixty-four-a, sixty-four-b, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter;" [ABCL §110-b(1)(a)].

In New York City, such 30 day notifications must also be provided prior to the filing of any renewal application, alteration application, or substantial corporate change (defined as a change in 80% or more of the officers, directors, or stock ownership of a corporate licensee.) [See ABCL §§110-b(1)(b), 110-b(1)(c), and 110-b(1)(d)]. The 30 day municipal notifications provide localities with the ability to advise the Authority of any objections they may have to issuance of a license to the applicant, or at the location. The Authority takes such local advice into account during the licensing process.

In addition, the Authority has the power to adopt into law county-wide resolutions passed by a county legislative body or board of supervisors (whichever is appropriate) further limiting the county-wide permissible hours of sale of alcoholic beverages via ABCL §17(9), as follows:

> "9. Upon receipt of a resolution adopted by a board of supervisors or a county legislative body requesting further restriction of hours of sale of alcoholic beverages within such county, and upon notice and hearing within such county, to approve or disapprove such hours within such county." [See ABCL §17(9)].

Finally, local towns and cities have the ability to hold a local option vote to become "dry," or even "partially dry," by circulating petitions and holding a vote that otherwise conforms with the Election Law for their residents regarding a series of seven (7) local option questions which describe for their voters the different types of retail liquor licenses available under article 9 of the ABCL. The questions that must be presented for voters as part of any such local option vote are set forth in ABCL §141, in pertinent part, as follows:

"Question 1. Tavern alcoholic beverage license. Shall a person be allowed to obtain a license to operate a tavern with a limited-service menu (sandwiches, salads, soups, etc.) which permits the tavern operator to sell alcoholic beverages for a customer to drink while the customer is within the tavern. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 2. Restaurant alcoholic beverage license. Shall the operator of a full-service restaurant be allowed to obtain a license which permits the restaurant operator to sell alcoholic beverages for a customer to drink while the customer is within the restaurant. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 3. Year-round hotel alcoholic beverage license. Shall the operator of a year-round hotel with a full-service restaurant be allowed to obtain a license which permits the year-round hotel to sell alcoholic beverages for a customer to drink while the customer is within the hotel. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 4. Summer hotel alcoholic beverage license. Shall the operator of a summer hotel with a full-service restaurant, open for business only within the period from May first to October thirty-first in each year, be allowed to obtain a license which permits the summer hotel to sell alcoholic beverages for a customer to drink while the customer is within the hotel. In addition, unopened containers of beer (such as six-

packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 5. Retail package liquor or wine store license. Shall a person be allowed to obtain a license to operate a retail package liquor-and-wine or wine-without-liquor store, to sell "to go" unopened bottles of liquor or wine to a customer to be taken from the store for the customer to open and drink at another location (such as, for example, at his home)?

Question 6. Off-premises beer and wine cooler license. Shall the operator of a grocery store, drugstore or supply ship operating in the harbors of Lake Erie be allowed to obtain a license which permits the operator to sell "to go" unopened containers of beer (such as six-packs and kegs) and wine coolers with not more than 6% alcohol to a customer to be taken from the store for the customer to open and drink at another location (such as, for example, at his home)?

Question 7. Baseball park, racetrack, athletic field or stadium license. Shall a person be allowed to obtain a license which permits the sale of beer for a patron's consumption while the patron is within a baseball park, racetrack, or other athletic field or stadium where admission fees are charged?" [See ABCL §141].

As to the impact of a local option vote, ABCL §141(3) sets forth the following:

"If a majority of the votes cast shall be in the negative on all or any of the questions, no person shall, after such election, sell alcoholic beverages in such town contrary to such vote or to the provisions of this chapter; provided, however, that the result of such vote shall not shorten the term for which any license may have been lawfully issued under this chapter or affect the rights of the licensee thereunder; and no person shall after

such vote apply for or receive a license to sell alcoholic beverages at retail in such town contrary to such vote, until, by referendum as hereinafter provided for, such sale shall again become lawful." [See ABCL §143].

One final note for local municipal attorneys, as per a 2006 Attorney General's Opinion, municipal "social host" type laws of the type intended apportion liability for or otherwise address underage consumption of alcoholic beverages at social gatherings held in private residences are not preempted by the ABCL or any other state law. [See 2006 N.Y.Op.(Inf.) Att'y Gen. 2].

CONCLUSION

The alcoholic beverage regulatory regime in New York was put in place at the end of Prohibition in 1934 via adoption by the New York Legislature of the ABCL. The ABCL has been repeatedly deemed by the Court of Appeals to be comprehensive and detailed in nature, thereby demonstrating that the legislature had preemptive intent in the drafting of the ABCL. As a result, local municipal governments may exercise only those regulatory powers over liquor licensed businesses in their jurisdictions that are not prohibited via operation of the preemption doctrine. There are, however, certain provisions of the ABCL specifically designed to incorporate local municipal input, including requiring all on-premises license applicants to provide their local municipal clerk with notification of their intent to file at least 30 days prior to the actual filing of their application with the Authority (New York City applicants and licensees must also provide municipal notifications for renewals, alterations, or substantial corporate changes), allowing the Members of the Authority to adopt resolutions of a board of supervisors or county legislature further limiting the hours of operation for alcoholic beverage

sales in a given county, and setting forth procedures for local option votes held in accordance with the Election Law that provide local municipalities with the ability to become "dry," or "partially dry," based upon the outcome of such a vote. Finally, according to a 2006 informal Attorney General's opinion, municipal "social host" type laws of the type intended to apportion liability for or otherwise address underage consumption at social gatherings held in private residences are not preempted by the ABCL or any other state law.

SEQRA and Land Use Case Law

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SEQRA and Land Use Case Law Update

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I. SEQRA

A. Standing

1. *Schmidt v. City of Buffalo Planning Bd.*, 174 A.D.3d 1413 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding seeking to annul the City of Buffalo Planning Board's negative declaration with respect to the demolition and reconstruction of an apartment complex in the City of Buffalo. Respondents moved to dismiss the petition on standing grounds. Supreme Court dismissed the petition and the Fourth Department affirmed. Petitioner alleged he had standing based upon (1) his interest in historic preservation generally; (2) his position as a member of a City advisory board dealing with historic preservation; (3) his interest in photographing the complex; (4) his visits to the complex; and (5) his status as a member of a protected class. The Fourth Department quoted its prior decision in *Niagara Preserv. Coalition, Inc. v. New York Power Auth.*, 121 A.D.3d 1507 (4th Dep't 2014), holding that "interest and injury are not synonymous . . . . A general — or even special — interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public . . . ." "Appreciation for historical and architectural sites does not rise to the level of injury different from that of the public at large for standing purposes." The Fourth Department also cited its prior holding in *Turner v. County of Erie*, 136 A.D.3d 1297 (4th Dep't 2016) in holding that petitioner does not have an injury by virtue of his position on a City advisory board, which is "at most a political impact . . . which does not establish environmental harm."

2. *Tilcon New York, Inc. v. Town of New Windsor*, 172 A.D.3d 942 (2d Dep't 2019). Standing in SEQRA cases requires a petitioner to identify an environmental injury that it has or will suffer which differs from the alleged injury to the public at large. Here, an asphalt company challenged a Town's lease of property to a competing asphalt business and approval of related land use applications. The Court held that petitioner lacked standing — it did not allege any actual or potential injury to itself or the public at large. Increased business competition was not a sufficient interest to confer standing, the company wasn't a party to the ZBA proceedings, and the approval wasn't adverse to the company. On the environmental claims, the company failed to establish that any injuries that were environmental in nature, rather than purely economic, nor did it show injuries distinct from those of the public at large. The company also did not have any type of taxpayer standing, which is limited to cases that alleged fraud, illegality, or a waste of public funds. Alleged violations of leasing and building laws did not meet that level of misconduct, nor was the leasing/land use process an issue of public importance where traditional standing rules would otherwise create a barrier to judicial review.

3. *Sheive v. Holley Volunteer Fire Company, Inc.*, 170 A.D.3d 1589 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding to enjoin any future "Squirrel Slam" hunting contests conducted by the fire company. Petitioner lives 50 miles from the area where the hunting contests are held. She alleged an environmental injury based on her fondness for squirrels and the possibility that the contests may result in the killing of squirrels that she sees near her residence. Supreme Court dismissed the petition for lack of standing and the Fourth Department affirmed.

4. *City of Rye v. Westchester County Bd. of Legislators*, 169 A.D.3d 905 (2d Dep't 2019). Petitioner challenged Westchester County Board of Legislators' negative declaration related to several proposed development projects at Playland Park, an amusement park located in the City of Rye and owned by the County of Westchester. The Supreme Court denied the petition and dismissed the proceeding, holding that the petitioner lacked standing. The Second Department found that the trial court properly used the "balancing of public interests" test and determined that these projects were immune from local zoning and land use laws. The City of Rye did not have standing based on its status as an "involved agency," and it failed to demonstrate any interest in the potential environmental impacts on the City of Rye's community character. Individual petitioner Mecca failed to demonstrate entitlement to a presumption of standing based on proximity, and neither individuals Mecca nor Sack demonstrated their entitlement to standing by showing an injury-in-fact that fell within the zone of interests protected by SEQRA.

5. *Star Property Holding, LLC v. Town of Islip*, 164 A.D.3d 799 (2d Dep't 2018). Nearby business opposing an application have SEQRA standing where they allege sufficient harm other than merely an increase in competition that they would sustain as a result of the proposed development.

6. *Real Estate Bd. of New York, Inc. v. City of New York*, 165 A.D.3d 1 (1st Dep't 2018). Advocacy organization does not have SEQRA standing where it failed to demonstrate that environmental issues were germane to its purpose.

7. *Pilot Travel Centers, LLC v. Town Bd. of the Town of Bath*, 163 A.D.3d 1409 (4th Dep't 2018). Petitioner lacked standing to challenge the repeal of a procedural statute concerning environmental review requirements because it "does not create an injury unique to petitioner."

8. *Lakeview Outlets, Inc. v. Town Malta*, 166 A.D.3d 1445 (3d Dep't 2018). Town Board adopted findings after a final GEIS. The findings imposed mitigation fees upon developers. In July and August 2014, the ZBA determined that plaintiff's plans to develop a restaurant and hotel were

consistent with the GEIS and findings statement and no further SEQRA review was required. Plaintiff was assessed and paid the mitigation fees totaling $268,406. In February 2016, plaintiff commenced this action seeking a declaration that the mitigation fees are illegal and directing defendant to refund the fees paid. The question was whether the 4-month statute of limitations or 6-year statute of limitations applied to the claim. "Although declaratory judgment actions are typically governed by a six-year statute of limitations, a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form. 'If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.'" "Plaintiff's claims are thus, in substance, a direct attack on the mitigation fee scheme established in the GEIS, which is properly viewed as 'an administrative act of defendant's [T]own [B]oard under the circumstances of this case, as opposed to a legislative act, such that any challenge thereto should have been the subject of a CPLR article 78 proceeding.' Indeed, it is settled that dissatisfaction with an agency's mitigation measures imposed pursuant to SEQRA is redressable by way of a CPLR article 78 proceeding." Thus, the claims are time-barred as they were brought more than 4-months from the determination.

B. Lead Agency Jurisdiction

1. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Developer sought approval for a townhouse complex. The Village Board of Trustees — as the SEQRA lead agency — issued SEQRA findings. Thereafter, the Village Planning Board adopted its SEQRA findings and granted subdivision and site plan approval for the project. By intermunicipal agreement, the Village Planning Board's authority was transferred to the Town Planning Board. The Town Planning Board rescinded the prior subdivision and site plan approval. The intermunicipal agreement was then terminated and the review authority over the project was transferred back to the Village. The developer submitted an amended application addressing the Town Planning Board's concerns and asked that the Village Board of Trustees reaffirm its prior SEQRA findings. The Town sued to challenge the decision to reaffirm the prior SEQRA findings and reaffirm the prior subdivision and site plan approval. The Third Department rejected the Town's argument that the Village Board of Trustees lacked jurisdiction to act as the SEQRA lead agency because it "served as the original lead agency and, therefore, had a continuing duty to evaluate the new evidence presented by [the developer]." In determining that a SEIS was not necessary the Board of Trustees "took the requisite hard look at the relevant areas of concern and satisfied the requirements of SEQRA . . . ."

C. Agency Discretion

1. Battle of the experts. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Where there are competing expert opinions, the agency may credit the information of one over the other.

2. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). SEQRA lead agency has "the discretion to select the environmental impacts most relevant to its determination and to overlook those of doubtful relevance."

3. *Uncle Sam Garages, LLC v. Capital Dist. Transp. Auth.*, 171 A.D.3d 1260 (3d Dep't 2019). Agency's classification of an action as Type II is entitled to deference. The Capital District Transportation Authority (CDTA) wanted to build a bus transit center adjacent to a parking garage owned by Uncle Sam Garages. Negotiations fell through, and the CDTA used eminent domain to acquire a sufficient portion of the property to construct the terminal and facilitate bus traffic. There were multiple aspects to this challenge, but one was a SEQRA challenge regarding the decision to classify the action as Type II. The project involved replacing but not expanding paved surfaces; minor work within the parking garage; and the construction of a new nonresidential structure with a floor area of less than 4,000 sq. ft. Based on the applicable environmental review regulations, the court upheld the Type II classification with presumptively no significant environmental impacts.

4. *Village of Ballston Spa v. City of Saratoga Springs*, 163 A.D.3d 1220 (3d Dep't 2018). City sought to acquire property owned by the Village via eminent domain for the installation of a continuous non-motorized trail to improve pedestrian and bicycle travel along Geyser Road. The City issued a negative declaration under SEQRA, but failed to properly comply with the reasoned elaboration requirement. Upon being alerted to this, before issuing its condemnation decision, the City reaffirmed its negative declaration and set forth its rationale in more detailed form. Petitioners argued that the City lacked the ability to cure the defect without amending or rescinding the prior negative declaration. The Third Department rejected that argument, holding that the City complied with SEQRA and had the power to remedy its prior failure to complete the reasoned elaboration. This was not an after-the-fact situation as the revised resolution was adopted prior to the determination being made.

D. Failure to Take a Hard Look/Reasoned Elaboration Requirement

1. *Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, 173 A.D.3d 1718 (4th Dep't 2019). EDPL § 207 proceeding challenging the determination to acquire an easement along a nature trail commemorating the women's rights movement in order to install a sewer line. DEC called

attention to the potential presence of several endangered and threatened species at the site, and indicated an inland salt marsh habitat in the area. The town did not survey these populations (as recommended by DEC) and did not modify the project to minimize impacts on them. Rather, the town listed the species as present on the EAF and said impacts to bats were mitigated by engaging in land clearing only during cold weather (hibernation) months. No similar explanations were provided for the other species, the marsh habitat, or the surface waters to satisfy the "hard look" and "reasoned elaboration" requirements.

2. *Micklas v. Town of Halfmoon Planning Bd.*, 170 A.D.3d 1483 (3d Dep't 2019). A golf course with a pro shop, clubhouse, restaurant, bar, and banquet house applied for an amendment to its site plan and special permit to allow an addition to its bar and restaurant that would be operated as a brewpub. Several nearby property owners, including the petitioners, complained that a brewpub wasn't a permitted use in the Agriculture-Residence district and that it would have negative effects on the character of the neighborhood. The planning board granted the application and was challenged. The planning board characterized it as a Type II, but in the approving resolution, it was called an unlisted action and given a negative declaration. The Court identified this as a possible clerical error but still found that the planning board sufficiently reviewed the proposal's environmental impacts and the negative declaration was reasonable, even if it might have provided a **more** reasoned elaboration for the basis of its determination. Zoning allegations were dismissed because the ordinance permitted "[p]rivate or public recreation or playground area[s], golf club[s], country club[s], or other open recreation uses" as special uses, including accessories to the same, and there was already a restaurant, bar, and banquet facility operating under a special permit.

3. *Peterson v. Planning Bd. of City of Poughkeepsie*, 163 A.D.3d 577 (2d Dep't 2018). Historic preservation association brought an Article 78 proceeding to challenge the City Planning Board's negative declaration. The Court noted that the EAF indicated that the proposed action would affect aesthetic and historic resources and the character of the existing community and that the parcel's forestation would be reduced from 2.75 acres to .3 acres. In issuing its negative declaration, the Planning Board listed approximately 29 reasons supporting its determination. The Planning Board stated that there would be no significant impact on the adjacent historic district. However, in doing so, the Planning Board merely relied on a letter from SHPO, which stated only that the proposed action would not have an adverse impact on the historic district. "Such a conclusory statement fails to fulfill the reasoned elaboration requirement of SEQRA." With respect to impact on vegetation, the negative declaration "inexplicably stated that '[t]he proposed action will not result in the removal or destruction of large quantities of vegetation or fauna.' In the context of this project, the level of deforestation is significant." The

Court found that the proposed action may have a significant adverse impact on the environment and remanded the matter back to the Planning Board for the preparation of an EIS.

4. *Adirondack Historical Ass'n v. Village of Lake Placid*, 161 A.D.3d 1256 (3d Dep't 2018). In furtherance of its Lake Placid Main Street Reconstruction Project, the Village issued a negative declaration and a resolution authorizing condemnation of two vacant parcels of real property owned by petitioner. Petitioner challenged the SEQRA negative declaration. The Third Department held that concerns were voiced about the potential traffic impacts, but the record did not contain any evidence that the lead agency took the requisite hard look at these potential traffic implications. "[T]he sum total of the proof of the Village Board's 'hard look' is its negative response to the question on the EAF as to whether there would be a substantial increase in traffic above present levels—made without articulating a reasoned elaboration for the basis of such determination—and the wholly conclusory statement in its resolution that '[t]here is no significant environmental impact that could not be mitigated with reasonable measures.'" "In light of this, and given the wholesale failure on the part of the Village Board to set forth a record-based elaboration for its conclusion that the identified traffic concerns were not significant, the SEQRA findings and determinations made in connection with the condemnation of the subject property must be vacated."

E. Rescission of Negative Declaration

1. *Leonard v. Planning Bd. of the Town of Union Vale*, 164 A.D.3d 662 (2d Dep't 2018). Property owners seeking to subdivide their parcel of land for a development project commenced a hybrid action/proceeding challenging the planning board's decision to rescind a 30-year-old prior negative declaration. "The record supports the Planning Board's conclusion that changes in the regulatory landscape for environmental matters constituted new information or a change in circumstances. Moreover, in determining that the project may result in significant adverse environmental impacts, the Planning Board identified specific environmental concerns relevant to the criteria for determining significance. The petitioners argue that the Planning Board's conclusion was incorrect. However, 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively.'"

F. Statute of Limitations

1. *Campaign for Buffalo History Architecture & Culture, Inc. v. Zoning Bd. of Appeals of City of Buffalo*, 174 A.D.3d 1304 (4th Dep't 2019). 30-day statute of limitations for challenge to ZBA's decision applied to petitioner's challenge to the negative declaration. Petition dismissed.

2. *Rimler v. City of New York*, 172 A.D.3d 868 (2d Dep't 2019). Petitioners commenced an Article 78 proceeding challenging the City's negative declaration for a 36-story development project. The 4-month statute of limitations began to run upon the final determination of environmental issues. Here, that occurred upon the City Council's approval of the project. CPLR § 306-b requires, where the statute of limitations is four months or less, service to be made not later than 15 days after the expiration of the statute of limitations. While that may be extended for good cause shown, that is a discretionary determination, and good cause does not exist if service is not timely attempted. Here, the Court affirmed dismissal for failure to timely serve, finding that good cause for an extension did not exist where there was no attempt to timely serve and the merits of the petition did not warrant such relief.

3. *Janiga v. Town of West Seneca Zoning Bd. of Appeals*, 174 A.D.3d 1401 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding challenging a determination of the ZBA interpreting the meaning of the required buffer area between their proposed properties and a proposed subdivision. The ZBA moved to dismiss on the ground that petitioners failed to timely serve them. The Fourth Department rejected petitioners' contention that they demonstrated that the time for service should be extended for good cause shown or in the interest of justice. To establish good cause, "reasonable diligence in attempting service must be shown. Here, petitioners failed to show that any attempt to serve the ZBA [or other respondents] was made during the applicable statutory period." Nor would the interests of justice be served by extending the period of time for service.

4. *Berg v. Planning Bd. of the City of Glen Cove*, 169 A.D.3d 665 (2d Dep't 2019). A redevelopment project to redevelop 56 acres of land along the waterfront of Glen Cove Creek was proposed. In 2005, the planning board, as the SEQRA lead agency, issued a positive declaration and, on December 19, 2011, issued a findings statement and decision approving the developer's PUD site plan and subdivision application. On June 11, 2015, the developer submitted an application to amend the PUD master development plan to decrease the overall footprint and density. The planning board determined that no SEIS was necessary and approved the modifications on October 6, 2015. Nearby residents commenced an Article 78 proceeding challenging both the December 19, 2011 determination and the October 6, 2015 determinations. Supreme Court dismissed the challenges to the December 19, 2011 determination as time-barred and found that the respondents were not estopped from asserting the defense. "Estoppel is generally not available against a governmental agency in the exercise of its governmental functions. While there exists a 'rare exception' to this general rule in exceptional cases where there is fraud, misrepresentation, or other affirmative misconduct upon which the other party relies to its detriment, here, the petitioners failed to

demonstrate any such improper conduct that would warrant the application of the doctrine of estoppel." The Court otherwise upheld the October 6, 2015 decision not to require a SEIS.

5. *Stengel v. Town of Poughkeepsie Planning Bd.*, 167 A.D.3d 752 (2d Dep't 2018). Statute of limitations began to run on SEQRA claims when the negative declaration was issued. "Here, the statute of limitations began to run with the issuance of the negative declaration for the project on February 19, 2015, as this constituted the Planning Board's final act under SEQRA and, accordingly, any challenge to the negative declaration had to be commenced within four months of that date."

II. Zoning/Planning

A. County Referral

1. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019) (*quoting Benson Point Realty Corp. v. Town of E. Hampton*, 62 A.D.3d 989 (2d Dep't 2009). Referral of revised plan are not necessary where "'the particulars of the amendment [are] embraced within the original referral.'"

B. Procedures

1. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). Zoning laws adopted by the local law, following the procedures of the Municipal Home Rule Law, are not required to comply with the procedural requirements of the Town Law. Moreover, changes in a proposed local law do not require another public hearing if they do not result in a substantially different law or one that is not embraced within the prior public notice.

2. *Corrales v. Zoning Bd. of Appeals of Village of Dobbs Ferry*, 164 A.D.3d 582 (2d Dep't 2018). Village Board's site plan approval was jurisdictionally defective and void because no public hearing was held as required by the Village's code.

C. Conditions

1. *McFadden v. Town of Westmoreland Zoning Bd.*, 175 A.D.3d 1098 (4th Dep't 2019). Petitioners wanted to lease their residentially zoned land as a dog training facility (not specifically permitted). ZBA conditionally granted a use variance, prohibiting overnight boarding and limiting the number of dogs on the property at any one time to six. Lower Court upheld and Petitioners appealed, arguing that they did not need a use variance and that conditions were therefore improper. The Fourth Department found that the use was not permitted, nor could it be classified as a customary "home occupation," because the Petitioners were leasing

land – not their residence – for the training facility. Town Law § 267–b empowers the ZBA to place reasonable conditions on variance recipients, and these conditions were appropriate.

2. *Rock of Salvation Church v. Village of Sleepy Hollow Planning Bd.*, 166 A.D.3d 985 (2d Dep't 2018). Planning Board imposed certain conditions on its approval of petitioner's site plan for an off-street parking lot. Petitioner challenged those conditions, which included that petitioner remove the planned implementation of a vehicular gate and that an access and drainage easement be recorded between certain parcels consistent with historical uses and practices. The Court found the Planning Board had broad discretion to impose reasonable conditions. The decision approving the site plan subject to conditions had a rational basis.

D. Spot Zoning

1. *Star Property Holding, LLC v. Town of Islip*, 164 A.D.3d 799 (2d Dep't 2018). Rejecting petitioners' allegations of illegal spot zoning. "Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. In evaluating a claim of spot zoning, the inquiry focuses on whether the rezoning is part of a well-considered and comprehensive plan calculated to serve the general welfare of the community. Here, the petitioners failed to establish that the rezoning of the property from Business One District to Business Three District is inconsistent with the Town's comprehensive plan and incompatible with the surrounding."

2. *Johnson v. Town of Hamburg*, 167 A.D.3d 1539 (4th Dep't 2018). Allegations of spot zoning should be dismissed because "petitioners failed to demonstrate that a 'clear conflict' exists between the Town's comprehensive plan and the rezoning determination."

E. Nonconforming Uses

1. *Nabe v. Sosis*, 175 A.D.3d 500 (2d Dep't 2019). Petitioner purchased a gas station and auto repair shop that operated as a legal nonconforming use. A year and a half later, Petitioner wanted to renovate the gas station and convert the repair shop to a convenience store. Upon denial, Petitioner asked the ZBA for permission to switch to a different nonconforming use, and for an area variance pertaining to the convenience store's solid waste disposal. ZBA denied, but the lower court annulled the denial. The Second Department reversed because nonconforming uses are seen as detrimental and the laws are intended to eventually eliminate those uses. The City code provided that a nonconforming use could be changed to a different nonconforming use, if there is "a finding that the proposed use is more consistent with the character of the surrounding neighborhood

and having less adverse impacts," but the ZBA determined that the change would have an adverse impact upon traffic. The ZBA's denial was rational and supported by evidence in the record, and was reinstated.

2. *New York HV Donuts, LLC v. Town of LaGrange Zoning Bd. of Appeals*, 169 A.D.3d 678 (2d Dep't 2019). A nonconforming gas station that was closed for more than a year due to a tanker truck accident and subsequent gasoline spill remediation activities was allowed to reestablish its nonconforming use. Remediation period was not a "discontinuance" of the nonconforming use. The Building Inspector initially granted the permits under the zoning code's allowance for rebuilding after casualties, and it granted the gas station a year from the date of its request to reestablish operations. The Dunkin' Donuts across the street appealed. The ZBA affirmed and the court agreed, because the remediation work was sufficient to show that the nonconforming use was never discontinued.

F. Variances

1. *Route 17K Real Estate, LLC v. Zoning Bd. of Appeals of Town of Newburgh*, 168 A.D.3d 1065 (2d Dep't 2019). Hotel developer applied to the ZBA for area variances, which were granted. One aspect of the request was for a variance related to a provision of the zoning law which required that a hotel have its principal frontage on a state or county highway. Petitioners challenged, arguing that the ZBA improperly classified the variance request as for an area variance as opposed to a use variance. The Second Department found that the ZBA properly classified the variances as area variances. The Town Law defines an area variance as authorization for the use of land in a manner which is not allowed by the dimensional ***or physical*** requirements of the applicable zoning regulations. The Court found the "principal frontage" requirement to be a physical requirement. The Court repeated the test for area variances and noted the "a zoning board need not justify its determination with supporting evidence with respect to each of the five statutory factors as long as its ultimate determination balancing the relevant considerations is rational." The Second Department determined that the record demonstrated consideration of all factors and that the decision to grant the variances was rational.

2. *Schweig v. City of New Rochelle*, 170 A.D.3d 863 (2d Dep't 2019). Petitioners sold their home and then were denied a building permit to construct a new home on an adjacent vacant lot they owned, on the grounds that it did not comply with the 15,000 sf. lot required by the zoning ordinance. They applied for a variance, which was also denied by the ZBA because the variances were substantial (almost 5,000 sf., or a third, below requirement), there were no compelling or unique circumstances weighing in favor, and the proposed construction would be

inconsistent with the density and character of the neighborhood. The Court upheld the ZBA's decision for weighing appropriate factors and making a reasonable determination. Petitioners' takings claim was likewise denied, because the minimum lot size had been increased ten years earlier, meaning Petitioners had notice of the lot regulations and could have included the lot in the sale of their home.

3. *Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Bd. of Appeals*, 167 A.D.3d 1350 (3d Dep't 2018). Petitioner applied to the ZBA for 5 area variances to construct additional student housing on its property. During the hearing process, petitioner withdrew two of its requests, but retained requests to increase the number of dwelling units, decrease the minimum living area per unit, and decrease the required number of parking spaces. The ZBA denied the variances and petitioner commenced this Article 78 proceeding. Supreme Court dismissed the petition. The Second Department held that the ZBA's determination was supported by the record and had a rational basis.

4. *Mengisopolous v. Bd. of Zoning Appeals of City of Glen Cove*, 168 A.D.3d 943 (2d Dep't 2019). A ZBA's denial of an application for area variances was annulled because the ZBA failed to meaningfully consider the relevant statutory factors. Even though the proposed variances were substantial and the alleged difficulty was self-created, the ZBA's failure to cite to particular evidence regarding the questions of undesirable effect on the character of the neighborhood, adverse impact to physical and environmental conditions, or other detriments to the health, safety, and welfare of the community was enough to annul its action. All factors must be weighed, and the Court remanded the matter for reconsideration.

5. *Matter of D'Souza v. Board of Appeals of the Town of Hempstead*, 173 A.D.3d 738 (2d Dep't 2019). A lower court dismissed an Article 78 challenge to a zoning variance denial because Petitioner did not submit copies of his variance applications, transcripts from any of the proceedings, or an affidavit from a person with knowledge in support of his petition. The Second Department reinstated the suit, finding that there is no requirement that pleadings must include affidavits or other written proof, and that the respondent, not the petitioner, was responsible for filing the certified transcript of the record.

6. *Abbatiello v. Town of North Hempstead Bd. of Zoning Appeals*, 164 A.D.3d 785 (2d Dep't 2018). Petitioner's house was constructed in 1920 and is a two-family residence. It is located in what later became a business district, where all residential uses are prohibited. Two-family residences were permitted prior to the 1945 zoning code, which rezoned the property to business. Petitioner purchased the property in 1977 believing the house to be a legal 2-family residence. Since he bought the property, he had been renting out the two units and has obtained various

permits from the Town allowing him to do so. In 2013, petitioner applied to the ZBA for a use variance to permit him to continue renting the property as a 2-family. The ZBA denied the application. "Contrary to the Board's conclusion, the petitioner presented evidence, including affidavits from neighbors and others who had lived in the community for many years, which was sufficient to establish that the property was a legal two-family residence prior to the 1945 amendments to the Town Zoning Code. By contrast, there was no evidence presented at the hearing to demonstrate that the property had been converted into a two-family dwelling after the 1945 amendments. Accordingly, the record does not contain evidence to support the rationality of the Board's determination denying the proposed use variance. Since the Board's determination was irrational, and arbitrary and capricious, the Supreme Court should have granted the petition, annulled the Board's determination, and remitted the matter to the Town for the issuance of the requested use variance."

7. *White Plains Rural Cemetery Ass'n v. City of White Plains*, 168 A.D.3d 1068 (2d Dep't 2019). Court overturned the denial of a use variance, finding that the record demonstrated that the cemetery met each of the required factors.

8. *54 Marion Avenue LLC v. City of Saratoga Springs*, 2019 WL 4307913 (3d Dep't 2019). The Third Department upheld a denial of a use variance where the record supported the conclusion that the hardship was not unique and was self-created.

G. Interpretation Appeals

1. *Northwood School, Inc. v. Zoning Bd. of Appeals for the Town of North Elba and Village of Lake Placid*, 171 A.D.3d 1292 (3d Dep't 2019). A group of boarding school students and their faculty advisor didn't qualify as a "family," and their school's request to house them in a single-family residence donated to the school was therefore properly denied. The home's zoning district permits only 1-2 family dwellings, and the ZBA determined that the proposed use did not meet the ordinance's definition of single-family residential use, nor did the group qualify as a family. The Court found these conclusions to be reasonable and supported by the record (different students would be housed each year, it would only be used during the school year, there would be a separate dwelling area for the faculty advisor, and students wouldn't be expected to share meals or household chores). The Court went over the standard of review. "This Court does not defer to a zoning board's 'pure legal interpretation of terms in an ordinance.' However, 'that body is accorded reasonable discretion in interpreting an ordinance that addresses an area of zoning where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing. Moreover, '[a zoning board's] fact-based interpretation of a zoning ordinance that determines its application

to a particular use or property is entitled to great deference.' Whether petitioner's proposed use of the property falls within the Code's definition of a family 'is essentially a factual question'; thus, we will defer to respondent's determination unless it was irrational or unreasonable." The court found no merit in the school's argument for special treatment, finding that a balancing of interests would be required if the school had sought a special use permit to expand into a residential neighborhood, but not for an interpretation of specifically defined terms included in the zoning ordinance.

2. *Casey v. Town of Arietta Zoning Bd. of Appeals*, 169 A.D.3d 1231 (3d Dep't 2019). Petitioners owned a 2.6–acre parcel in a residential zone with a 3,200 sf. residence, a detached 1,200 sf. garage, and a boathouse. Petitioners applied for a building permit to construct a 2,016 sf. pole barn for storage. The Zoning Officer determined the barn was a principal building as defined by the Town Code because it exceeded 1,250 sf., so he denied the application because the house (principal) and garage already existed. The ZBA affirmed. The lower court dismissed the petition. The Third Department found that although the Zoning Officer's conclusion implicitly held that it was not an accessory structure, he did not follow the proper pathway to reach that conclusion. Under the Code's definitions, it would be impossible to determine that a structure was a principal building without first determining whether it was an accessory structure. Accordingly, the court remitted the ZBA's December 2015 determination to the Zoning Officer to render a determination regarding whether the proposed pole barn was an accessory structure under the former Town Code and, dependent on the answer to that question, whether a permit should be granted. The court did not remand so much of the ZBA's denial of petitioners' most recent application, which proposed a new building rather than an accessory building, because it would expand a nonconforming use on the property.

3. *Yeshiva Talmud Torah Ohr Moshe v. Zoning Bd. of Appeals of The Town of Wawarsing*, 170 A.D.3d 1488 (3 Dep't 2019). Two synagogues, classroom facilities, on-site residential space for the rabbi, and student dormitory and dining facilities were proposed. Although "places of worship" were a permitted use in the zoning district where the property was located, the town's municipal code officer and ZBA denied it as more similar to a school or camp, which were not permitted uses. The Town conceded that the synagogue and rabbi residences were permissible, but the Court overturned the denial because places of worship were defined in the ordinance to expressly include not only traditional religious spaces such as churches and synagogues, but also related religious education uses such as schools and student housing. In fact, the zoning ordinance included school halls in its definition of a place of worship, and the Court found that the proposal for an on-site school hall to provide religious education attendant to the site's use for synagogue worship, and the

student housing was similar to the examples of permissible "related on-site facilities" provided in the ordinance.

4. *Chestnut Ridge Associates, LLC v. Village of Chestnut Ridge ZBA*, 169 A.D.3d 995 (2d Dep't 2019). The ZBA had no jurisdiction to interpret whether a landscaping business was permitted in the laboratory-office zoning district absent a prior determination from the building inspector.

5. *Brophy v. Town of Olive Zoning Bd. of Appeals*, 166 A.D.3d 1123 (3d Dep't 2018). The Third Department found that weddings were properly approved as an accessory use to a bed and breakfast located in a residential zoning district. The B&B started out small when it was originally approved in 1998, but grew from 1 room to 3 and began offering wedding events. In 2015, neighbors complained after there were 12 weddings with tents, music, and food service. The ZBA required site plan approval for these events to continue as an accessory use, and approved four wedding events annually with up to 75 guests each. The Court upheld this determination, finding that the record showed that the owners resided on the property and rented guestrooms on a year-round basis, but only offered the property as a wedding venue during warmer months. The Court also upheld the ZBA's authority to require site plan approval because the town code required site plan review for all principal uses, and this requirement "necessarily should attend to an approved accessory use." The Code required the ZBA to impose "conditions and safeguards as may be required to protect the public health, safety, morals and general welfare," and so it was reasonable to require a site plan, even if the bed and breakfast had originally been approved without conditions.

6. *Vineland Commons, LLC v. Building Dep't of Town of Riverhead*, 165 A.D.3d 808 (2d Dep't 2018). Petitioner purchased the subject property in 2001. In 2004, the Town amended its zoning classification for the property, placing it in a rural zoning district where retail was not a permitted use. In 2014, petitioner applied for a use permit to operate a convenience store on the property. The building department denied the application. The petitioner then commenced an Article 78 proceeding. The Second Department held that the petition should have been dismissed for failure to exhaust administrative remedies, which would be an appeal to the ZBA.

H. Mootness

1. *Sierra Club v. New York State Dep't of Envtl. Conserv.*, 169 A.D.3d 1485 (4th Dep't 2019). Petitioners challenged the issuance of permits related to a renovation of a power plant that burned coal to generate electricity for nearly 80 years. The plant was temporarily inactive, sold, and the purchaser sought to resume operations using natural gas and biomass rather than coal. The DEC issued an amended negative declaration and

issued revised air permits. The DPS issued a notice to proceed with the construction of the gas pipeline necessary to operate the plant in October 2016. Petitioners commenced the lawsuit in October 2016, but failed to request a TRO to stop repowering or construction of the pipeline. Petitioners waited to serve motion papers until the end of December. Oral argument occurred in January 2017 on the motion to dismiss for lack of standing and mootness. In March 2017, respondents informed the court that construction was completed and that the plant had resumed operations. In April 2017, Supreme Court issued a decision denying petitioners' motion for temporary injunctive relief and granting respondents' motions to dismiss. Judgment was entered in June 2017 and petitioners filed a notice of appeal in July 2017. Petitioners did not seek an order from the Fourth Department to enjoin operation of the plant. They perfected the appeal in April 2018. The Fourth Department determined that the appeal should be dismissed as moot. "The primary factor in the mootness analysis is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation. Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding." Petitioners failed to attempt to preserve the status quo. The respondents did not undertake the project in bad faith.

I. Eminent Domain

1. *United Refining Co. of Pennsylvania v. Town of Amherst*, 173 A.D.3d 1810 (4th Dep't 2019). Proceeding under EDPL § 207 to annul the determination to condemn certain real property in the Town. The Fourth Department upheld the determination noting that judicial review is "very limited" and "confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with the [State Environmental Quality Review Act ([SEQRA] ECL art 8)] and EDPL article 2; and (4) the acquisition will serve a public use." The burden is on the petitioner. The Fourth Department reaffirmed that what qualifies as a public purpose or use is broad. Redevelopment and urban renewal are valid public uses.

J. Special Use Permits

1. *Edwards v. Zoning Bd. of Appeals of Town of Amherst*, 163 A.D.3d 1511 (4th Dep't 2018). Petitioners commenced an Article 78 proceeding challenging the ZBA's determination granting a special use permit for a telecommunications tower. They argued that the ZBA's determination to grant the special use permit was inconsistent with the Town's comprehensive plan. The Fourth Department rejected this argument. "It is well settled that the inclusion of a permitted use in a zoning code is tantamount to a legislative finding that the permitted use is in harmony

with the general zoning plan and will not adversely affect the neighborhood." Petitioner also argued that the ZBA improperly granted certain "variances" without analyzing the statutory factors. "Town Law § 274–b(3) provides that where, as here, 'a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to [Town Law § 267–b].' Additionally, Town Law § 274–b (5) provides that a town 'may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits submitted for approval.' 'In effect, subdivision (5) allows a town ... to establish one-stop special use permitting if it so chooses.' Thus, 'where a town ... exercises its discretion under subdivision (5), an applicant may have two avenues to address an inability to comply with a given ... requirement in connection with a special use permit, but this overlap does not create discord in the Town Law or render either [subdivision (3) or subdivision (5)] superfluous.'"

2. *Quickchek Corp. v. Town of Islip*, 166 A.D.3d 982 (2d Dep't 2018). Town Board denied an application for a special use permit to operate a gasoline service station. The property is located in a zoning district where gas stations are allowed as a special use. The Second Department noted that the burden on a special use permit applicant is lighter than an applicant for a variance. A denial of a special use permit must be supported by evidence in the record. Here, the alleged reason for denial — increased traffic — was not supported by the record.

K. Site Plan Review

1. Petitioner owned a 43.5-acre parcel in an agricultural overlay district, faced the ocean on its southern side and a public highway to the north. After a series of abandoned applications to construct four single-family homes, in 2013, the petitioner applied to build one 13,000 square foot house on the northwest corner. The planning board rejected this plan in 2015 based on a determination that the northwest part of the property was unsuitable for development. The court affirmed the denial because local planning boards are accorded broad discretion in land use decisions, and this determination was reasonable - the board considered the factors and criteria for site plan applications that were set out in the village code, and its determination was based on findings that the proposed development would reduce agricultural soils, impair views and farmland vistas, and negatively impact future subdivisions of the property.

2. *Fildon, LLC v. Planning Bd. of the Incorporated Village of Hempstead*, 164 A.D.3d 501 (2d Dep't 2018). Petitioner own two parcels of property in the industrial zoning district in the Village. They submitted an application to the Planning Board for site plan approval of a green waste

and construction debris transfer station. The Planning Board denied the application due to concerns about traffic and congestion. "A local planning board has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. When reviewing the determinations of a local planning board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination. Contrary to the petitioners' contentions, the Planning Board's determination had a rational basis, was not illegal, and was not arbitrary and capricious."

3. *Sagaponack Ventures, LLC v. Board of Trustees of the Village of Sagaponack*, 171 A.D.3d 762 (2d Dep't 2019). Petitioner submitted a site plan application to the Village Board of Trustees. The Board denied the application and determined that the portion of the property proposed to be developed was not a suitable location for development. The petitioner challenged, Supreme Court dismissed the petition, and the Second Department affirmed. "A local planning board has broad discretion in considering applications involving the use of land, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion. Here, the determination of the Board that the northwestern corner of the property was not a suitable location for development was not illegal, arbitrary and capricious, or an abuse of discretion. The Board properly considered the factors set forth in the Village Code governing site plan applications and it determined that development in the northwestern corner of the property would contribute to the loss of agricultural soil, that such development would negatively impact the views and vistas of farmland areas, and that such development would have a negative impact on any future subdivision of the property."

L. Subdivisions

1. *Perkins v. Town of Dryden Planning Bd.*, 172 A.D.3d 1695 (3d Dep't 2019). Community solar developer applied to the planning board for a subdivision to construct projects on 5 separate lots. A common driveway would serve the parcels as part of the plan. Petitioners sought to amend their petition to allege that the subdivision violated Town Law § 280-a because there was no frontage on a public street. Supreme Court denied the motion to amend and the Third Department affirmed, holding the claim to be without merit. Town Law § 280-a applies to buildings and, under the local zoning law, a building was defined as an enclosure.

M. Preemption

1. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). The Mined Land Reclamation Law does not preempt a town's authority to determine that mining should not be a permitted use of land within the town.

N. Historic Preservation/Architectural Review

1. *Save America's Clocks Inc. v. City of New York*, 33 N.Y.3d 198 (N.Y. 2019). There is a historic building in NYC with a clock tower and gallery space overlooking the mechanism, which are designated as an "interior landmark" under NYC Landmarks Preservation Law, meaning the owner needed approval from the Landmarks Preservation Commission ("LPC") prior to any changes or modifications. A developer submitted a request for a certificate of appropriateness ("COA") to convert it into luxury housing. LPC held two public hearings and conducted a site visit, eventually concluding that planned restoration investments would outweigh any negative impacts. Among other things, Petitioners challenged LPC's authority to approve changes that would restrict public access to an interior landmark. Lower Court ruled for Petitioners, and the Appellate Division affirmed. The Court of Appeals, by majority with a dissent, reversed, finding that LPC's decision was rational and entitled to deference based on the extensive deliberative process, and its findings that "the main lobby, stair hall, clock tower rooms and banking hall w[ould] be fully restored, and the clock mechanism and faces w[ould] be retained, thereby preserving these significant features." Regarding closing the area to public access (the law states that an interior landmark "is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value"), the court agreed with LPC that "public access is a threshold condition, not an ongoing one." Further, alteration and even demolition were inherently contemplated by the COA process.

2. *Livingston Development Group, LLC v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 168 A.D.3d 847 (2 Dep't 2019). An application for a condominium development had been approved by the planning board, but was denied by the architectural review board and the zoning board of appeals. Following a viewshed analysis conducted by the planning board, the village board granted the developer's application for site plan review, subject to a requirement that the developer obtain approval from the village Architectural and Historic Review Board. The review board denied the application based on its finding that the condominiums would be excessively out of character with the surrounding area. The zoning board of appeals affirmed the denial. The lower court annulled the ZBA and AHRB, but the Second Department held that the review board's denial was appropriate. The trial court's decision was

based on its belief that site planning issues were delegated to the jurisdiction of the planning board only, but the review board and the zoning board of appeals did not rely on the site plan viewshed requirements, so their denial did not actually "usurp" the planning board's authority but was both reasonable and within the authority delegated to the review board and to the zoning board of appeals.

O. Enforcement

1. *Village of Sharon Springs v. Barr*, 165 A.D.3d 1445 (3d Dep't 2018). The Village established the material facts of zoning violations through its code enforcement officer. The affidavit was supported by documentary and photographic evidence. Defendant submitted no opposition to raise a material question of fact. While the complaint did not state a cause of action or identify the basis for the relief requested, the Third Department determined that summary judgment may be granted on an unpleaded cause of action "where the proof supports such a cause of action and the opposing party has not been misled to its prejudice."

III. Conflicts

A. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Third Department found no conflict of interest for members of the Village Board of Trustees where they were residents of a development project that was under review by the Board. "In determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and[,] where a substantial conflict is inevitable, the public official should not act." Applying this standard to the facts, the Court found that "[t]his mere relationship . . . does not give rise to an instance where a substantial conflict would be inevitable." "Moreover, petitioners failed to tender any proof indicating how the subject members gained any benefit or advantage by their votes."

Update on Governmental Regulation of Religious Education

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An Overview and Update on the Establishment Clause and the Blaine Amendment: State Aid To - and Regulation of - Religious Schools

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The First Amendment of the US Constitution contains two provisions aimed at securing religious liberty: the Establishment Clause and the Free Exercise Clause. The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion." This clause prohibits the establishment of an official religion, the favoring of one religion over another or the support of non-religion over religion or vice versa. The Free Exercise Clause prohibits Congress from making any law "prohibiting the free exercise thereof." This clause operates to protect persons' religious beliefs and actions taken in pursuit of those beliefs. In Cantwell v. Connecticut, the Supreme Court held that the Bill of Rights applies to actions of state governments as well. See Cantwell v. Conn., 310 US 296, 303 (1940).

The New York State Constitution contains a parallel provision to the Free Exercise Clause. Section three of article one of the Bill of Rights of the New York State Constitution provides that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no persons shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." N.Y. State Constitution, Article I, section 3.

This discussion will provide an overview and an update of significant cases decided under the Establishment Clause that consider the provision of state aid to religious schools. After providing this review of case law, this discussion will examine one recent controversy in more depth – the extent of permissible governmental regulation of religious schools.

State Aid to Religious Schools

I. Federal Caselaw

One of the earliest Establishment Clause cases decided by the Supreme Court involved the lawfulness of reimbursement for transportation to parochial schools. Everson v. Board of Education, 330 U.S. 1 (1947). In Everson, a taxpayer challenged a New Jersey law that authorized the reimbursement of public funds to parents who paid bus fares for their children to use public buses to be transported to school. Some of the funds were used to reimburse funds expended by parents whose children attended Catholic schools. The crux of the challenge was that in reimbursing parents for the transportation of their children to religious schools, the State of New Jersey was ultimately supporting the Catholic religion in violation of the Establishment Clause. Id. at 8. In deciding that the Establishment Clause did not prohibit the use of tax-levy dollars to pay for the transportation of children to religious schools, the Supreme Court focused on the point that the statute was a general one – it reimbursed parents of students attending public, nonpublic, and parochial schools. Id. at 17. Justice Black argued that the purpose of the Establishment Clause was not to prevent religious schools from receiving general government support – whether police and fire protection, the connections to a municipal sewer system, or reimbursement for transportation expenses as part of a program for all school children. Id. at 18. Rather, the Establishment Clause was intended to prevent support for one religion over another or for non-religion over religion. Because the law at issue "[did] no more than provide a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools", the Court held that this law did not violate the Establishment Clause. Id.

Twenty years later, in Board of Education v. Allen, the Supreme Court had another opportunity to consider a law that required governmental aid be provided to students in religious schools. 392 U.S. 236 (1968). In 1965, New York State amended section 701 of the Education Law to require school boards to provide textbooks free of charge to students in public and private schools. The plaintiff boards of education sought a declaratory judgment that this law violated both the Federal and State constitutions in that the provision of funds for the purchase of textbooks for religious schools constituted a law supporting the establishment of religion. The appellants argued that the use of tax-levy dollars to purchase books for use by sectarian schools would ultimately assist the schools' ability to propagate their religious mission. The trial court held that the law violated the Establishment Clause, the Appellate Division reversed, finding that the school boards lacked standing, and the New York Court of Appeals held that the boards had standing and that the law did not violate the Federal or State Constitution. 392 U.S. at 240.

In upholding the decision of the New York Court of Appeals, the Supreme Court found that the reasoning in Everson guided the result in this case. See 392 U.S. at 241-42. Similar to the law at issue in Everson, which provided a benefit to children attending public and nonpublic schools, section 701 provided textbooks free of charge to students studying in public and parochial, or other private, schools. Id. at 243. In analogizing to the reasoning in Everson, the Supreme Court distilled the test that it had used, and would continue to use, to differentiate permissible from impermissible government aid under the Establishment Clause. The test asked whether the purpose of the governmental action was a secular one and whether the effect of such action was intended to advance or inhibit religion. Id. The Court found that just as the law challenged in Everson had a secular purpose, to facilitate the transportation to school of students who attended all types of schools, section 701 of the Education Law had the secular purpose of

making textbooks available at no cost to all students. Similarly, just as the reimbursement of the costs of transportation to parents in Everson neither advanced nor inhibited religion, the Court found that the loaning of books to students in parochial schools, when no funds were provided to the religious schools, did not have the unlawful effect of advancing religion. The Court concluded that "[perhaps] free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution." Id. at 243.

In holding that section 701 did not constitute a violation of the Establishment Clause, the Supreme Court recognized that religious schools carried out two functions, the provision of both a secular and religious education, and that it was feasible for the state to support the secular function without also promoting the religious function. Id. at 248. This recognition – or this choice – in some ways marked a turning point in Establishment Clause jurisprudence because it meant that aid could support religious schools, provided that the aid had a secular purpose and was made available on neutral terms to students at all schools.

The Supreme Court's reasoning in Everson and in Allen created the parameters for the Court's decision in Mitchell v. Helms, a case about the provision of federal aid to parochial schools for the purchase of instructional materials and equipment. 530 U.S. 793 (2000) (plurality opinion). In Mitchell v. Helms, Justice O'Connor, whose concurrence constitutes the controlling opinion in the case, pointed out that the "general principles used to determine whether government aid violated the Establishment Clause have remained largely unchanged." Id. at 844. These two principles were: did the government act with the purpose of advancing or inhibiting religion; and did the aid have the effect of advancing or inhibiting religion. Id. at 845. By 2000, when Mitchell v. Helms was decided, the Supreme Court had developed a three-part

test to assess whether the aid the effect of advancing or inhibiting religion: first, did the aid result in governmental indoctrination; second, did the aid program define its recipients by reference to religion; and third, did the aid program create an excessive entanglement between government and religion? Id.

As there was no claim that purpose of the aid was to advance religion or that the aid program created an excessive entanglement between government and religion, Justice O'Connor focused on whether the aid program defined its recipients by reference to religion and whether the aid resulted in government indoctrination. The federal Department of Education distributed the federal aid at issue in Mitchell, funds authorized by Chapter 2 of the Education Consolidation and Improvement Act, on neutral grounds. The allocation took into account the relative enrollment of students whose educational needs imposed a higher than average cost and required that the federal aid be spent on students in public and nonpublic public schools. For these reasons, there was no viable argument that the program defined recipients of Chapter 2 by reference to their religion. Justice O'Connor found that "[as] these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike." Id. at 846. Justice O'Connor also concluded that the program had sufficient safeguards to ensure that the aid would not result in governmental indoctrination. Some of these safeguards included a requirement that the funds supplement but not supplant non-federal funds, a commitment to use the materials for secular purposes, and a provision requiring that public agencies – rather than the schools – control the funds and retain title to the materials. Id. at 848-49.

In holding that the provision of instructional materials and equipment to parochial schools did not violate the Establishment Clause, Justice O'Connor rejected the holdings of two

earlier cases, Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977). In those cases, the Court had held that the provision of instructional materials and equipment to religious schools violated the Establishment Clause because "any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion." Id. at 850. Justice O'Connor highlighted the inconsistency among the Court's previous holdings that textbooks could be loaned to religious schools while maps and computers could not be loaned, and concluded that the rationale for the inconsistent holdings – that a religious school could divert the latter for religious purposes but not the former – was not meaningful. Id. at 850-858. For Justice O'Connor the divertibility rationale proved too much because nearly every form of aid could arguably be used in support of religious education or practice.

Rather than focusing on the potential that aid could be diverted to a religious use, Justice O'Connor urged a rule that asked whether the aid at issue "is, or has been, used for religious purposes." Id. at 857 (citations omitted). In Mitchell v. Helms, Justice O'Connor found that the only evidence of actual diversion was *de minimis*, and as a result, considering the secular purpose of the Chapter 2 program, the fact that the aid was allocated on the basis of neutral criteria, that it could only supplement, and not supplant, non-federal funds and that there were safeguards in place to prevent funding of religious activity, Justice O'Connor concluded that there was no basis to find that Chapter 2 violated the Establishment Clause. Id. at 867.

Thus, across the span of fifty years, the Supreme Court had honed its inquiry into the lawfulness of support by the government for religious schools into two parts. The first examined the purpose of the support, thereby permitting support whose purpose is secular and prohibiting support when its purpose is to advance or inhibit religious education or practice. The second

focused on the effect of the support. In Mitchell v Helms, Justice O'Connor's holding emphasized the need to probe how a religious school used the governmental aid, especially given the parameters surrounding the provision of such aid, rather than how such school *could* use the governmental aid. At the same time that Justice O'Connor endorsed this analysis, she also cautioned against the provision of direct monetary support to religious schools, noting "that the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition. *See, e.g.*, Walz v. Tax Comm'n of City of New York, 397 U.S. 663, 668 (1970) ("For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity")." In an area in which it is difficult to draw bright lines, this clear statement highlights an important one and one that has helped the courts differentiate permissible from non-permissible support.

The next major case to address direct funding of religious institutions is Trinity Lutheran Church v. Comer, which held that the Free Exercise Clause prohibited the government from categorically excluding religious organizations from a grant program. 137 S.Ct. 2012 (2017). The facts of the case are straightforward. Missouri's Department of Natural Resources established a grant program to help schools and daycare centers purchase rubber playground surfaces. Trinity Lutheran Church Child Learning Center applied for a grant to resurface its playground, but its application was rejected from the program because the Missouri State Constitution includes a provision that prohibits funds "be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . ." Id. at 2017 (citing Art. I, Section 7 of the Missouri Constitution). Trinity Lutheran sued the Department of Natural Resources on the ground that its rejection of the application of the Child Learning Center

violated the Free Exercise Clause. The District Court granted the Department's motion to dismiss and the Court of Appeals affirmed. The Court of Appeals held that the Free Exercise Clause did not require that Missouri disregard its state constitutional provision that prohibited the making of direct monetary grants to a religious institution.

Justice Roberts held that a law that denied a generally available benefit on account of religious identity would be subject to strict scrutiny and could only be justified based on a compelling state interest. Id. at 2019. Consistent with this rule, in McDaniel v Paty, 435 U.S. 618 (1978), the Supreme Court struck down a law that disqualified ministers from serving as delegates to the State's constitutional convention because it penalized the free exercise of the minister who had to choose between serving as delegate or exercising his religious beliefs. Id. Consistent with McDaniel, in Church of Lukumi Babalu Aye, Inc. v. Hialeah, the Supreme Court found that three ordinances that outlawed ritual slaughter were intended to discriminate against persons who practiced Santeria. 137 S.Ct. at 2021 (citing Lukumi Babalu Aye, 508 U.S. 520 (1993)).

In the context of these precedents, it seemed like a very logical step for the Court to conclude that the Department of Natural Resources' policy constituted a violation of the Free Exercise Clause. Justice Roberts explained that the Department gave Trinity Lutheran a choice – either the Church could participate in the grant program and cease operating as a church or it could give up its ability to participate in the grant program and continue operating as a church. Id. at 2022. For the majority in Trinity Lutheran, such a choice was not consistent with the Free Exercise Clause because it conditioned the church's ability to participate in the program on its identity as a church. In other words, "[in] this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit. The rule is simple:

No churches need apply." Id. at 2023. Justice Roberts found that Missouri's proferred reason for this categorical exclusion – to avoid a violation of the Establishment Clause – was not the compelling interest necessary to justify the discrimination at issue. Id. at 2024.

Several justices emphasized that the holding turned on the fact that the Department of Natural Resources categorically denied the grants to any and all applicants owned or controlled by a religious entity by including a footnote that made this point explicit. The third footnote in Justice Roberts' opinion states: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Id. at 2024, n.3. Although seven Justices supported the majority's holding, only four Justices (Chief Justice Roberts, Justices Alito, Kagan and Kennedy) joined in this footnote. Justices Gorsuch and Thomas expressed their inability to join the point made in this footnote because of the concern that it narrowed the holding to these precise facts. Id. at 2026 (Gorsuch, J., concurring). It seems very possible that the plurality included this footnote, however, to caution against reading this decision as a step moving the Court closer to approving monetary grants for religious schools.

Notwithstanding this footnote, Trinity Lutheran is a very significant decision in the Supreme Court's jurisprudence about the Religion Clauses. The first notable issue is that the majority's opinion barely engages with the Establishment Clause. After Justice Roberts noted that the Court of Appeals had found that the Department could provide the grant to the church without violating the Establishment Clause, he failed to explore this issue further. Id. at 2018. Perhaps Justice Roberts determined that the purpose and effect of a grant program to resurface playgrounds was, to such a large extent, secular that there was little reason to elaborate. But, the dissent did not view this question as a simple one at all and criticized the majority's failure to

analyze whether the provision of the grant to Trinity Lutheran violated the Establishment Clause. See e.g., id., at 2028 – 41 (Sotomayor, J., dissenting). Justice Sotomayor found that the state constitutional provision that prevented the provision of the grant to Trinity Lutheran to be consistent with the Court's Free Exercise and Establishment Clause jurisprudence. She wrote, "Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid these concerns, and only those concerns, it has prohibited such funding . . . The Constitution permits this choice." Id. at 2038.

From the dissent's perspective, Justice O'Connor's concurrence in Mitchell v. Helms would have required an analysis of whether the provision of the grant to the Trinity Lutheran Church Child Learning Center would have the effect of advancing religion. That the Court never engaged in this analysis suggested to the dissent that the majority had adopted the plurality's approach in Mitchell rather than the one expressed by Justice O'Connor. Id. at 2030. This approach would inquire only whether the aid was secular in nature and whether it was distributed based on neutral criteria rather than whether the aid actually supported religious activity. For the dissent, "[such] a break with precedent would mark a radical mistake." Id. at 2031.

In addition to failing to analyze the provision of the grant to Trinity Lutheran under the Establishment Clause, as a doctrinal matter, Trinity Lutheran suggests that government aid to religious schools, in the form of a grant program like that of the Missouri's Department of Natural Resources, not only may be permissible but also may be required. The effect of this new rule was shown almost immediately. On the day following its decision, the Supreme Court vacated two state supreme court decisions and remanded both decisions for reconsideration in light of Trinity Lutheran. See Moses v. Skandera,367 P.3d 838 (N.M. 2015), *vacated sub nom.*

N.M. Ass'n of Nonpublic Schs. v. Moses, 137 S.Ct. 2325 (2017)(granting *cert.*, vacating judgment, and remanding to the Supreme Court of New Mexico for further consideration in light of Trinity Lutheran,137 S.Ct. 2012); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015)(en banc), *vacated sub nom.*, Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S.Ct. 2325 (2017)(granting *cert.*, vacating judgment, and remanding to the Colorado Supreme Court for reconsideration in light of Trinity Lutheran, 137 S.Ct. 2012).

In Moses v. Skandera, the New Mexico Supreme Court had prohibited the loaning of textbooks to students attending private schools based on a provision of the New Mexico constitution that prohibited the use of public funds to support any sectarian or private school. 367 P.3d 838. And in Taxpayers for Pub. Educ.v. Douglas Cty. Sch.Dist., the Colorado Supreme Court had invalidated a voucher program that Douglas County School District had established, which directed public funds to private and religious schools in payment for students' tuition at those schools. 351 P.3d 461 (2015). The Colorado Supreme Court held that the voucher program violated a state constitutional provision that expressly prohibited the payment of public monies to a school under the control of a church or sectarian denomination. Many states have constitutional provisions analogous to the provision at issue in Moses v. Skandera and Taxpayers for Pub. Educ., which prohibit the use of public funds to support religious schools. Trinity Lutheran calls into question the constitutionality of these provisions, oftentimes referred to as Blaine Amendments.

II. Blaine Amendments

In 1875, Congressman James Blaine proposed an amendment to the federal Constitution that would have prohibited the use of public funds in schools under the control of a religious denomination. This proposal was motivated by an interest in maintaining public education free

from sectarian influence and by hostility to the growing Roman Catholic population in the country. The proposed amendment did not pass the Senate by the required two-thirds vote. Subsequently, thirty-eight states adopted similar provisions in their state constitutions. New York State's Blaine Amendment is codified as section three of article XI of the State Constitution. It provides that "[n]either the state nor any subdivision thereof, shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination . . . but the legislature may provide for the transportation of children to and from any school or institution of learning." N.Y. State Const. Art. XI, § 3.

The Blaine Amendment has been the subject of extensive litigation in New York State. In 1938, in Judd v. Board of Education, residents of the Town of Hempstead in Nassau County challenged the Hempstead School District's decision to provide transportation to students attending parochial schools within the district as violating the Blaine Amendment as then codified. 278 N.Y. 200. In 1938, New York's Blaine Amendment contained no exception for the provision of transportation. The Court of Appeals held that a provision of the Education Law that required a school district to offer similar transportation options to children attending public and private or parochial schools violated the then-Blaine Amendment and was void. 278 N.Y. at 217. The Court of Appeals rejected the argument that the provision of transportation "is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils." Id. at 211. The Court reasoned that the prohibition against "direct or indirect" aid includes any aid that could benefit the school and that the provision of free transportation facilitates attendance at the school -- thereby providing indirect support to the school. The Blaine

Amendment was amended in the same year to expressly authorize the legislature to require the provision of transportation to schools under the control of religious denominations.

The Court of Appeals had a second opportunity to interpret the Blaine Amendment in Board of Education v. Allen, which involved the lawfulness of section 701 of the Education Law. 20 N.Y.2d 109 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968)(*see* infra, pps.2-4). As amended by the legislature in 1965, section 701 authorized school districts to purchase and loan textbooks to children in both public and private schools, provided that the textbooks were designated for use or approved by the boards of education. The Court of Appeals rejected the reasoning in Judd and held "that it should not be followed." Id. at 115. Departing from the logic in Judd, the Court held that while the goal of the Blaine Amendment was to proscribe the public support for religious schools, it did not mean that "every State action which might entail some ultimate benefit to parochial schools is proscribed." Id. at 115-16. For the Court of Appeals in Allen, "the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such." Id. at 116. Because the goal of the amendment to section 701 was not to aid religious schools but to provide an important benefit to children attending all types of schools, and the textbooks are ones that must be designated or approved by the boards of education, and therefore, must necessarily be secular rather than religious in nature, the Court held that the statute did not constitute the provision of aid to religious schools in violation of the Blaine Amendment. Id. at 117. [1]

Based on the reasoning in Allen, New York has imposed several obligations on boards of education to support students in nonpublic schools. Among other requirements, state law now requires that transportation, textbooks, and health services be provided to students in nonpublic

[1] The Court of Appeals also held that section 701 did not violate the Establishment Clause. Board of Education v. Allen, 20 N.Y.2d at 117. This decision was appealed to the Supreme Court, 392 U.S. 236 (1968), and, as discussed above, see supra at pps. 2-3, the Supreme Court upheld the decision of the Court of Appeals.

schools. Section 3635 of the Education Law requires that transportation services be provided on the same terms to students in public and nonpublic schools. See Educ. Law § 3635(1)(a) and (c). Section 701 requires that textbooks be provided to students in public and nonpublic schools. See Educ. Law § 701(3). Section 912 obliges boards of education to provide children attending nonpublic schools with the same health and welfare services that are made available to students in public schools. See Educ. Law § 912. These services can include "all services performed by a physician, physician assistant, dentist, dental hygienist, registered professional nurse . . . school psychologist, school social worker. . .and may also include vision and health screening tests . . ." Id.

In 2013, the state enacted a law that imposed a very prescriptive requirement on the way the New York City Department of Education (DOE) provides transportation for students whose school day extended until 4 pm or later. Laws of 2013, Chap. 57, Part A, § 23. Rather than rely on section 3635, which requires a school district to provide transportation on the same terms to students in public and nonpublic schools, section 3627 requires the DOE to provide the transportation for such students or to reimburse licensed transportation carriers (or the nonpublic schools that contract with such carriers) for the costs of such transportation. See Educ. Law § 3627 (1). The law specifies that children be dropped off a shorter distance from their homes than the distance required by the DOE's guidelines. Educ. Law § 3627(6). Although the purpose of this legislation was to meet the needs of students in religious schools whose school days can extend late in the day, the legislation was drafted, as Allen requires, to extend a benefit on equal terms to all students whose school day extended until 4 pm or later. That the beneficiaries of this legislation are primarily students who attend religious schools probably would not change the analysis applied by the Court of Appeals in Allen or the result – that the provision of

transportation to the population of students who attend a lengthy school day is a benefit to the student and not to the schools that they attend.

In 2016, the New York City Council authorized the Mayor to establish a program reimbursing nonpublic schools for expenses incurred in the provision of security services. See New Yok City Administrative Code § 10-172. Pursuant to this law, the City established a program that reimburses nonpublic schools – both private and parochial schools – for the costs of security guards whom they employ to provide security services to their students. Id. Relying upon a rationale similar to that for the provision of transportation, textbooks and health services, the City concluded that the provision of security services benefitted the students attending nonpublic schools, among which are many religious schools, and therefore, such support did not violate the Blaine Amendment.

III. Effect of Trinity Lutheran on Blaine Amendments

In the wake of the Supreme Court's remanding Moses v. Skandera to the New Mexico Supreme Court for reconsideration in light of Trinity Lutheran, the New Mexico Supreme Court re-evaluated its interpretation of the state's Blaine Amendment, which is codified as section three of article XII of the State Constitution. Moses v. Ruszkowski, 2018 N.M. Lexis 70.[2] Prior to Trinity Lutheran, the New Mexico Supreme Court had interpreted section three of article XII to prohibit the use of public funds for religious schools as an absolute matter. Id. at * 21.The Supreme Court had considered and rejected the approach endorsed by New York, which had allowed the provision of certain forms of assistance on the ground that such assistance supported students rather than the religious schools. Id. In Moses v. Ruszkowski, the New Mexico

[2] Section three of article XII of the New Mexico State Constitution provides: "The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."

Supreme Court held that although its Blaine Amendment differed from the state constitutional provision in Trinity Lutheran in that its provision prohibits support of any private or religious school and does not disqualify only religious entities from receiving public monies, it should interpret section three of article XII in a manner that avoids the Free Exercise concerns that Justice Roberts identified in Trinity Lutheran. Id. at *45. To avoid an interpretation that resulted in treating religious schools and non-religious schools differently, the Supreme Court held that the law at issue – which allows the Department of Education to loan textbooks to students in public and private schools – does not support private or religious schools in violation of section three of article XII of the New Mexico State Constitution. Id. at *46. "We conclude that the IML [the law that was challenged] provides a public benefit to students and a resulting benefit to the state. Any benefit to private schools is purely incidental and does not constitute 'support' within the meaning of Article XII, Section 3." Id.

For some commentators, the holding by the New Mexico Supreme Court was not surprising. See, e.g., McCarthy, Martha M., *Trinity Lutheran Church v. Comer: A New Church/State Standard with Far-Reaching Implications*, 352 Ed Law. Rep. 425 (2018). While the New Mexico Supreme Court did not hold that the Free Exercise Clause required that the law at issue make textbooks available to students in religious schools, it did adopt a reading of its Blaine Amendment that will allow – as the New York Court of Appeals did in Board of Education v. Allen, 20 N.Y.2d 109 (1967), aff'd, 392 U.S. 236 (1968) – support for students in religious schools. More generally, the effect of the Trinity Lutheran decision, as evidenced by the holding in Moses v. Ruszkowski, suggests that "the federal Free Exercise Clause overrides antiestablishment provisions that most states have adopted . . ." See 352 Ed. Law Rep. at 431. In addition to having significant ramifications on the extent to which government supports religious

schools, therefore, Trinity Lutheran could shift the balance in our federalist system away from state sovereignty.

As noted above, the Supreme Court also remanded a decision of the Colorado Supreme Court that had invalidated a voucher program of the Douglas County School District, which had permitted the payment of public funds to religious schools. Taxpayers for Pub. Educ. v. Douglas Cty Sch. Dist., 351 P.3d 537 (Colo. 2015) (en banc), *vacated sub nom.* Colo. State Bd. of Educ. v. Taxpayers for Publ. Educ., 137 S.Ct. 2325(2017)(granting *cert.*, vacating judgment, and remanding to the Colorado Supreme Court for reconsideration in light of Trinity Lutheran). The Colorado Supreme Court found that the voucher program provided aid to religious schools in violation of its Blaine Amendment, codified as section seven of article IX of the Colorado Constitution. After the Colorado Supreme Court's decision, the composition of the Douglas County school board shifted and the new school board voted in December 2017 to terminate the voucher program. In January 2018, the Colorado Supreme Court granted the parties' motion to dismiss the decision as moot. See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist., 2018 Colo. LEXIS 195.

While the dismissal of the case involving the voucher program established by the Douglas County School Board did not give the Colorado Supreme Court an opportunity to analyze its Blaine Amendment in light of Trinity Lutheran, in December 2018 Montana's Supreme Court invalidated a tax credit program that would have allowed taxpayers to be reimbursed for their donations to organizations that fund religious schools. See Espinoza v. Montana Department of Revenue, 435 P.3d 603 (2018). The Montana Supreme Court based its decision on its analogue to the Blaine Amendment, which is codified as section six of article X of the Montana Constitution. It provides that "[the] legislature, counties, cities, towns, school

districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies . . . to aid any . . . . school, academy, seminary, college, university . . . controlled in whole or in part by any church, sect, or denomination." The Supreme Court found that the tax credit program permitted "the [l]egislature to subsidize tuition payments at religiously-affiliated private schools" and that this type of support for religious schools "is precisely what the Delegates intended Article X, Section 6 to prohibit." 435 P.3d at 613. Because the Supreme Court held that the tax credit program violated section six, the Court did not analyze the constitutionality of a rule promulgated by the Montana Department of Revenue that excluded all religious schools from participation in the tax credit program. Id. at 614. The Court also concluded that no separate analysis under the Establishment Clause was necessary. Id. And although the Court noted that a broad reading of section six of article X could implicate the Free Exercise Clause, the Supreme Court concluded that "this is not one of those cases." Id. Two justices dissented, questioning the Court's decision as violating the Free Exercise Clause. For the dissenting justices, the decision that section six of article X barred religious schools from participating in the tax credit program raised questions about students' rights under the Free Exercise Clause. The Supreme Court granted certiorari on June 28, 2018. This case presents the question whether the Free Exercise Clause requires the government to support religious schools notwithstanding state constitutional provisions prohibiting such support. The Supreme Court's decision in this case will guide the longevity – or lack thereof – of the state constitutional provisions that prohibit aid in support of schools under the control of religious denominations.

Governmental Regulation of Religious Schools

New York's Education Law requires that children ages six to sixteen attend school on a full-time basis. See Educ. Law, § 3205. State law and regulation closely regulate the provision of instruction in public schools. For example, state law and regulation require the provision of instruction for certain subjects at specific grade levels and in specialized topics as well. See Educ. Law § 3204(3)(a); 8 NYCRR §§100.2-100.5. As a statutory matter, the regulation of instruction in nonpublic schools is less comprehensive. The Education Law provides that students in nonpublic schools, which include religious schools, receive instruction that is "at least substantially equivalent" to the instruction given in public schools in the same district. See Educ. Law § 3204.

The State Education Department (SED) has long provided guidance to nonpublic schools regarding required subjects, specialized topics of instruction, and administrative requirements. See New York State Education Department Guidelines for Determining Equivalency of Instruction in Nonpublic Schools ("Guidelines"), found at http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html These Guidelines indicate that the determination whether students receive a "substantially equivalent" education should be made by the local school district and that the focus of any inquiry by the local school district is on the instruction being provided to the student in its district. In fact, the Guidelines note "the board's [the board of education of the school district in which the child resides] responsibility is to the children living in the district; it has no direct authority over a nonpublic school." Id. While the Guidelines set forth formal requirements with regard to opening new nonpublic schools, for established schools, the Guidelines do not establish a formal schedule for review of the

instruction provided. Rather, the Guidelines provide that if "a serious concern arises about equivalency of instruction in an established school", the superintendent of schools in the local school district should inform the nonpublic school, discuss the reason for the inquiry with the nonpublic school, and if necessary, visit the school "to check on the information which led to the assertion of lack of equivalency." Id. The superintendent should try to work with the nonpublic school to develop a plan of improvement so that the nonpublic school can remedy the deficiencies identified. However, if the superintendent determines that after efforts have been made, an improvement plan has not been designed or the instructional program continues to be inadequate, the superintendent is required to notify the board of education of the district that of the lack of substantial equivalency. Once the board approves a resolution that a nonpublic school is not equivalent, the board must notify the nonpublic school and the students attending such nonpublic school that the children would be considered truant if they continued to attend that school. Id. The Guidelines provide that if parents continue to send their children to a school that has been determined to be not equivalent, the parents should be notified that petitions will be filed in Family Court that their children are truant. There is an appeals process from the determination that a school's program is not equivalent. This process authorizes a school official or a parent to file an appeal with the Commissioner of the SED within 30 days of the local board's decision.

I. Recent Events

In the wake of a complaint made by Young Advocates for Fair Education ("YAFFED") with the New York City Department of Education (NYC DOE) about the adequacy of the secular instruction provided at certain religious schools, in 2015, the NYC DOE commenced an investigation into the adequacy of the instruction at those schools. The focus of YAFFED's

complaint were religious schools called yeshivas, which are schools whose mission is to convey the learning of Jewish texts and values to its students. Significantly, YAFFED's complaint was aimed at a subset of between 30 – 40 yeshivas out of larger group of 80-90 yeshivas located in New York City. The NYC DOE proceeded in accordance with the Guidelines to meet with representatives from the yeshivas and to visit the yeshivas that permitted access to DOE. The efforts of the NYC DOE are fully documented in a letter from the Chancellor of the NYC DOE to the Commissioner of the SED dated August 2018. See https://int.nyt.com/data/documenthelper/164-chancellor-letter-to-sed-8-15/1bb49eafd0d208cd1088/optimized/full.pdf#page=1

A. Felder Amendment

In the spring of 2018, the state legislature amended section 3204 of the Education Law to provide additional guidance regarding how to evaluate whether instruction offered at a nonpublic school was substantially equivalent to that provided in a public school. See Educ. Law § 3204 (2)(ii) – (v). This amendment is referred to as the Felder Amendment because it was introduced by State Senator Simcha Felder. Governor Cuomo signed this amendment into law on April 12, 2018, and it took effect immediately.

The Felder Amendment makes a number of significant changes in the application of the substantial equivalence standard for a targeted set of nonpublic schools. The Felder Amendment defines the set of schools to which these changes should apply with reference to criteria for elementary and middle schools that are distinct from the criteria for high schools. To be a covered elementary or middle school, schools must: "(1) [be] non-profit corporations, (2) have a bi-lingual program, and (3) have an educational program that extends from no later than nine a.m until no earlier than four p.m. for grades one through three, and no earlier than five thirty p.m.

for grades four through eight, on the majority of weekdays . . ." Id. 3204 § (2)(ii). To be a covered high school, schools must: "(1) [be] established for pupils in high school who have graduated from an elementary school that provides instruction as described in this section, (2) are a non-profit corporation, (3) have a bi-lingual program, and (4) have an educational program that extends from no later than nine a.m. until no later than six p.m. on the majority of weekdays . . ." Id. 3204 § (2)(iii). These criteria very generally describe the yeshivas that are the focus of the complaint by YAFFED. These schools are incorporated as not-for-profit corporations, educate their students in both English and Yiddish or English and Hebrew and have lengthy school hours, which become longer as the students get older.

For elementary, middle and high schools that satisfy the criteria described in paragraphs (ii) and (iii) of subdivision two, the Felder Amendment provides that the Commissioner of the SED determines substantial equivalence. Educ. Law § 3204 (2)(v). Therefore, one of the effects of the Felder Amendment is to establish an alternate procedure for the determination of whether the instruction provided at certain religious schools was substantially equivalent to the instruction provided at public schools in the same district. While the responsibility for making the determination for religious schools that met the criteria outlined above shifted to the Commissioner of the SED, the responsibility for making the determination of substantial equivalence for all other nonpublic schools in a district remained with the local board of education.

In addition to making a procedural change, the Felder Amendment also makes a substantive one. For elementary and middle nonpublic schools that satisfy these criteria, the Felder Amendment re-directs the consideration of substantial equivalence from a comparison of the instruction provided in nonpublic schools to that in public ones to an inquiry into whether

"the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, taking into account the entirety of the curriculum, over the course of elementary and middle school . . . ." Educ. Law § 3204 (2)(ii). The Amendment further specifies that the inquiry should include an examination of the school's instruction in English, mathematics, history, and science, but describing the nature of the instruction with a focus on skills rather than particular content. Id. For example, instruction in mathematics is described as "instruction . . . that will prepare pupils to solve real world problems using both number sense and fluency with mathematical functions and operations." Id. The emphasis on skills becomes even more pronounced for nonpublic high schools that satisfy the criteria described in paragraph (iii) of subdivision two. The Felder Amendment directs the substantial equivalence inquiry to consider whether "the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education." Educ. Law § 3204 (2)(iii). In contrast to the recitation of the particular areas of study provided for nonpublic elementary and middle schools, the inquiry for nonpublic high schools contains none.

The effect of the Felder Amendment is to establish a different approach for the consideration of substantial equivalence for yeshivas. It moves the locus of decision-making from the local board of education to the Commissioner of SED and it shifts the inquiry from one based on aligning curricula to analyzing the development of skills in the students of a particular school.

B. SED Guidance and Regulations

Over a two year period preceding the enactment of the Felder Amendment, the SED had been working on updating the guidance regarding substantial equivalence. The SED explained

that this "consultative process" was commenced "[i]n response to questions from the field". http://www.nysed.gov/news/2019/state-education-department-proposes-regulations-substantially-equivalent-instruction#comment On November 20, 2018, the SED issued its revised guidelines, which were intended to assist local boards of education in their efforts to assess equivalency. In Young Advocates for Fair Education v. Cuomo, 359 F.Supp.3d 215 (E.D.N.Y. 2019), which involved a challenge to the Felder Amendment, Judge Glasser described the revised guidelines as follows:

> With minor exceptions, the Revised Guidelines incorporate the curricular standards contained in the Education Law and its implementing regulations, and apply them to all private schools. (citations omitted). In this sense, the Revised Guidelines are largely a continuation of the Prior Guidelines, albeit with some changes and clarifications. The Revised Guidelines come with "Toolkits," which are simply checklists of factors that will be reviewed by education officials when making their determination, and each factor corresponds to a specific provision of the Education Law or the regulations promulgated thereunder. The Toolkits are accompanied by an appendix, which sets forth a detailed list of course requirements for private schools at various grade levels and, for some grades, the number of hours per week that must be devoted to each subject. Core subjects such as mathematics, science, English, social studies, art and health must be taught throughout elementary, middle and high schools. In grades 7 and 8, the Revised Guidelines require approximately 3 ½ hours of secular studies per day. For high schools, the Revised Guidelines incorporate by reference Section 100.5 of the Commissioner's regulations, which also generally require more than three

> hours per days of secular studies. (citations omitted). These course requirements "may be met by incorporating, or integrating, the State learning standards" into other courses. Although the Revised Guidelines do not say so explicitly, this would permit private schools to integrate secular subjects into religious classes, provided that the school meets all unit of study requirements and provides students with instruction that enables to achieve State learning standards.

In addition to imposing new substantive requirements on nonpublic schools, the revised guidelines created a formal structure for reviewing the substantial equivalence determination. Under the current guidelines, a local board of education was authorized to take action to the extent a concern has been raised about the equivalency of instruction in a particular school; the guidelines imposed no requirement that local boards of education regularly evaluated the nonpublic schools to ensure that they were providing substantially equivalent instruction. The revised guidelines required local boards of education to review nonpublic schools in their district in the 2018-19 school year and expected those reviews to be completed by the end of the 2020-21 school year. It also anticipated that reviews of nonpublic schools would continue on a five-year cycle.

In the wake of the issuance of the revised guidelines, three associations representing Catholic schools, yeshivas, and independent schools commenced separate proceedings pursuant to Article 78 to challenge the guidelines. Each association also brought a preliminary injunction to prohibit the respondents from taking any action to implement the revised guidelines. The petition brought on behalf of the New York State Council of Catholic School Superintendents and Catholic schools throughout the State raised federal and state constitutional violations as well as numerous challenges under state law. The Catholic schools argued that the revised

guidelines impermissibly entangle the government with religious schools in violation of the Free Exercise Clause and the Establishment Clause, and infringe on petitioners' rights to free exercise and liberty of conscience as protected by the State Constitution. In Matter of Application of New York State Council of Catholic School Superintendents, et al v. Maryellen Elia, Commissioner of Education et al , Verified Petition, ¶ ¶ 174- 183. Petitioners also argued that the guidelines violate parents' right to make their own choices regarding their children's education in violation of the Due Process Clause. Id. ¶¶ 210-216. Among the many state claims, petitioners argued that the SED lacks the statutory authority to require local boards of education to conduct the reviews of substantial equivalence required by the revised regulations, id. ¶ 80- 107, that the revised guidelines violate the State Administrative Procedure Act (SAPA), id. ¶¶ 151 –168, and that the revised guidelines are vague. Id. ¶¶ 108 – 150.

The petition commenced on behalf of several yeshivas throughout the state, Parents for Educational and Religious Liberty in Schools ("PEARLS"), Agudath Israel of America, a national Orthodox Jewish organization, and a number of parents of children in yeshivas sought a declaratory judgment. Similar to the petition brought on behalf of Catholic schools, this petition alleged federal constitutional and state law violations. The federal law claims contend that the revised guidelines impede the religious schools' right to the free exercise of religion and their free speech rights and frustrate the parents' due process right to control the education of their children. Parents for Educational and Religious Liberty in Schools ("PEARL"), Agudath Israel of America, et al v. Betty Rosa, Chancellor of the Board of Regents; and Maryellen Elia, Commissioner of the NYSED, Verified Petition, ¶¶ 110-126. The petitioners also argued that the revised guidelines amount to a licensing requirement for nonpublic schools and that state law provides no authority for the SED to impose such a requirement. Id., ¶¶ 74-84. Similar to the

arguments raised by the Catholic schools, the yeshiva petitioners claimed that state law gives no authority to SED to establish uniform standards for nonpublic schools, that the guidelines should have been promulgated pursuant to SAPA, and that they are vague. Id. ¶¶ 85-96 and 97-106.

In April 2019, Justice Christina Ryba of New York State Supreme Court held that the revised guidelines constituted rules and therefore should have been promulgated pursuant to SAPA. PEARL et al v. Rosa et al, Index No. 901354-19 (Albany Co. April 17, 2019). Justice Ryba found that the revised guidelines created fixed standards and required that local school authorities take specific actions. Because the guidelines were not promulgated pursuant to SAPA, Justice Ryba nullified the rules and did not reach any other objections that petitioners raised.

Following the court's decision, the SED, pursuant to SAPA, proposed regulations regarding substantial equivalency; the proposed regulations, while updated, largely incorporate the standards developed in the guidance issued in November 2018. See Memo re Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students, dated May 30, 2019. These proposed rules were published in the State Register on July 3, 2019. Notice of Proposed Rulemaking, Substantially Equivalent Instruction for Nonpublic School Students, N.Y. State Register, Vol. XLI, Issue 27 (July 3, 2019) . The public comment period ended on September 3rd. News reports have indicated that SED received over 140,000 comments – generally in opposition – to the rules.

Based on the petitions that were filed in response to the November 2018 issuance of the revised guidelines by SED, it is extremely likely that, if the proposed regulations are adopted by the Board of Regents, some, if not all, of the parties that challenged the revised guidance will

challenge the regulations on the same grounds that they challenged the revised guidance. Among the many grounds that the parties may assert, there will likely be a claim that the regulations burden the free exercise of religion of the parents whose children attend the nonpublic schools covered by these regulations.

In Blackwelder v. Safnauer, parents who were home-schooling their children brought an action to prevent the superintendents of a number of school districts, the Cato-Meridian Central School District, the Oswego School District, and Waterloo School District, from reviewing the homeschooling program and conducting an on-site inspection. Blackwelder v. Safnauer, 689 F.Supp. 106 (N.D.N.Y. 1988), aff'd on other grounds, 866 F.2d 548 (2d Cir. 1989). Among other claims, parents argued that the state's compulsory education laws, including the requirement that a child in an educational setting outside of a public school receive substantially equivalent instruction to that offered to public school students, "[burdened] their faith because the state retains the power to approve or disapprove the manner in which they accomplish what they view as a religious command, that is, the manner in which they educate their children." Id. at 128. The District Court rejected plaintiffs' Free Exercise challenge to the substantial equivalency requirement, holding that the state's interests in educating minors were compelling and that the substantially equivalent standard was the least restrictive means to achieve the state's interest in ensuring that minors received an education that met certain minimum standards. Id. at 135.

In reaching this holding the District Court reinforced that only compelling state interests justified the burdening of an individual's religious practices. Id. at 130 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)), but see Leebaert v. Harrington, 332 F.3d 134, 139 (2d Cir. 2003) (holding that rational basis review applies to a "hybrid" claim based on the Free Exercise Clause and the right of a parent to direct the rearing of his child under the Due Process Clause). The

District Court found that New York had compelling interests in requiring substantial equivalency. Id. The Court found that New York had an interest in preparing young children to participate in the democratic political system as well as an interest in preparing children to become self-sufficient members of society. Id. The Court also recognized New York's interest in exposing children to a wide range of ideas in order to prepare them to become functioning members of society, and how this interest potentially conflicts with parents' interest in preventing exposure to certain ideas – whether for religious or other reasons. While the Court noted that in Wisconsin v. Yoder, the Supreme Court upheld the Amish parents' right to direct their children's education, consistent with their religious beliefs, by withdrawing their children from school when they were 14 years old, the District Court found that the facts in Yoder were sufficiently distinct from the facts at issue to govern the outcome. The District Court found that the unique circumstances of the Amish, whose children attended school until eighth grade and who then were expected to live relatively isolated from mainstream American society, did not compel the same result in situations like the one presented in Blackwelder. The District Court wrote, "[u]nless a child is a member of an identifiable religious sect with a long history of maintaining a successful community separate and apart from American society in general, it must be assumed that that child must be intellectually, socially, and psychologically prepared to interact with others who may not share the views of the parents in the case at bar." Id. at 135; see also Leebaert v. Harrington, 332 F.3d at 144-45 (distinguishing a parent's objections to the health curriculum in his son's middle school based on his interests as a parent and on his religion from the Amish community's interests in maintaining their identity and way of life).

Against these interests, the District Court found that the substantially equivalent standard was the least restrictive means to satisfying the state's interest in ensuring that its students

received an education that met some minimum standards. Significantly, the Court observed that "[the] 'substantially equivalent' standard is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue." Id.

In 1990, two years after the District Court's decision in Blackwelder, the Supreme Court held that the First Amendment does not bar application of a "neutral, generally applicable law to religiously motivated action." Employment Div. v. Smith, 494 U.S. 872, 881 (1990). Pursuant to this holding, a challenge brought against the substantial equivalence standard, or the regulations promulgated under this standard, would only have to satisfy rational basis review rather than the strict scrutiny standard applied in Blackwelder. However, if the regulations are adopted by the Board of Regents, there will likely be arguments made that, notwithstanding Smith, the communities affected are more akin to the Amish community in Yoder, and therefore that the applicable standard ought to be strict scrutiny rather than rational basis. Assessing the appropriate standard and determining the impact of the regulations on the schools' ability to pursue their religious mission – which must be a highly factual inquiry – in light of the state's interest in ensuring that its residents receive an education that meets some minimum criteria will be a complex but extraordinarily important undertaking.

Public Sector Labor and Employment Law 2019 Update

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PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 2019 UPDATE

October 26, 2019

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I. LEGISLATION

With regard to legislative changes, the State has been extremely active since the start of the year passing multiple labor laws which will affect both private and public employers, in most instances.

Agency Fee Amendments - In the 2018 Budget Bill, in anticipation of the impending decision of the U.S. Supreme Court in *Janus v. AFSCME Council 31* that invalidated New York's agency fee provision (Taylor Law §208(3)), the Legislature enacted amendments to Taylor Law Sections 208 and 209-a(2):

- Public employers are required to: commence dues deduction for union members within 30 days after receipt of proof of a signed authorization card; remit dues to the union within 30 days after deduction occurs; accept proof of a union member's authorization via electronic record or electronic signature; continue deduction until the union member revokes membership in writing in accordance with the terms of the authorization card; reinstitute dues deduction if a separated employee returns to the unit within a year after separation; reinstitute dues deduction upon a union member's return from any leave of absence, paid or unpaid, voluntary or not; and notify the union within 30 days of a new employee's entrance into the unit, with name, address, job title, agency, and department, and permit union representative to meet with the new employee on work time within 30 days after notification.

- Unions are permitted to limit representation and services provided to non-members to the negotiation and enforcement of the terms of the collective bargaining agreement, while remaining free to provide extra-contractual representation and service to members, e.g., in statutory or regulatory proceedings not within the terms of the

contract. Non-members may also be denied union representation in employee evaluation or disciplinary processes arising under the contract, if the contract permits individual employees to proceed without the union and to be represented by their own advocates in such processes.

In the 2019 Budget Bill, additional revisions were made to the Taylor Law relating to *Janus*:

- A new CSL §215 was added, purporting to shield public employers and unions from liability under NY State law for their roles in deduction of agency fees from the salaries of non-members before the *Janus* decision was issued.

- Section 209-a was amended to make it an improper practice for a public employer to disclose employee home addresses, personal phone numbers (landline or cell), or personal email addresses unless otherwise required under the Taylor Law (or pursuant to subpoena or court order).

- Section 208 was amended to require employers to provide the union with names, addresses, job titles, employing agency/department and work location of all employees in the unit, unless the collective bargaining agreement specifies otherwise.

Election Law Amendment - In April, the State expanded the rules governing paid time off for employees to vote such that the time allowed off increased from two to three hours and changed the notice that employees must give to request the time from between two and ten days before an election, to just two days before the election. It also eliminated the presumption that an employee has sufficient time to vote without paid leave if the employee has four consecutive hours outside of work time to vote.

2019 Sexual Harassment and Related Amendments - Governor Cuomo signed legislation expanding claimant's rights under the Human Rights Law in August 2019:[1]

- Extends reach of the HRL to employers with fewer than 4 employees.

- Removes requirement that claimant show harassment was "severe and pervasive" in order to prevail.

[1] Effective dates of the changes vary.

- Removes defense that employee failed to file an internal complaint (failure shall not be determinative of liability).

- Protection of non-employees (e.g., contractors, vendors, consultants) from discrimination is extended beyond sex harassment to include all forms of unlawful discrimination.

- Punitive damages, previously limited to housing discrimination claims, are now available in all employment discrimination and harassment cases, with no stated limit on amount.

- Award of attorney's fees to any prevailing party, previously discretionary and only available in sex discrimination cases, is now required.

- The law is to be liberally construed for its remedial purposes regardless of how federal civil rights laws with similar language are construed; exemptions from liability to be construed narrowly.

- Statute of limitations for administrative complaints of sex harassment increased from one to three years; no change for other theories of liability.

- CPLR amended to extend existing prohibition against written contracts with mandatory arbitration of claims of sexual harassment, to claims involving all forms of unlawful discrimination.

- General Obligations Law and CPLR amended to prohibit nondisclosure agreements (unless it is the claimant's preference) not only in settlement of sex harassment claims but also in claims involving other forms of unlawful discrimination; voids any nondisclosure agreement that restricts the complainant from initiation/participation in any agency investigation, or from disclosing facts necessary to receive unemployment or other public benefits to which the complainant is entitled.

- Extends the Attorney General's authority to prosecute civil and criminal cases involving discrimination to all forms of unlawful discrimination (previously only age, race, creed color or national origin were listed).

Domestic Violence Leave

Recently, there were amendments to the victims of domestic violence which provides that effective November 18, 2019, employers will be required to provide reasonable accommodations to employees who are either victims themselves, or parents of children who

are victims of domestic violence. That law provides that employees are entitled to time off from work for the following reasons:

1. to seek medical attention for injuries caused by domestic violence including for a child unless the parent seeking the leave committed the act of violence;

2. to get services from a shelter, program, or rape crisis center that deals with these issues;

3. for psychological counselling similar to the first provision above;

4. to take action to increase safety including safety planning and temporary or permanent residency placement; or

5. to get legal services, appear in court, or assist in the prosecution of domestic violence.

For an employer to not give time off, the employer would have to show undue hardship which could be shown by the overall size of the business, number of employees, type of facilities, size of the budget and the type of business being operated. If granted leave, an employer can require an employee to use paid leave when available, but if it cannot, then unpaid leave is appropriate. Employees must give reasonable advance notice of a leave request, if feasible. If they cannot, then the employer can seek evidence of the need by seeking a police report, a copy of a court order, other evidence from a court or the prosecutor handling the case, or some documentation from a health care provider or counselor that the individual was in treatment or counseling as a result of the domestic violence.

Discrimination based upon Traits

New York also enacted amendments to the Human Rights Law to prohibit discrimination on traits historically associated with race. The focus was on hair texture and protective hairstyles such as braids, locks, and twists. This follows the interpretation of the New York City Human Rights Law that already was interpreted to prohibit discrimination based upon such

traits. It should be noted that although the amendment lists hair traits specifically, it is not so limited to simply hair. Instead, it is reasonable to conclude that it will be expanded to include anything that is closely associated with someone's racial, ethnic, or cultural identities.

Equal Pay

The State has also enacted a law intended to guarantee equal pay regardless of gender which states that an employer cannot pay two different people different amounts for similar work. The new bill provides that no employee within a protected class shall be paid less than an employee who is not in the same protected class for equal work for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Differentials are still permitted for non-discriminatory reasons such as merit, seniority and job-related purposes consistent with a business necessity, the change nevertheless constitutes an overhaul to the former equal pay provisions.

Past Wage Information

At the same time, the State passed legislation preventing employers from asking about a job candidate's past wage levels. This would apply not only to new job applicants, but also promotions. The prohibition applies to both written and oral requests for past wage history. Nothing prevents an individual, however, from volunteering that information and the employer being able to then confirm it.

Labor Law section 215

While Labor Law section 215 already prohibited employers from retaliating against an employee who raised a wage and hour complaint, the law has now been expanded to include

threatening to contact or contacting Federal immigration authorities or otherwise reporting or threatening to report the citizenship or suspected immigration status of not just the employee, but also the employee's family. This change will become effective as of the end of October of 2019. This is undoubtedly in reaction to the President's efforts through ICE to deport illegal aliens in New York and elsewhere.

Stand Alone HRA

In the area of health insurance, the Federal government issued new guidance under the Patient Protection and Affordable Care Act that reverses an earlier guidance letter. Beginning in 2020, an employer-sponsored and funded group health plan known as a health reimbursement arrangement might now be allowed on a stand-alone basis in certain circumstances for large employers. There are numerous limitations for these stand-alone plans and larger employers (fifty or more employees) are treated differently than smaller employers or employees not considered full-time for ACA purposes.

II. PERB DECISIONS

GOOD FAITH NEGOTIATIONS

NYSCOPBA and NYS DOCCS, 50 PERB ¶3031 (2017) -- Vacates, on procedural/administrative convenience grounds, decision of ALJ that employer violated the Act by refusing to provide information requested by the union (video involving alleged employee misconduct) prior to the demand for arbitration. The Board notes that the employer's obligation to provide information extends to disciplinary matters so long as the disciplinary process is based in the collective bargaining agreement, but that the employer's obligation is subject to considerations of reasonableness, burdensomeness, relevance and necessity. Where the employer raises an issue of confidentiality, it has a duty to negotiate regarding accommodation of such interest. The Board suggests in dicta that where the union asks for information in video form prior to demanding arbitration, the employer's obligation may be

satisfied by providing the union an opportunity to view video on the employer's premises, rather than providing a copy.

Long Beach Firefighters and City of Long Beach, 50 PERB ⁋3036 (2017) – Civil Service Law Section 71 permits employers to terminate an employee who has been disabled for more than one year due to occupational injury, and the law also permits any employee so terminated to re-apply for employment within a year after the disability ends. The City notified an employee who had been out for a year that he would be terminated, except that he could meet with the Fire Commissioner and city representatives if he disputes the termination. The Union demanded bargaining over this action and the City refused, asserting that this was not a procedure for separation from employment, and that the statute provides a post termination procedure. PERB, citing and refusing to revisit *Town of Cortlandt,* holds that the City's actions amounted to establishing a procedure for separation from employment, which triggers the duty to bargain.

City of Cortland and Cortland PBA, 51 PERB ⁋3014 (2018) – Resolving challenges to interest arbitration proposals, PERB holds that an employer's proposal eliminating the option for employees to take overtime pay rather than compensatory time for overtime work, is not prohibited as it does not violate the Fair Labor Standards Act. Two of the union's proposals are found to involve mandatory subjects: requiring payment at time and one half for work on "no time off" days and no new designation of such days without bargaining; and allowing employees to call in sick without providing the nature of the illness. Two union proposals deemed non-mandatory: making seniority the sole basis for work assignments; and allowing arbitrators to address the underlying disability claim in connection with disability leave under GML § 207-c (as opposed to allowing the arbitrator to review the employer's initial determination of eligibility, which would be a mandatory subject).

PBA of NYS and NYS (Office of Parks, Recreation and Historic Preservation), 51 PERB ⁋3025 (2018) – Employer implemented a work schedule for Park Police that union had objected to; PERB finds that pre-implementation discussions with union constituted negotiations and that employer failed to engage therein. The ALJ did go too far in directing restoration of the schedule that existed before the implementation.

Town of Blooming Grove and Blooming Grove PBA, 51 PERB ⁋4526 (2018) – PERB holds that the union's proposal on minimum staffing, normally non-mandatory in nature, is converted to a mandatory subject per *City of Cohoes*, 31 PERB ⁋3020 because the contract includes a provision reserving to the police chief the right to determine staffing levels for tours of duty. The union's proposal to have wages earned pursuant to *Gen'l Munic. Law* §207-c treated as non-taxable on W-2 forms, is mandatory despite redundancy with federal law, as including it in the CBA creates a distinct remedy. Finally, the fact that an employer's proposal involves a duration in excess of two years does not make the proposal improper notwithstanding the arbitration panel's order being limited to two years.

Putnam County Sheriff Deputies PBA and Putnam County, and Sheriff, 52 PERB ⁋4528 (2019) – The union argued that management breached the affirmative duty to support ratification of an MOA by the County Legislature, which failed to vote on the measure. The ALJ dismissed the Charge, finding that the County Executive supported the MOA and countered negative comments by other management personnel in communications with the Legislature. The two managers who criticized the MOA (the Deputy County Executive and the County Personnel Director) were not part of management's negotiating team so their actions did not violate the Act.

UNILATERAL CHANGES IN TERMS & CONDITIONS OF EMPLOYMENT

NYSCOPBA and NYS Office of Parks and Recreation, 50 PERB ⁋3024 (2017) – Employer's decision to cease permitting a forest ranger the use of an employer-owned vehicle for transportation to and from work, does not violate the Taylor Law. Such benefits are mandatorily negotiable, but there was no reasonable expectation of continuation and therefore no binding past practice under *Chenango Forks*, because after several years of allowing it, the employer had required the ranger to sign an acknowledgement of the employer's right to terminate the practice. Further, any challenge to the employer's action in requiring the ranger to sign the acknowledgement was time-barred, and knowledge of the change is imputed to the union because of the ranger's status as union steward.

PEF and NYS Office of Medicaid Inspector General, 50 PERB ⁋3025 (2017) – Employer unilaterally changed policy of investigators having official placards allowing them to avoid parking meters and park their personal autos in otherwise restricted parking areas while either in the field, or at the office on days they would be in the field. Board upholds the employer's action in changing the policy so that placard would be given out only if no State vehicle was available and only for duration of the field assignment, as the policy involved a management prerogative and not an economic benefit, i.e., it only related to the manner and means of doing the job.

United Fed. of Teachers and NYC Dep't of Education, 50 PERB ⁋3030 (2017) -- Board dismisses union's claim that unilateral imposition of new standards of practice for speech and language teachers violated the Act. While an increase in workload can be a mandatory subject of bargaining, the union did not establish that the change at issue lengthened the workday or increased the scheduled hours of work.

Rochester Psychiatric Center (NYS OMH) and PEF, 50 PERB ⁋3032 (2017) – Employer unilaterally began requiring nurses calling in sick for 4 days or less, to provide medical documentation if one of the days is Christmas Eve or New Year's Eve. The prior policy has been to not require medical documentation for any absence of 4 days or less. PERB holds that this was a past practice that could not be changed without bargaining. The fact that civil service

regulations empower state employers to require proof of illness does not supersede the statutory duty to bargain over a term or condition of employment.

Sullivan County PBA and Sullivan County & Sullivan Co. Sheriff, 51 PERB ⁋3008 (2018) – Union's IP Charge alleged unilateral termination of 19-year practice of permitting unit members to choose between compensatory time or time and one-half salary payment, for overtime work. PERB agrees with the employer that it has the right to limit employees to salary payments and end the practice of allowing employees to choose compensatory time: the collective bargaining agreement always provided for overtime compensation in the form of salary and contained no reference to comp time.

CSEA, PEF et al. and NYS Dep't of Civil Service, 51 PERB ⁋3027 (2018) – PERB affirms ALJ's determination that the State's unilateral imposition of a schedule of fees to take promotional examinations involved an economic benefit and violated the Act notwithstanding language in *Civil Service Law* §50 (which discusses exams and fees).

Schenectady Teachers Fed. and Schenectady CSD, 52 PERB ⁋4517 (2019) – ALJ holds that the employer violated the Act by unilaterally making a health insurance plan available to new hires after a 90-day waiting period, when the (expired) contract required a one-year waiting period. The employer's reliance on the Affordable Care Act, which limits waiting periods to 90 days, was rejected because that statute did not relieve the employer from the duty to negotiate over changes aimed at compliance with the ACA.

PRACTICE AND PROCEDURE

Javed and District Council 37, 50 PERB ⁋3028 (2017) – Board upholds the ALJ's denial of the charging party's motion to have his testimony taken by telephone because he was outside the country due to immigration issues. The Board notes that telephone testimony hampers the ability of the ALJ to determine credibility and the right of cross examination. The Board leaves open the possibility that *video* testimony, e.g., via Skype, may be permissible in some cases involving "genuine unavailability [of the witness] and compelling need," where an application is made sufficiently in advance of the hearing so that the necessary technology will be in place.

Montgomery County Sheriff and Deputies PBA, 50 PERB ⁋3029 (2017) – The union violated the Taylor Law by submitting proposals to interest arbitration that were not "directly related to compensation", specifically: a proposal identifying which employees are eligible for assignment of overtime; and a clause involving continuation of all contractual benefits while an employee is out on leave for a line of duty injury. The latter proposal was improper because while it contained some compensation-related subjects, it was inextricably intertwined with other non-compensation related subjects.

PBA, Village of Wappingers Falls and Village of Wappingers Falls, 50 PERB ⁋3041 (2017) – Employer's motion to file exceptions to Assistant Director's letter ruling is denied. The motion papers were not served on all parties within 10 working days after the ruling at issue.

Further, even if the motion had been timely, it would have been denied because there were no extraordinary circumstances shown: the employer's claim that to allow counsel to represent the charging party would be a violation of the Rules of Professional Conduct is not an issue PERB will entertain, citing *Bd. of Ed., City School Distr., City of Buffalo* (motion to preclude introduction of evidence allegedly obtained in violation of attorney ethics rules, denied).

NYS Court Clerks Assoc. and Unified Court System, 50 PERB ⁋3042 (2017) – Employer's motion to file interlocutory exceptions to ALJ's denial of pre-hearing motion to dismiss, is denied for failure to demonstrate extraordinary circumstances or severe prejudice. The IP charge alleged discrimination in demoting a probationary employee and returning her to her lower title after she opposed a supervisor's directive that she rewrite a performance evaluation of a subordinate who had just filed a grievance. None of the issues raised by the employer, e.g., that the charging party has a pending Article 78 proceeding alleging a violation of the Taylor Law, and that the IP charge implicates the employer's authority over matters of employee probation, justify an interlocutory review as these issues could be adequately addressed in post-hearing exceptions.

Cicero PBA and Town of Cicero, 51 PERB ⁋3009 (2018) – Union alleged Town's submission in interest arbitration was regressive because it contained no increases in meal allowance and shift differential. The Board affirms the ALJ's decision that the Town, at the final bargaining session before impasse was declared, had dropped its proposals for increases and that there was therefore no regression. PERB also upheld the ALJ's grant of the employer's motion, made after the hearing but before the ALJ's decision, to delete two proposals that the union had objected to at the hearing. The Board holds that a party is free to correct observed deficiencies in its petition or response, and that an ALJ is authorized to allow such corrections rather than such matters being exclusively the province of the Director of Conciliation. PERB notes that the motion involved issues of what can be subject to interest arbitration, not which job titles are included in the arbitration.

United Fed. of Police Officers and County of Rockland, 51 PERB ⁋3016 (2018) -- PERB holds that undercover investigators employed by the Rockland County District Attorney's office are not eligible for interest arbitration because although they may fit the definition of police officers, they are not "members of any organized police force or police department."

City of Ithaca and Ithaca PBA, 51 PERB ⁋3020 (2018) – Departing from prior rule, PERB holds that in the interest of finality, when the union responds to an employer petition for interest arbitration by invoking the right to maintenance of the status quo pursuant to the Triborough Amendment, PERB should go forward and process the petition rather than decline to do so as it had in the past. Such action by the union limits the eventual arbitration award to the status quo with respect to the period for which Triborough is invoked.

DC 37 AFSCME and NYC Transit Authority, 51 PERB ⁋3031 (2018) – PERB grants employer's motion for interlocutory exceptions from ALJ's interim determination that TA

hearing officers are employees under the Act: extraordinary circumstances exist as success on exceptions would end this unit clarification proceeding. On merits, PERB upholds decision that hearing officers are public employees, as they work every day for 7 hours, and despite signing contracts saying they are employees for payroll tax purposes only.

PEF and NYS Dep't of Corrections, 52 PERB ⁋3003 (2019) – PERB affirms, as modified, ALJ's dismissal of a charge alleging that shop steward was formally counseled and had approval to attend union convention revoked, because of steward's protected activity in a labor-management meeting. The ALJ who wrote the decision was not the same one who heard the testimony, but there was no need for a de novo hearing because the findings (that the union did not prove a link between the protected activity and the adverse action) were not credibility findings as between two witnesses, but rather findings based on weighing the probative value of the testimony. Close proximity of the events, and vague conclusory assertions by union witnesses, did not prove anti-union animus.

REPRESENTATION

City of Yonkers and Int'l Brotherhood of Teamsters, 50 PERB ⁋3033 (2017) – The positions of Director of General Services and Budget Analyst are not exempt from inclusion in the (white collar administrative) bargaining unit. The Director is not managerial because his duties do not involve determination of goals and objectives and methods for accomplishing them. The Budget Analysts are not confidential because their involvement in collective bargaining consists only of costing out bargaining proposals, which does not constitute assistance to a managerial employee performing statutorily enumerated labor relations responsibilities.

Village of Westhampton Dunes and Westhampton Dunes Police Association, 50 PERB ⁋3035 (2017) – PERB rejects Village's application to have Constable Sergeants designated as managerial or confidential. The Sergeants handle scheduling and staffing, authorize overtime, review the work of the Constables and have authority to counsel them, make recommendations for how much to pay new hires, and have input in the hiring and employee discipline processes. PERB holds that the Sergeants' supervisory duties do not rise to the managerial level, and that their role in setting the pay rates for new hires should be seen as that of ensuring fairness to the existing employees, not of assisting the police chief in his performance of his collective bargaining duties.

Commanding Officers Assoc. of Long Beach and City of Long Beach, 51 PERB ⁋3005 (2018) – Commanding Officers' unit had fragmented from larger PBA unit but there was no new collective bargaining agreement in place. The Commanding Officers Association pursued arbitration of two alleged violations of the existing (PBA) contract: one involving overtime and the second involving discipline of a unit member. The union's IP charge challenged the employer's refusal to arbitrate which was based on arguments that a fragmented unit is not entitled to Triborough Law protections so the arbitration clause is not continued in these

circumstances. PERB holds that fragmented units are indeed covered by the Triborough Law, and that this protection extends to the arbitration clause as it would in any non-fragmentation situation. This protects the union's right to arbitrate the overtime issue but not the disciplinary grievance, as the City Charter prohibits bargaining over police discipline, and this prohibition does not give way to Taylor Law considerations.

Law Enforcement Employees Benevolent Assoc. and CUNY; IBT Local 237, Intervenor, 51 PERB ¶3012 (2018) – Board affirms ALJ's dismissal of petition to fragment 669 security officers from 2400-member blue collar unit. There are no compelling reasons to fragment this existing unit; fact that security officers have peace officer but not police officer status supports denial of petition.

SEIU and Herkimer County Community College and Herkimer County, 51 PERB ¶4003 (2018) – SEIU, the sole union in a representation election, received a majority of the valid ballots cast, but not a majority of the number of unit members eligible to vote. PERB rejects the employer's argument that the union should be required to receive the votes of a majority of the eligible voters when there is only one union in the election.

INTERFERENCE AND DISCRIMINATION

Churchville-Chili SRPs and Churchville-Chili Central School District, 51 PERB ¶3003 (2018) – In conversation between provisional office employee and union president about the member's status, the president wondered why the employee was still in place and hadn't been "walked out" of the office yet, and stated that the member shouldn't trust the employer. The employee complained to management, who issued a counseling memo to the union president. PERB sustains the IP Charge, holding that the counseling memo amounted to interference in union operations: the president's statements were protected as a union official's advice on what rights the employee has. It is irrelevant that the employer's motive was good (i.e., maintaining civility among employees) or that a counseling memo is not considered disciplinary in other contexts.

Amalgamated Transit Union and Niagara Frontier Transit Metro System, 51 PERB ¶3004 (2018) – Employer held to have engaged in interference with union operations as well as with union members' rights to select their representative. Employer's representative told union representatives that they did not have to "listen to" the union president when resolving a disciplinary matter, and he showed the union representatives a provision in the union's international constitution purporting to prove the point. On another occasion, the employer's representative, after having the union president removed from a meeting, insisted on the other union representatives remaining despite the fact that the meeting involved negotiations, and suggested that the employer would be more forthcoming in contract negotiations without the union president's participation.

Bagarozzi and Bd. of Educ., City School District, City of New York, 51 PERB ¶3032 (2018) (Cacavas, ALJ) – IP Charge by a tenured teacher claiming that she was retaliated against by her supervisor for her protected activity in filing contract grievances and making complaints about the employer to outside agencies. The alleged retaliation included adverse performance ratings, and being subjected to an investigation and disciplinary charges under Educ. Law §3020-a, which ended in a Hearing Officer's finding of guilt on an incident from two years prior, and imposition of a $2000 fine. The ALJ finds the employer's actions retaliatory and orders reimbursement to the Charging Party of the $2000 fine she paid pursuant to the decision in the disciplinary case. The remedy was based in part on the fact that the disciplinary charge arose from conduct occurring before the supervisor pushing the discipline started work at the school.

Piller and NYS Office of Temporary and Disability Assistance, 51 PERB ¶3023 (2018) – PERB orders remand to ALJ who had dismissed an IP charge finding no improper motivation for employer's action directing union representative to not be on premises before or after assigned work hours. Employer argued that its action was motivated by avoiding overtime pay to the representative, and concerns about safety in the neighborhood at night. PERB holds that the ALJ had erroneously found that the representative was eligible for overtime, and had failed to make clear findings on the issues of safety or whether the ban on presence in the workplace after hours was applied uniformly.

Teachers Assoc. of Pleasantville and Pleasantville Union Free Sch. Dist., 51 PERB ¶3024 (2018) – During impasse, the employer violated §209-a(1)(a) and (c) of the Act by prohibiting teachers from wearing T-shirts bearing the union's logo and a slogan praising teachers in areas where there would be student or public contact. The employees' activity did not amount to a discussion of pending negotiations with the public on employer property, or enmeshing students into the labor dispute. However, the Superintendent's letter to unit members expressing the employer's position about the wearing of the shirts and about its bargaining proposals, did not violate the Act as the letter contained no threat of reprisals or benefits, and evidenced no intent to negotiate with employees individually.

Oliver and State of New York (NY State Police), 51 PERB ¶3037 (2018) – PERB affirms dismissal of employee's charge that the employer violated the Act by taking disciplinary action against the employee in alleged retaliation after the employee filed a charge of sexual harassment under Title VII and made an in-house EEO complaint. It is settled that such employee activity does not constitute protected activity under the Taylor Law.

Elgalad and BOE, CSD, City of NY, 52 PERB ¶3001 (2019) – PERB affirms dismissal of IP charge that alleged that disciplinary charges against teacher (for engaging with a student involved in an investigation of the teacher's actions, and for unfavorable performance evaluations), were in retaliation for the many grievances filed by the teacher. The employer had legitimate nondiscriminatory reasons for the adverse actions.

SUBCONTRACTING/TRANSFER OF UNIT WORK

CSEA and Pine Valley CSD, 51 PERB ¶3036 (2018) – PERB agrees with bus drivers' union that the school district violated the Act by using non-unit bus drivers to transport students to alternative education program at a BOCES. The BOCES had moved the program to a new location that could easily be handled by another school district's buses. However, Pine Valley drivers had handled this work for 20 years and PERB finds exclusivity was maintained despite the fact that student athletes who played on other districts' sports teams (because Pine Valley is so small) would often travel to and from games by the other district's buses: those students would be transported to and from the other district on whose teams they played by Pine Valley buses. Instances of other districts' buses transporting Pine Valley students to special events were found to be too isolated and/or remote in time (four years prior to the change at issue). PERB also rejects the employer's argument that the union had waived exclusivity by agreeing to management rights language on direction, deployment and utilization of the work force, finding that this clause was too vague to constitute a clear, intentional and unmistakable relinquishment of the union's bargaining rights. Finally, PERB holds that the IP charge was not barred by duty satisfaction: contract language concerning regular and alternative education bus runs does not support permitting subcontracting.

III. COURT DECISIONS

DISCIPLINE AND TERMINATION

In the First Department, in *Phillips v. New York Citywide Administrative Services*, 2019 Slip Op 04658 (6/11/19), dismissed the petitioner's action and upheld the termination decision. In that case, the agency sent the employee to an outside physician for a fit-for-duty examination. The employee challenged the decision arguing that the agency lacked the authority to delegate its duty to select a medical officer under Civil Service Law section 72(1) to an outside physician. The Court also noted that the employee failed to explain her work behavior which first lead to her being placed on leave.

In *Matter of BOE of the City Sch. Dist. on the City of New York v. Crooks*, 2019 NY Slip Op 04297 (5/30/19), the First Department affirmed the lower Court's modification of an order that vacated an arbitration award and penalty in a disciplinary action involving a tenured teacher which was subject to compulsory arbitration rather than voluntary arbitration the latter of which results in less strict scrutiny. The Court essentially chastised the arbitrator by concluding that the award was not simply arbitrary and capricious, but also irrational. The record indicated that the teacher threatened physical violence and placed at least one child in fear of his physical safety. What were also described as racist comments were also not something that would not affect the students as concluded by the arbitrator.

The First Department in *Patterson v. City of New York*, 2019 NY Slip Op 048809 (6/18/19) refused to overturn the termination decision of the City and the subsequent disqualification from employment. While the petitioner had submitted a resignation letter while disciplinary

charges were pending, the City could properly elect to ignore it and prosecute him on the original charges.

In another education case, the First Department *in Matter of Lamberti v. City of New York*, 2019 NY Slip Op 05090 (6/25/19) refused to reverse the termination decision of the probationary employee based upon the fact that the petitioner had received ineffective or developing ratings on more than one occasion which meant that there was no bad faith, and that the was not entitled to more notice than the sixty days under the statute prior to termination. The Court also noted that the petitioner had been supplied with support and even if there were any deviations from internal procedures, he was not denied any rights.

In an attendance case, the conclusion that termination was appropriate by the arbitrator did not shock the conscience of the First Department in *Matter of Blythe-Baugh v. City of New York*, 2019 NY Slip Op 05088 (6/25/19). It should be noted that the petitioner did not dispute the absences or tardiness evidence in the record and failed to seek medical accommodations until just before charges were filed.

The Third Department in *CSEA Local 1000 v. NYS Office of Children and Family Services*, Case No. 527717, July 18, 2019 affirmed the lower Court's dismissal of the petition seeking to overturn the termination of the employee. The employee had been in one competitive class for an extended period of time on a probationary basis and prior to the end of his probationary period and before he was permanently appointed, the employee was first promoted to another competitive position on a temporary basis and then appointed provisionally. By the time of his termination, the employee had worked for nearly two and a half years for the same employer. The employer first terminated him from the provisional position and told him that he was being returned to his prior position. At the same time, he was then told that he was going to be terminated from the former position as well. In challenging whether he was still a probationary employee, the petitioner claimed that all of his employment time should count and that the failure of the employer to advise him that it did not count, meant that he was no longer a probationary employee. The Court concluded that the responsibility to ask if the time as a provisional employee would count toward his first probationary period rested with the employee and his failure to do so did not trigger the employer's obligation to answer that request in writing. Therefore, the employer was free to not include the additional time in the probationary calculations.

In *Matter of Ethington v. County of Schoharie*, Case No. 526920 (June 20, 2019)[related Case No. 526701], the Third Department upheld the dismissal of the petitioner who had supplied false information to the labor attorney handling some underlying cases. The Court concluded that even though the attorney had been successful in the defense of the other cases, the fact that the petitioner had submitted false documents was enough under Civil Service Law section 24 to warrant dismissal.

In *Ansley v. Jamesville-Dewitt CSD*, TP 18-01530 (July 5, 2019), the Court modified the lower court's determination by effectively upholding the decision that the employee was guilty of the charges, but reversed as to the penalty of termination in light of the fact that the twenty year unblemished record of the bus driver who was working with children with special needs for five years, was shocking to the conscience of the Court.

The First Department affirmed the lower Court which upheld the dismissal of teacher in *Matter of Denicolo v. BOE of the City of New York*, et al, 2019 NY Slip Op 02962 (4/18/19). The Court reviewed the record and determined that the hearing officer's findings had a rational basis and were supported by the evidence. The Court also noted that it was constrained by controlling precedence such that the penalty did not shock their sense of fairness.

In *Matter of Bruno v. Greenville Fire District*, 2019 NY Slip Op 03043 (4/24/19), the Second Department affirmed the lower Court's dismissal of the Article 78 proceeding brought by a probationary firefighter who was terminated from his position. The Court recognized the limited scope of review as to whether the dismissal was in bad faith, for a constitutionally impermissible purpose, or in violations of statutory or decisional law. In this case, the employee failed to raise a material issue of fact on any of these standards.

In *Espinal v. County of Nassau*, 2019 NY Slip Op 03785 (5/15/19), the Second Department affirmed the ruling that reversed the determination of the Civil Service Commission which revoked the petitioner's eligibility and appointment and which terminated the employee based upon a prior criminal record. The Petitioner had originally disclosed certain criminal history to the Commission which thereafter sought additional information which was not supplied. Nevertheless, the Commission certified the employee as being eligible for employment. The employee claimed that the other convictions were out of state matters and he thought that the request was as a result of a different position which he had been seeking at the time, but from which he later withdrew his application. Five years later, he applied for a different position after his job was privatized. Now he disclosed the prior convictions which had not been disclosed previously. In response to that, the Commission revoked his eligibility certificate and terminated the employee. The Court found that the certificate could not be revoked more than three years later absent fraud, which was lacking in this case, especially since the Commission never alleged that any fraud occurred. Further citing article 23-A of the Correction Law, the Court found that none of the exceptions to hiring existed and that the employee could not have been charged with a failure to disclose or cooperate since he, in response to the 2016 application, had actually provided the information about his prior convictions.

The First Department in *Almanzar v. City of New York City Civ. Serv. Comm*., 2018 NY Slip Op 08062 (11/27/18) upheld the termination of two corrections officers involved with a physical confrontation with a prisoner on the issue of excessive force. The decision turned on the procedural posture of the case where the employees first sought an administrative appeal

and later sought an Article 78 proceeding. By following this process, the nature of the review by the Court changed and not in favor of the officers.

In *Nobile v. BOE of the City Sch. Dist. of the City of New York*, 2018 NY Slip Op 08065 (11/27/18), a former teacher sought to rescind a disciplinary settlement on the grounds that although he had signed the agreement along with his attorney and the Department's counsel, because the Superintendent had not yet signed it, he could change his mind. The Court was not impressed and he is still retired.

In upholding a 3020-a hearing officer's dismissal recommendation, the Second Department in *Johnson v. Riverhead CSD*, 2018 NY Slip Op 08021 (11/21/18), recognized a different standard for their review but still concluded that the determination of the hearing officer was neither arbitrary nor capricious.

In *Snowden v. Village of Monticello*, Decision No. 526490, November 29, 2018, the Third Department heard a case involving the termination of a Code Enforcement Officer under Section 75 of the Civil Service Law which was transferred to that Court. The decision turned on whether the charges were time-barred even though the allegations allegedly constituted a crime. The Court determined that the charges were not time-barred nor were they unsupported by substantial evidence.

The Second Department in *Matter of Buccieri v. County of Westchester*, 2018 NY Slip Op 07305 (2nd Dept. 2018) granted, in part, the petition of an employee who was suspended without pay for thirty (30) days after a recommendation of a hearing officer on the issue of misconduct and/or incompetence as part of a Section 75 hearing. Initially, the lower Court upheld the petition and remitted the matter to the employer on the basis that the Commissioner who rendered a final decision had actively participated in the events leading up to the hearing and, therefore, should have recused herself. Another individual then accepted the recommendation of the hearing officer with regard to the suspension and the petition should a further review under CPLR Article 78. The Appellate Court determined that nineteen (19) of the charges were supported by substantial evidence while three were not and thus ultimately held that the thirty (30) days penalty was not so disproportionate to the offenses to be shocking to one's sense of fairness.

The Seventh Circuit Court of Appeals recently decided in *Graham v. Arctic Zone Iceplex, LLC* that undocumented incidents may still allow an employer to fire an individual contrary to the typical understanding that if it is not written down, it does not count. The Court stated that "even minor grievances can accumulate into a record that justifies termination." In that case, the plaintiff argued that the problems set forth in the termination notice (e.g., bad attitude, failure to timely complete work, insubordination) were not legitimate reasons for termination because they were never recorded. The Court rejected the waiver argument that was proffered.

In another City of New York BOE case, the First Department affirmed the refusal to vacate the arbitration award terminating a teacher. The hearing officer determined that there was sufficient evidence on the issue of incompetency based upon six written reports of formal and informal observations of the petitioner's teaching over a period of two years. *Matter of Johnson v. BOE of the City of New York*, et al, 2019 NY Slip Op 02834 (4/16/19).

DEFERENCE

While not a per se labor case, the First Department decision in *GP v. NYSDHR*, 2019 Slip Op 04280 (5/30/19) reiterates the substantial deference position of courts as it applies to factual determinations of State agencies. The Court went further to refuse to substitute its judgment for that of the agency or to pass on credibility issues where conflicting evidence existed. The Court also concluded that the Commissioner was not required to follow the findings of the ALJ, but, instead, could reach an independent decision on both the facts and the ultimate conclusion.

While not a public sector matter, per se, the Fourth Department reaffirmed the long standing rules with regard to deference to administrative agency determinations with regard to them being upheld unless they were arbitrary and capricious or clearly irrational. Finding that the State Division of Human Rights was not obligated to have a hearing even when a question of fact existed, the Court yielded to "the expertise [of SDHR] in evaluating allegations of discrimination…which extends to [a] decision whether to conduct a hearing." The Court further found that there is no protection under the law based upon someone's status as a caregiver. *Matter of Floriano-Keetch v. NYSDHR*, 2019 NY Slip Op 06282 (8/22/19).

RETIREMENT

The Second Department affirmed the dismissal of an Article 78 proceeding with respect to retirement benefits based upon a failure to timely file the petition within four months of receiving the determination of the retirement system in *Matter of Strax v. City of New York*, 2019 NY Slip Op 04177 (5/29/19).

In *Matter of Tomassi v. City of Buffalo*, Decision No. 39, CA 18-01482 (6/7/19). The Court unanimously affirmed the denial of the petition filed by a former firefighter who was granted performance of duty disability retirement benefits and later a supplemental benefit until he reached age sixty-two. The employee argued that an amendment to the Retirement and Social Security Law section 384-d(i) raised the mandatory service retirement to age sixty-five and thus he was being denied equal protection of the law. A review of the legislative history led the Court to the conclusion that the intent of the law was not to provide benefits for someone who was already enrolled in the plan. The Court also concluded that the employee had failed to show any evidence as to how he had been treated differently than others similarly situated.

In *Matter of Halloran v. NYS ERS*, 2019 NY Slip Op 03336 (5/1/19), the Second Department reversed the grant of retirement benefits by the Court which reversed the decision of the System which had denied accidental retirement benefits to the sanitation worker who claimed an injury to his left shoulder. Examinations to his left shoulder shortly after the accident were negative and it was not until seventeen months later that an MRI revealed a rotator cuff tear to the same shoulder. The ERS determination was that there was no causal relationship between the accident and the injury. The Court recognized that the test was whether there existed some credible evident to support the agency's determination. The Court concluded that the employee did not establish that the disability was the "natural and proximate result of his line-of-duty accident." The Court concluded that there was a rational basis for the decision and that it was not arbitrary and capricious and so it refused to substitute its judgment for that of the agency even if its review would lead to a different result.

In *Matter of Hannon v. New York State Dept. of Human Rights*, 2019 NY Slip Op 02343 (3/27/19), the Second Department affirmed the lower Court's confirmation of the hearing officer's decision pursuant to section 74 of the Retirement and Social Security Law when it determined that the State and Local Retirement System properly denied disability retirement benefits to an employee who had submitted over two hundred pages of medical records to the System after the physician on the IME determined that the ailments were either well controlled where she could work or simply self-reported complaints which were not verifiable.

In an ERISA case dealing with an Education Law section 3813 notice requirement (similar to GML section 50-e), the Second Department affirmed the denial of the motion to file a late notice of claim on the grounds that there was no privity since the disability policy was between the employee and the insurance company, not the municipal employee. Therefore, since the claim would be patently meritless, no basis for the late notice existed. *Matter of Arroyo v. Central Islip UFSD*, 2019 NY Slip Op 04688 (6/12/19).

STATUTE OF LIMITATIONS

The lower Court's decision dismissing the petition of the employee who was terminated as a New York City Correction Officer was affirmed by the Second Department in *Matter of Campos v. New York City Department of Corrections*, 2019 NY Slip Op 03966 (5/22/19). The employee was charged with having sexual relations with a minor and his defense was that the minor had claimed to be eighteen years of age. Given the choice of appealing his termination to the Civil Service Commission or the Court, after being told that an appeal to the Commission would be final and binding, the employee chose to appeal to the Commission which upheld the termination. Thereafter, the employee filed an Article 78 proceeding in Court. In addition to determining that there was no right to appeal the decision of the Commission, the Article 78 proceeding was also untimely since it was not filed within four months of the denial of the first appeal.

In *Matter of Salomon v. Town of Wallkill*, 2019 NY Slip Op 05671 (7/17/19), affirmed the lower court's dismissal of the petition on timeliness grounds. The Court rejected the continuing wrong doctrine which it said could be used only if it is "predicated on continuing lawful acts and not on the continuing effects of earlier unlawful conduct." In this case, the employer made a determination with regard to health insurance contribution levels and the employee tried to argue that with each paycheck, the act of the employer continued. Each paycheck was not a continuing wrong in itself. The Court also noted that the filing of a grievance did not toll the statute of limitations.

In another statute of limitations case, the First Department in *Matter of Stewart v. NYC Dept. of Education*, 2019 NY Slip Op 05069 (6/25/19) affirmed the refusal to reconsider the petitioner's application to be a cleaner. The case was filed more than four months after the agency's determination and the time line did not run from the date of the notice of claim or the date of the 50-h hearing.

In a CPLR section 217 timeliness case, the Third Department in *Matter or Karkauer v. NYSED*, Case No. 527364 (July 11, 2019), reiterated the Court of Appeals determination of what constitutes "final and binding" in terms of exhaustion of administrative remedies. The agency "must have reached a definitive position on the issues that inflicts actual, concrete injury and…the injury…may not be…significantly ameliorated by further administrative action or by steps available to the complaining party." The Court determined that although a second almost identical notice was sent one month after the first notice to the employee, the employee should have acted after he received the first notice.

In *Martin v. Dept. Educ. of City of New York*, 2018 NY Slip Op 09018 (12/27/28), the First Department dismissed the petition to vacate the arbitration award terminating the teacher's employment for failing to timely commence the Article 75 proceeding within ten days after receipt of the Hearing Officer's decision pursuant to Education Law section 3020-a. Petitioner failed to show any prejudice even though the hearing was not completed within 125 days and the arbitration award was not issued within thirty days of the last day of the hearing. On a substantive point, the Court also upheld the findings of the Hearing Officer even in light of the thirty year career of the petitioner.

In *Peckham v. Island Park UFSD*, 2018 NY Slip Op 08318 (12/5/18), the Second Department reversed the lower Court and dismissed the employment discrimination claim for age and sexual orientation. The Court concluded that the action was time barred and there was no tolling available to resurrect the matter.

In re Singh v. City of New York, 2018 NY Slip Op 07253 (1st Dept. 2018) is a case where the Appellate Division upheld the denial of the petitioner's application to file a late notice of claim with respect to a firefighter's exam. The court concluded that they should not delve into the facts and the petitioner failed to set forth any facts which would show any liability on the part of the City employee.

ARBITRATION

Livermore-Johnson v. NYS Dep't of Corrections and Comm. Supervision, 155 A.D.3d 1391 (3d Dep't 2017) – Employer's cross-motion to vacate arbitration award granted. The award violates public policy: the employee, a Supervising Offender Rehabilitation Coordinator, accessed confidential information on the employer's computer system regarding parole officer's surveillance of the employee's husband, a convicted rapist and registered sex offender, and shared some information with her husband. Arbitrator's award dismissing charge because the specific allegations regarding the number of times the employee shared information were not proven, is overturned due to public policy, reflected in *Public Officers Law* §74(3)(c), against disclosure of confidential information or use for personal interest.

The Second Department in *Matter of Ross v. NYC Metropolitan Transit Authority,* 2019 NY Slip Op 05548 (7/10/19) reversed the lower court and reinstated the arbitration award which terminated the employee, a bus driver. The Appellate Court took the position that the lower Court applied the wrong standard and while the penalty was harsh, it did not violate any strong public policy or "clearly exceed an enumerated limitation on the arbitrator's power."

In another City of New York BOE case, the First Department affirmed the refusal to vacate the arbitration award terminating a teacher. The hearing officer determined that there was sufficient evidence on the issue of incompetency based upon six written reports of formal and informal observations of the petitioner's teaching over a period of two years. *Matter of Johnson v. BOE of the City of New York*, et al, 2019 NY Slip Op 02834 (4/16/19).

The Second Department decided *Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628*, 2018 NY Slip Op 08294 (12/5/18) reversed the lower Court which granted a permanent stay of arbitration. The Appellate Division concluded that there was no statutory, constitutional or public policy reason to stay the arbitration and there was sufficient general language in the contract to determine that the issue was arbitrable.

In two related cases involving the same parties, the Third Department stayed arbitrations at the request of the employer in *City of Plattsburgh v. Plattsburgh Permanent Firemen's Association*, Case Nos. 527791 and 527793 (July 3, 2019). The issue in the first case was whether the contractual language was a job security clause or a safety clause with regard to minimum staffing levels. Although it was mixed, the fact that it was considered a job security clause was fatal and against public policy thereby rendering the arbitration demand unenforceable. Trying to argue that it was a violation of the CBA language dealing with filing vacancies did not prove to be more fruitful for the union.

In a case where a stay was not granted, the Third Department in *Matter of Hudson City Sch. Dist. v. CSEA, Local 1000*, Case No. 528149 (July 11, 2019) determined that the issue of prescription drug coverage with regard to retirees was a matter for an arbitrator and that the argument that the clause within the CBA referring to staff and employees could not have meant former employees was something for the arbitrator to decide.

Similarly, the Fourth Department in Matter of *Jefferson County v. Jefferson County CSEA*, 2019 Slip Op. 06298 (8/22/19) also rejected the request to stay the arbitration between the parties citing the two step process a court must use to determine when a public sector grievance is subject to arbitration. Since the parties did not raise the issue whether there was a statutory, constitutional, or public policy prohibition against arbitration, the sole focus was whether the CBA contained language where the parties agreed to take the matter to arbitration. Not surprisingly, with a broad definition of what constitutes a grievance, the case was allowed to proceed administratively. The Court also rejected the arguments that there was no agreement to arbitrate because of the existence of a separate MOA on the subject and further that CPLR section 7502(b) was inapplicable because of the question of whether the new CBA affected the continued viability of the prior MOA.

In a case once again proving that overturning an arbitration decision is not a concept preferred by the Courts, the Third Department in *Capital District Transportation Authority v. Amalgamated Transit Union*, Case No. 527824 (June 20, 2019) ruled that vacature exists only if the award violates a strong public policy, is irrational or the award "clearly exceeds a specifically enumerated limitation on the arbitrator's power." Finding none, the Court concluded that since the contract was "reasonably susceptible to different conclusions" the arbitrator's finding that a forty year past practice existed would not be disturbed.

In a not very surprising move, the Fourth Department *in Matter of Arbitration between the Professional, Clerical, Technical Employees Assoc. v. Buffalo City Sch. Dist*., CA 18-02028 (July 5, 2019), refused to vacate an arbitration award and, instead, confirmed same in a termination case with a security guard who the employer said did not have the proper registration card. The Court rejected the violation of public policy argument which was advanced and determined that there was nothing in General Business Law section 89-g that prevented the matter from going to arbitration. On the issue of whether the arbitrator exceeded his authority, the Court stated that "by submitting to arbitration, however, respondent ran the risk that the arbitrator would find the dispute covered by the CBA, as he did, notwithstanding respondent's position…". It would have been interesting to see how the Court would have reacted to a request to stay under these circumstances.

Keeping with its consistent desire to have labor cases heard outside of the judicial system, the Fourth Department in *Matter of Bender*, 2019 NY Slip Op 06297 (8/22/19) reversed the partial vacature of an arbitration award reinstating same and further confirming the determination of the arbitrator. In that case, an assistant principal was directed to leave a school function after showing up under the influence of alcohol. Rather than go through disciplinary proceedings, the parties agreed to a Last Chance Agreement because the employee was generally popular as a teacher and an administrator. The employee later violated the agreement by virtue of having employee alcohol bottles in his desk at school and he was arrested for DWI by the local police. Rather than just terminating him under the agreement, the District conducted a hearing where the hearing officer sustained the charges and concluded

that termination was the appropriate penalty. The lower court felt that since the district had not followed the terms of the LCA and initiated disciplinary proceedings, any charges related to the LCA should be dismissed. The Court also found that termination shocked its conscience and was "shockingly disproportionate" because the DWI did not happen on school grounds. In reversing the lower Court, the Appellate Division determined that the election of remedies doctrine was inapplicable under these circumstances and that the terms of the LCA would stand and could be pursued through a hearing. The Court also reiterated the basis for vacating a hearing officers findings under Article 75 concluding that any judicial review would be limited.

DISCRIMINATION

The Second Department in *Reilly v. First Niagara Bank, N.A*. 2019 NY Slip Op 04974 (6/19/19) affirmed the dismissal of the sex based employment discrimination and hostile work environment claim of the petitioner. In this case, the plaintiff failed to allege that an adverse employment action occurred under circumstances giving rise to an inference of discrimination. The court also used the now modified "severe and pervasive" standard with regard to the hostile workplace to decide that there was insufficient evidence to permit the complaint to stand. The Court also took the position that plaintiff failed to sufficiently allege that the employer encouraged, condoned, or approved of the actions.

The Second Department in *Sanderson-Burgess v. City of New York*, 2019 NY Slip Op 05173 (6/26/19) affirmed the dismissal of several causes of action in the same sex and retaliation employment discrimination claim filed with regard to the actions of one civil employee in the police department against another civil employee. The Court recognized its obligation to analyze the case under both the McDonnell Douglas framework as well as the mixed motive framework of the more recent cases. Even with these standards, the Court concluded that the plaintiff could not follow any "evidentiary route" that would allow a jury to find in favor of the plaintiff. The Court also noted that once the NYPD became aware of the situation, it took "prompt remedial action." Thus, the harassment and aiding and abetting claims were dismissed.

The Fourth Department in *Matter of Christian Central Academy v. NYS DHR*, Case No. 372 (5/3/19) upheld the determination of the Division which determined that the employer had engaged in discrimination on the basis of familial status in their hiring policies. The court concluded that there was sufficient basis for the penalty and the judgment interest that was imposed.

The First Department also affirmed the granting of a motion to dismiss the employment discrimination claim in *Marino v. City of New York*, 2018 NY Slip Op 09027 (12/27/28), as time barred rejecting the continuous violation doctrine. The Court further found that the City could not be held liable for the alleged acts of the corporate pension fund which was independent and distinct from the City.

In *Matter of Ufland v. NYS DHR*, Case No. 1162 (12/21/18), the Fourth Department affirmed the dismissal of the petition which sought to annul the determination of the DHR, after an investigation, that there was no probable cause to believe that the County Department of Social Services has discriminated against petitioner based upon her disability. In this case, the petitioner's employment was terminated a year prior to her administrative complaint. In addition to being considered untimely, the Court concluded that the DHR had conducted a proper investigation and had given the petitioner a full and fair opportunity to be heard. The Court also rejected the petitioner's attempt to use the Unemployment hearing decision as evidence of the discrimination and the argument that a hearing by DHR was required.

On April 18th of this year in *Natofsky v. City of New York* (17-2757-cv), the Second Circuit Court of Appeals decided that under the ADA, a plaintiff must prove "that discrimination was the but-for cause of any adverse employment action." This changes the standard and brings it in line with ADEA and Title VII claims. Previously, under the "mixed motive" standard, the plaintiff was required to show that that person's disability was a motivating factor in the employer's adverse employment action, even if other permitted motivations existed. Now a plaintiff must show that but-for his or her disability, the adverse employment action would not have been taken. This effectively raises the burden on plaintiffs to prove these types of cases.

GENERAL MUNICIPAL LAW SECTION 207

In a 207-c case, the Second Department confirmed the determination and dismissed the petitioner's application for benefits in *Redmond v. Town of Haverstraw,* 2019 NY Slip Op 05670 (7/17/19). In this case, while the hearing officer recommended that benefits be granted, the respondents issued a final determination denying the application. On appeal, the Court opined that their review was "limited to a consideration of whether the determination was supported by substantial evidence upon the whole record." The Court noted that while the hearing officer's recommendation is to be afforded weight, the final decision rested with the administrative authority and since there was conflicting medical opinions, the "Courts are not free to reject the choice made" as long as the evidence was rational and fact-based.

In *Matter of Fortuna v. City of White Plains*, 2019 NY Slip Op 02092 (3/20/19), the Second Department affirmed the hearing officer's determination denying benefits under GML section 207-a for on the job injuries sustained as a firefighter. Petitioner retired and then eight months later attempted to retroactively apply a new CBA provision to convert sick leave benefits into salary benefits and to supplement his disability retirement benefits. The City granted a partial conversion of the sick leave benefits, but denied to supplement the retirement benefits. The Court concluded that the hearing officer's determination was supported by substantial evidence.

APPR

A third school related First Department decision in *Damesek v. City of New York*, et al, 2019 NY Slip Op 03301 (4/30/19) dismissed the petition of an administrator challenging his

APPR rating. The Court concluded that there were sufficient facts to justify the unsatisfactory rating.

In *Matter of Addoo v. NYC Board of Education*, 2019 NY Slip Op 04887 (6/18/19), the First Department upheld the lower court's refusal to annul the APPR rating for the employee. The teacher tried to argue that her employment was discontinued, but in reality, the Court noted that she resigned and that there was a rational basis for the rating.

DISABILITY

In a decision that shows the importance of video surveillance in spite of medical examinations and testimony to the contrary, the Third Department in *Swiech v. City of Lackawnna*, Case No. 527159, July 3, 2019, refused to reverse the disqualification from future wage replacement benefits on the basis that the claimant violated Workers' Compensation Law section 114-a when there was video evidence showing him doing activities that he had previously testified that he could not do or that his physicians had stated were not possible based upon their examinations. It should be further noted that extreme adherence to the rules governing the forms for a full Board review is critical because if you do not fill out the forms properly or completely, the Board can deny the request for a full Board review.

The Third Department in *Matter of Cavallo v. DiNapoli*, Decision 526613 (12/20/18), upheld the denial of petitioner's applications for accidental disability benefits as a result of an injury he sustained exiting a vehicle while responding to a fire call. While the Retirement System conceded that he was permanently disabled, they concluded that the incident was not an accident. In light of the medical testimony, the issue of whether the performance of duty disability retirement benefits should have been denied was remitted for further proceedings while the application for accidental disability retirement benefits was properly denied on the basis that it did not fit the definition of an accident which was sudden. The Court concluded that a misstep by a firefighter was not out-of-the-ordinary or unexpected.

In *Bufearon v. City of Rochester*, Decision 526688 (12/27/18), the Third department upheld the ruling that the claimant did not sustain a causally-related cervical spine injury that was never mentioned as part of the initial proceedings. Since there was a lack of credible medical testimony relating the injury to the accident, the Board properly decided the credibility issue against the claimant.

In a Worker Compensation case discussing the retroactive application of Worker Compensation Law section 15(3)(w) as it applied to whether an individual had to demonstrate attachment to the labor market in order to receive permanent partial disability benefits, the Third Department in *Matter of Pryer v. Incorporated Village of Hempstead*, 2019 NY Slip Op 06561 (9/12/19) concluded that not all cases will result in retroactive application. In this case, the determination on whether the claimant was in the labor market by the Board preceded the amendment and so retroactive application was not appropriate.

In *Arroyo v. Central Islip UFSD*, 2019 NY Slip Op 04669 (6/12/19), the Second Department affirmed the motion to dismiss the complaint of the security guard injured while employed by the school. Petitioner received long term disability benefits for three years and then was told by the insurance company that he was no longer entitled to benefits because he was no longer totally disabled. The petitioner attempted to argue that while the plan was not technically subject to ERISA since it was a governmental plan, the District had nevertheless subjected itself to the statutory scheme governing appeals. That argument was summarily rejected. The Court concluded that the District was not a party to the Summary Plan Description and had nothing to do with its content or development. The claim was fully controlled by the insurance company without any involvement by the employer. The Court also noted that the claim failed for filing and service a notice of claim under Education Law section 3813 which was a condition precedent. A related appeal between the same parties decided the same day under Slip Op 04688 dealt with the issue of filing a late notice of claim. The Court also rejected that attempt.

The Second Department in *Shortt v. City of New York*, 2019 NY Slip Op 04745 (6/12/19), reversed the lower Court's grant of a CPLR 3211(a)(7) motion dismissing the complaint against the teacher's employer after the school district alleged that the plaintiff had failed to exhaust her administrative remedies under the CBA. The teacher was injured as a result of a malfunctioning elevator and initially sought "line of duty injury" paid medial leave. The Department of Education denied the request without setting forth a reason and instead of appealing that decision, the teacher sued the District. The Court concluded that the negligence claim was not governed by the CBA and thus could be continued. The Court also rejected the collateral estoppel argument raised by the employer who tried to rely on the DOE determination on the basis that the defendant had failed to demonstrate that the issue decided by the DOE was the same being sought by the plaintiff. While not specifically mentioned, it would seem that the failure of the DOE to elaborate further on the initial decision proved fatal to the defense.

The Third Department refused to overturn the Workers' Compensation Board after it rejected the claims for mental injury on behalf of a County Sheriff. *Karam v. Rensselaer County Sheriff's Dept.*, Decision No. 525286/525911, December 6, 2018.

The Second Department also affirmed the lower Court's granting of a petition directing that the firefighter's surviving spouse receive accidental death benefits from the date of the first application in *Carlock v. Board of Trustees of the New York Fire Department Pension Fund*, 2018 NY Slip Op 07119 (2nd Dept. 2018).

CIVIL RIGHTS LAW

On December 11th in *NYCLU v. New York City Police Department*, 2018 Slip Op. 8423, the Court of Appeals addressed Civil Rights Law section 50-a with respect to police officer personnel records stemming from a disciplinary proceeding. The NYCLU sought disclosure of

the records under FOIL arguing that compliance under the Civil Rights Law was unnecessary where the officer's identifying information had already been redacted. In this case, upon the administrative appeal, the NYPD provided seven hundred pages of redacted Disposition of Charges forms, but not the final opinions. The Court carefully reviewed the statute and the procedures which should be used and determined, in part, that the records sought by the NYCLU were not records which were "relevant and material to any pending litigation." The Court went on to recognize the policy arguments proffered by the NYCLU, but it declined to "second-guess the Legislature's determination, or to disregard-or rewrite-its statutory text." The Court then discussed FOIL and its relationship to the case at length. Judges Rivera in a rather lengthy opinion, and Wilson dissented. Rich advised the Committee that our Section is joining with the Labor & Employment Law Section in opposing NYSBA's support for legislative repeal of CRL §50-a.

In a recent Civil Rights Law section 50-a case, the First Department affirmed the decision of Supreme Court on the issue of whether body camera footage was a personnel record albeit on different grounds. In *Matter of Patrolmen's Benevolent Assn. vs De Blasio*, et al, 2019 NY Slip Op 03265 (4/30/19), the Court held that while the statute does not provide for a private right of action, it did not prohibit a review for injunctive relief. The Court nevertheless dismissed the petition and determined that body-worn-camera footage was not a personnel record because the footage is used for other objectives beyond personnel evaluations, as argued by the petitioners, and is for transparency, accountability and public trust building. The Court distinguished this release of information from *NYCLU v. New York City Police Dept*., __ N.Y.3d __, 2018 Slip Op 8423 (2018) which sought the records related to a disciplinary proceeding.

MISCELLANEOUS OR WE GOT TIRED DOING NEW HEADINGS

In *Stewart v. MTA Bus Company*, Case No. 527915 (August 1, 2019), the Third Department affirmed the determination of the Unemployment Board on the issue of the claimant's right to benefits even though an arbitrator, while not issuing a termination order, did determine that the claimant was guilty of misconduct. The Court concluded that the Board was entitled to make its own determination on the facts and to decide if the actions of the employee rose to the level of a disqualifying basis for benefits. Collateral estoppel was used only on the factual findings, not the end result.

The same Board of Education did not fare any better in *Matter of Buffalo Council of Supervisors, et al v. Board of Education*, et al, CA 18-02195 (July 31, 2019) when the same Court reversed the lower Court's dismissal of the petition. The Court concluded that there was no defect when the attorney rather than the petitioner verified the petition and that the proceeding was not barred by res judicata and collateral estoppel as a result of a prior arbitration between the same parties with regard to the discipline of the employee. The Court also concluded that the petitioner was not required to exhaust any administrative remedies under the CBA because the petitioner alleged violations of the Education Law not the

agreement. The fact that the petitioner also filed a grievance was "of no moment" because the Court felt that the issues presented and remedies sought were different. The Court also refused to grant deference to the Commissioner of Education on the Education Law question which it felt needed no particular education law expertise to decide.

In *Matter of Fields v. City of Buffalo*, CA 18-02225 (July 31, 2019), the Fourth Department determined that the police officer's challenge of the refusal to provide a defense and indemnification was untimely since it was made more than four months after the City had advised the employee that it was not going to provide a defense and indemnification. The fact that the plaintiff in the underlying action amended the complaint to add additional parties did not toll the statute of limitations as to this defendant police officer with the Court thereby refusing to extend the *Perez* holding.

The Third Department on May 16, 2019 decided *Matter of Lynn v. State of New York and PERB*, Decision 526445, which discussed whether the Court was going to issue a decision pursuant to the request of PERB. In this case, the petitioner filed an Article 78 proceeding seeking to have the Court direct PERB to issue a determination on two improper practice charges. Supreme Court granted the petition and directed PERB to issue determinations within sixty days of the date of service of the order. PERB then appealed and obtained an automatic stay. During the pendency of the appeal, PERB issued a determination on the charges, but continued the appeal on the issue on whether the petitioner had failed to exhaust his administrative remedies. The Court simply determined that the matter was moot because the relief originally requested by the petitioner had been granted with the issuance of the IP decisions.

The Third Department in *Jones v. Town of Mayfield*, Decision 527043 (5/16/19) concluded that health insurance was not the equivalent of salary payments under Town Law section 27 as it pertained to Town justices' salaries being equal. The petitioner declined health insurance coverage which the other justice took and then argued that she should get additional salary to make up the difference between the two justices' entire benefit package.

In a retaliation and defamation case, the Third Department in *Carter v. Village of Ocean Beach, et al*, Decision 527565 (5/9/19) affirmed the partial grant of summary judgment to the defendants. The plaintiffs alleged that they were not hired back as seasonal, part-time officers in retaliation to their complaints of misconduct by other officers and improper policing practices. The Federal Court case was dismissed after which a State Court action was brought under Civil Service Law section 75-b. The Court concluded that the officers had failed to communicate the concerns to another government official who could have addressed them and instead raised the issues only to the individual about whom they were complaining. The plaintiffs had failed to make the "notification efforts which are a procedural prerequisite to invoke" the statutory protections. On the issue of defamation, there was no proof that the governmental agency had either known of the matters or approved them as being within the scope of the other officers' positions with the police department.

In an interesting whistleblower retaliation case, the Third Department in *Lilley v. Green CSD*, Decision 527253 (1/3/19) reversed the lower Court's dismissal of the case on the grounds that Civil Service Law section 75-b can allow a case to proceed as to whether the disciplinary action may be retaliatory even if the employee is guilty of the alleged infraction if, while the employee may have had an "interest", was that interest something which was under his authority to act upon. The Appellate Court also found that the trial court failed to make a separate determination on whether the employer's action was pre-textual.

The Fourth Department decided *Timkey v. City of Lockport,* Case No. 1114 (12/21/18) which affirmed a lower Court's grant of summary judgment for the plaintiff on the issue of the defendant's obligation to provide health insurance benefits to the plaintiff who was previously employed by the City. Eight years after the plaintiff left the employ of the defendant, plaintiff requested that the City provide him with medical benefits under the relevant CBAs in the City. While the Court recognized that the general rule that contractual rights do not survive beyond the termination of the CBA, rights which would have vested at that time can survive. In this case, the employee had worked for the City for more than twenty years which allowed him to become eligible for the benefit upon reaching retirement age.

The Third Department decided *Endicott Police Benevolent Assoc. v. Bertoni*, Decision 526197 (3rd Dept. October 25, 2018) which involved an appeal of a dismissal of an Article 78 proceeding to review a determination of the municipality setting minimum qualifications for civil service exams for the positions of Chief and Assistant Chief of Police for the Village of Endicott. The PBA sent a letter to the Department requesting that promotional examinations be conducted rather than open competitive examinations and that the minimum qualifications for experience be revised. The Department did not respond and held the open competitive examinations. The PBA unsuccessfully argued that competitive civil service exams should be used only when it is impracticable to fill a position through promotional exams. The Court took the position that it was up to the local civil service commission to determine the types of examinations which would be given. On the issue of changing the minimum qualifications, the Court concluded that the respondent had met the minimal burden of providing a fair explanation for at least one of the requirements for Chief of Police. The same was not true, however, with regard to the change for the Assistant Chief since the record did not set forth any explanation for that change.

A procedural change of a case from an Article 78 proceeding to a declaratory action by the Second Department in *Matter of Williams v. Town of Carmel*, 2019 NY Slip Op 06160 (8/21/19) changed little substantively. Either way, the matter was dismissed and the retiree petitioner was not entitled to payment for unused sick time pursuant to an earlier memorandum of agreement. In rendering its decision, the Court noted that an Article 78 proceeding was not the "proper vehicle to resolve contractual rights" although commencing an action in an improper form does "not necessarily warrant dismissal." In giving weight to the plain language of the agreement, the Court concluded that by use of the phrase "upon effective

ratification" meant that the clause applied only to those individuals who retired after the effective date of the agreement.

In an interesting change of pace, the union in *Matter of Yonkers Firefighters, Local 628 v. City of Yonkers*, 2019 NY Slip Op 06402 (8/28/19), decided that in addition to challenging the dismissal of their petition they would seek to get the judge pulled from the case. When recusal was refused, they sought a review by the Second Department which examined the rules regarding recusal and determined that there were no facts which would warrant either a mandatory or discretionary recusal in this case.

That stemmed from the related case decided the same day which sought to overturn the vacature of an arbitration decision by Supreme Court set forth in *Matter of Yonkers Firefighters, Local 628 v. City of Yonkers*, 2019 NY Slip Op 06391 (8/28/19). The arbitrator ruled that the City had improperly terminated a firefighter and that was overturned by Supreme Court and affirmed by the Appellate Division.

SCHOOLS ARE MUNCIPAL CORPORATIONS TOO

The Third Department on March 28, 2019 decided *BOE of Minisink Valley CSD v. Elia*, Decision 526754, which upheld the determination of the Commissioner on the issue of whether the elementary teacher should have been credited for her long-term substitute work when an elementary position opened up that resulted in the PEL being canvassed. The Court provided great deference to the Commissioner's decision and concluded that "any and all service within the system must be counted, not just within the specific tenure area" under Education Law section 3013 as opposed to Education Law section 3012. The Court went further to recognize the "negative policy outcome of deterring teachers from accepting long-term substitute work if it falls outside of their preferred tenure area."

A school Superintendent filed breach of contract and tortious interference claims against the district which were dismissed on motion of the district in *Mehrhof v. Monroe-Woodbury CSD*, 2019 NY Slip Op 00110 (1/9/19). The Second Department concluded that not only did the documentary evidence submitted by the defendant totally refute the allegations in the complaint, but that the plaintiff had also failed to set forth sufficient facts to show that there existed a specific business relationship with an identified third party with which the defendants had interfered.

Buffalo Teachers Federation v. Elia, 162 A.D.3d 1169 (3d Dep't 2018), *lv. to app. den.*, 32 N.Y.3d 915 (2019) -- Certain public schools that are "underperforming" under Federal and New York State school accountability standards can be placed under receivership per Education Law §211-f. In Buffalo, the district Superintendent, as receiver over 5 schools in the district, sought modifications of the collective bargaining agreement with the teachers' union regarding issues including length of the school day and year, and teacher transfer rights. The statute provides that if the receiver and union do not agree on changes, the Commissioner of Education resolves the issues in accord with standard collective bargaining principles. After the Commissioner

approved all of the Superintendent's proposed changes that had not been agreed to by the union, the union filed an Article 78 petition. Supreme Court dismissed the union's claims. The Appellate Division affirmed in part, holding (1) that the Commissioner properly refused to determine whether the district bargained in good faith, a matter left to PERB; (2) that the receivership statute does not violate the Contract Clause of the U.S. Constitution; and (3) that the Commissioner's determination was not affected by bias. The Court agreed with the union that the Commissioner's jurisdiction extends to a proposal by the union during bargaining to reduce class size in the affected schools and that it was error for the Commissioner to refuse to consider the union's proposal merely because class size was not among the topics on which the Superintendent had sought changes. The case was remitted to the Commissioner to resolve the class size issue.

FOIL

In a related FOIL decision, the Second Department in *Matter of Outhouse v. Cortlandt Community Volunteer Ambulance Corps, Inc.*, 2019 NY Slip Op 02881 (4/17/19) found that an EMT who had made requests for records pertaining to the rejection of her application for reinstatement was not entitle to the documents under FOIL because the company was not an agency required to comply under the terms of the Public Officers Law. The Court considered whether they were required to disclose its annual budget, maintain offices in a public building, was subject to a governmental entity authority with regard to hiring and firing personnel, had a board of primarily governmental officials, was created exclusively by the government, or it described itself as an agent of the government. Based upon these criteria, the Court concluded on a factual basis that the defendant was not a governmental agency subject to FOIL.

IV. PENDING LITIGATION (*JANUS*-RELATED)

Pelligrino v. New York State United Teachers, United Teachers of Northport, Northport UFSD, et al., EDNY 2:18-CV-03439 – Anticipating the Supreme Court's decision in *Janus*, this class action, filed a month before *Janus*, against the school district as representative of all school districts in the state, the local teacher's union as representative of all teacher locals, and NYSUT, seeks recovery of past agency fees paid by agency feepayers and past union dues paid by union members who would not have joined but for the agency fee law. It also seeks to invalidate NY State laws (see above) limiting the rights of union members to quit the union according to the language in the authorization cards they signed, and requiring public employers to turn over to the union the names and home addresses of employees newly hired, newly returned from leave, reemployed or promoted or transferred into the unit. Defendants' motions to dismiss are pending.

Seidemann v. Professional Staff Congress, Faculty Assoc. of Suffolk Community College, et al., SDNY 1:18-cv-09778 (filed October 24, 2018). The suit seeks recovery of agency fees that

had been paid to the union pre-*Janus*, based on the First Amendment and the torts of conversion and unjust enrichment. Defendants' motions to dismiss are pending.

Ethics for Land Use Practitioners

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Touro Law Center, Class of 2020

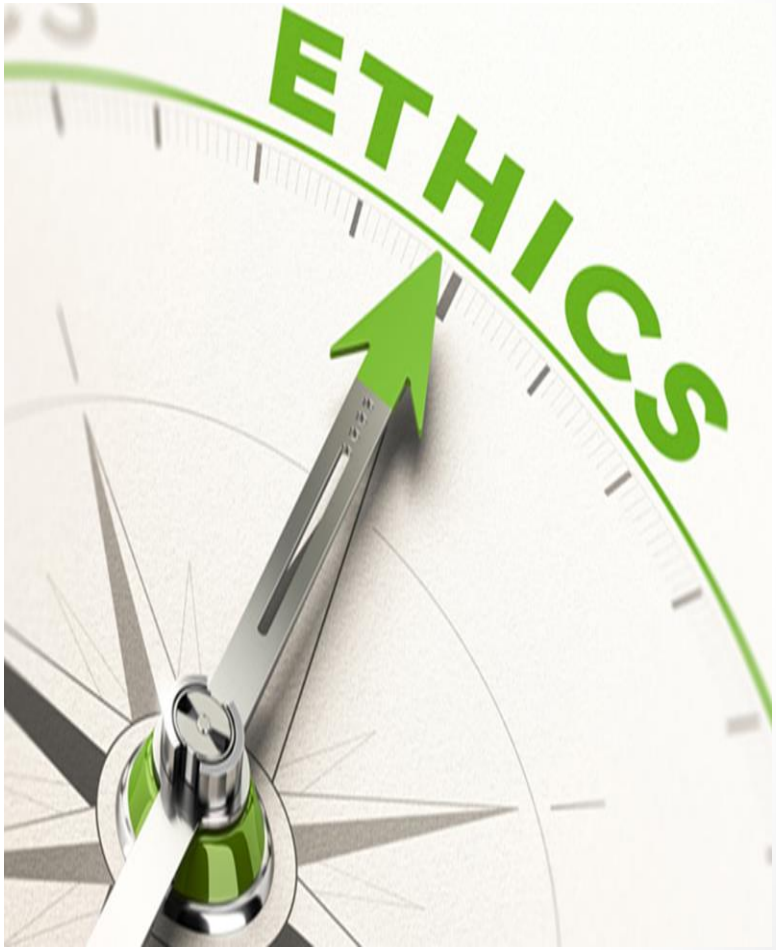
Legal Ethics and Land Use Planning

Patricia E. Salkin

Aisha Scholes

2019 NYSBA Local and State Government Law Section Fall Meeting

October 16, 2019

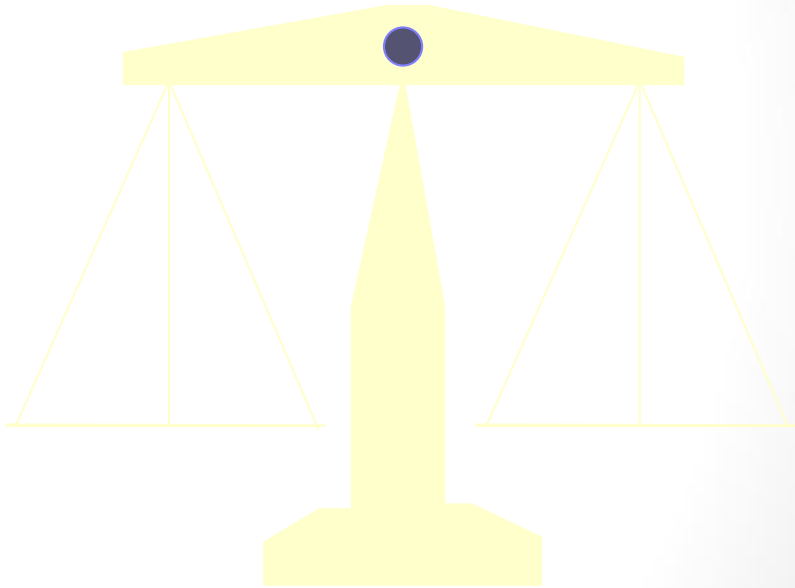


Defining Ethics

- Conduct or Behavior
  - Bad Faith
  - Ex Parte Conversations
- Morals or Values
  - community standards
- Conflicts of Interest
  * Financial/Contractual
  * Familial

Ethics for Lawyers– Know The Rules

- Conflicts of Interest
  - Contractual
  - Personal Financial Gain
  - Familial Relationships
- Representing Multiple Municipalities
- Conflicts Between Clients
- Government as a Former Client



Lawyers as Counselors

- Ethical Issues Faced by Municipal Officials
  - Conflicts
    - Relationships
      - Family
      - Employment
      - Neighbors
    - Financial
      - Business
      - Investments
      - Personal Real Estate
  - Public Statements
    - Campaign Promises
    - Statements in other Public Fora
  - Conversations in the Community
    - Ex-Parte

Recent Case Law and Opinions

- Conflicts of Interest
- Campaign Promises
- Familial Relationships
- Business Interests
- Business Relationships
- Membership Organizations
- Recusal
- Disqualification
- Bribery
- Ex Parte Communication

Appreciating the Arts

- Is the spouse of deputy zoning official prohibited from petitioning the town council for an amendment to the zoning law to allow her to open and operate an art studio and gallery on the spouse's property?

The Doctor is in the House

- Is there a prohibited conflict of interest where applicants are physicians who have a doctor-patient relationship with a member of the zoning board or a member of his/her immediate family?

Multiple Municipal Clients

- It is a prohibited conflict of interest where the same attorney represents the zoning department before the board of adjustment but where he also represents generally the highway department ?

What Happened Outside the Meeting Stays Outside…

- Is it a problem where a planning board member, who was also the municipal engineer, had ex parte communications with the applicant?

The Legislative Body and the Zoning Board – Doing Business?

- Is it a problem where a County Commissioner approached a ZBA Member and attempted to speak with him during a 20 minute break in the hearing where the ZBA member told the Commissioner to speak to the Board's attorney?

Conflicts, Recusal and Then Some…

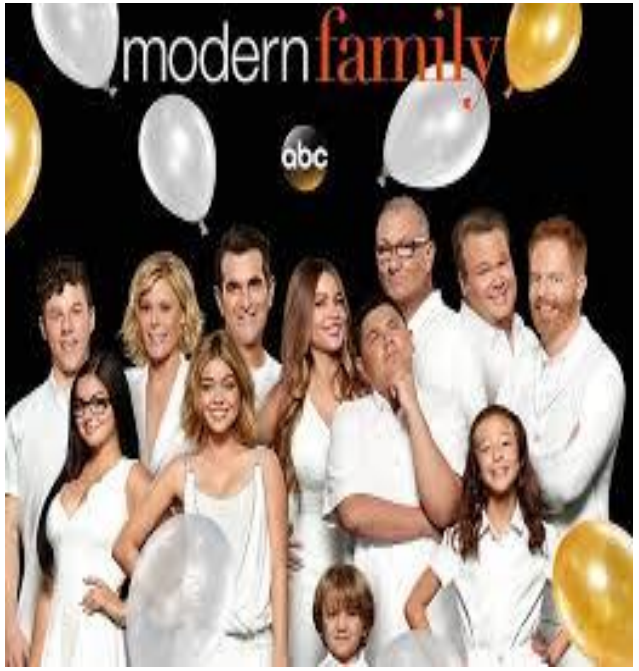
- Is it a problem where the town supervisor fails to recuse herself from discussions where she is a member of a homeowner association suing the zoning board over a related matter?

The Rent is Due

- Is it good idea for a board member to receive a below-market rent deal from the town supervisor?

We Are Family

- Is it a conflict where one board member is related to a former attorney for the law firm representing the applicant?



Planning for Retirement?

- Is it a problem where after 13 years as city attorney, the attorney drafts ordinances creating the positions of zoning hearing officer and code enforcement special magistrate for which he is appointed?

Breaking Up is Hard to Do…

Is it a conflict where the town solicitor was the “non-amicably” released divorce attorney of the applicant seeking a special use permit?

It's Only Money…

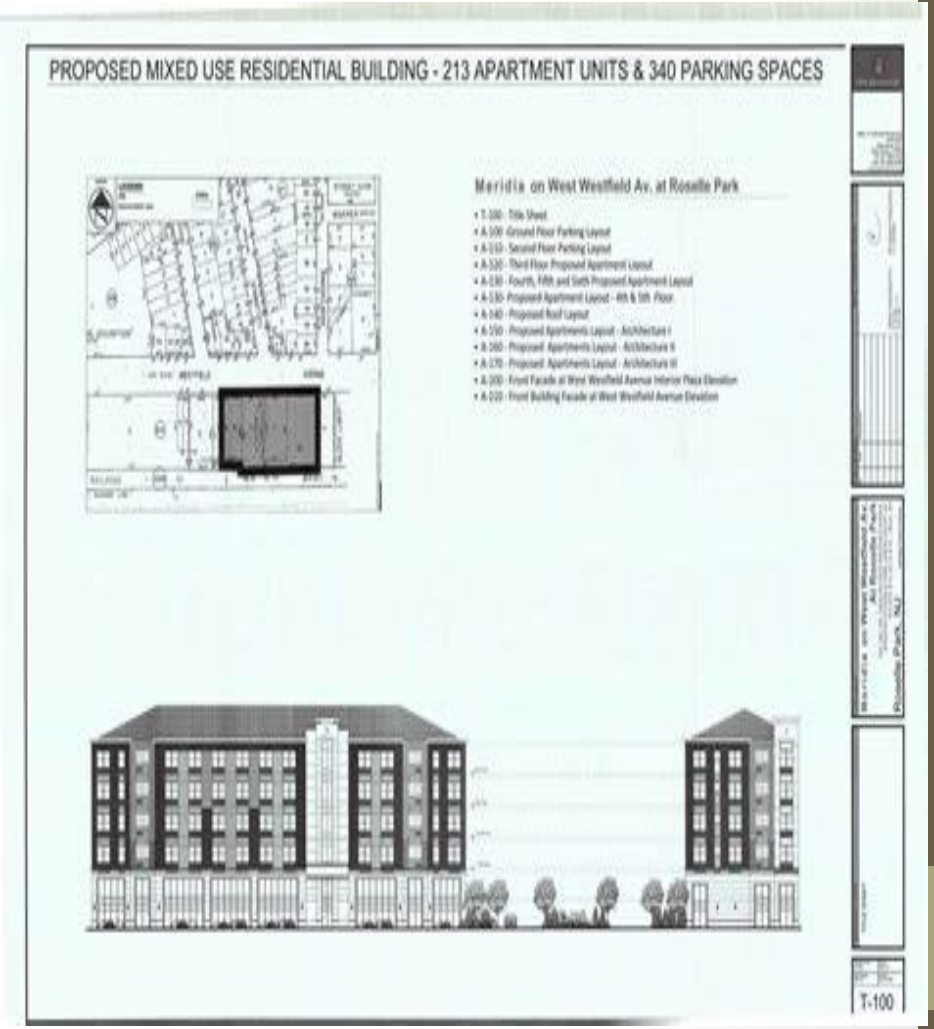
- Can a developer voluntarily pay a fee for the cost of extra meetings since zoning board only meets once a month?

Campaign Promises

- Is it a problem where the town supervisor who voted deny a special use permit for a proposed quarry owned land near the quarry site and had run for pubic office on the platform of opposing the quarry?

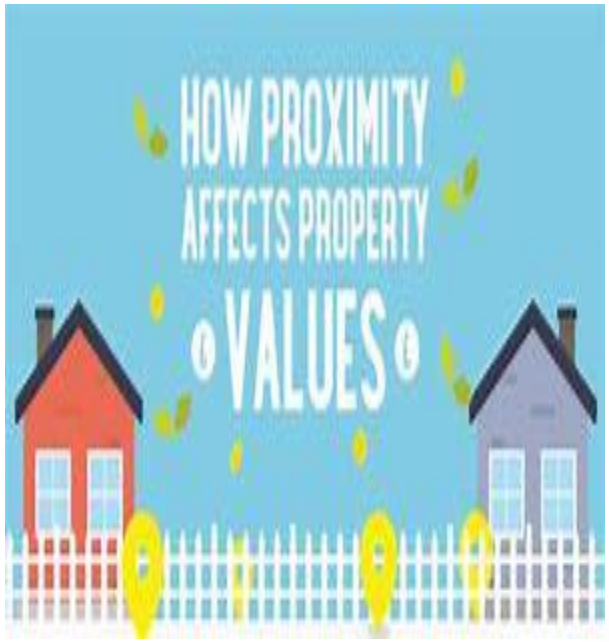
Board Members Must Apply Too…

- Is it a prohibited conflict of interest for the planning board to approve a site plan application filed by a board member where the board member disclosed his interest and recused himself from voting on his application?



Where You Live…

- Is it a conflict for a zoning board of appeals member to vote on an application where the property is in close proximity to where they live?

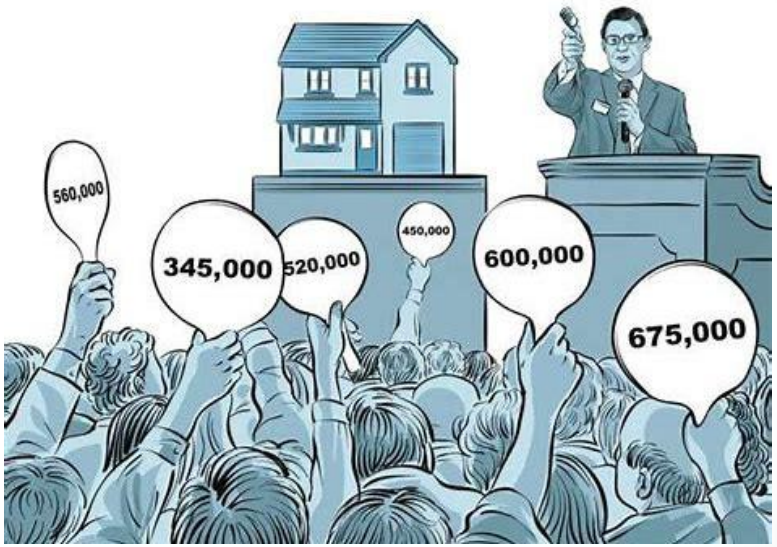


His Honor the Mayor Esquire

- Is it a prohibited conflict of interest where the Mayor was the partner in a law firm with the brother of the applicant who was seeking to construct and operate an asphalt manufacturing plant?

I'll Buy That....

- Is it a prohibited conflict for a zoning board member to participate in a hearing where:
  - he owned the adjacent property;
  - tried to purchase the subject property but was outbid by the applicant;
  - he offered to purchase the property at the hearing;
  - His wife sent a letter in opposition and she also appeared at the hearing and voiced her objection to the application



For Rent

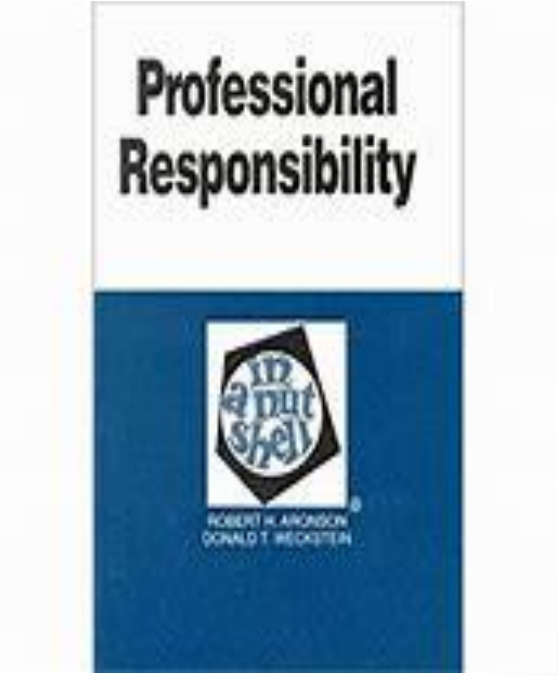
- Is it a prohibited conflict of interest where a township employee raised opposition to the plaintiffs being allowed to rent any home built on their property where the employee runs a rental property three houses away?
- How about if zoning board members allegedly threaten the plaintiff with eminent domain if they don't agree to certain requests?

Is Bribery Ever a Good Idea?

- Instead of cash for permits, would it be better to simply make a donation to the charity of a city council member's choosing?

Board Attorney Disqualified?

- Should an attorney for the zoning board of adjustment be disqualified where the lawyer represented the applicant prior to gaining employment with the Board?



The Counselor is in…

- Under a First Amendment Claim is it is problem where Village officials involved in a zoning decision making were represented by the same law firm that employs the Village attorney?

More Work Please….

- Can someone serve simultaneously as an elected member of a school district board of directors and also as a member of the local city planning commission?

Every Vote Matters…

- Is it a problem when a Township Councilman casts the deciding vote on an ordinance designed to prevent 104-unit townhouse project from being built on land adjacent to his home?

Until Next Time

- If you have to ask, go with your gut and don't do it
- Recusal is not bad and disclosure is good
- Don't think about ethics as a legal issue, think about it as a public trust
- Let's keep the trend going and not see a case between now and next time with anyone from the Local and State Government Law Section or their client as a defendant!

ZONING AND PLANNING LAW REPORT

MAY 2019 | VOLUME 42 | ISSUE 5

RELATIONSHIPS AND ETHICS IN THE LAND USE GAME

Patricia Salkin, Thomas Brown and Aisha Scholes*

Introduction

Ethical considerations in the land use decision making process can be organized into a number of categories, including, first and foremost, the broad subject of conflicts of interest.[1] Players in the land use game can find themselves in real or perceived conflicts situations based on personal financial interests resulting from investments, including businesses and real estate holdings (such as the location of their property vis-à-vis the location of the subject property before the Board), employment for themselves or members of their immediate family, and memberships in nonprofit organizations that may be either passive or active (e.g., simply dues paying member or officer or other volunteer engagement). Other relationships may be problematic, such as private relationships that typically have a shield of confidentiality, such as the lawyer-client relationship or the doctor-patient relationship. This could also extend to members of the clergy who appear before boards where their followers serve as members. This article discusses ethics issues that arise because of various personal relationships between members of land use boards, applicants and other stakeholders. Of course, disclosure of relationships that could be viewed as potential conflicts is always advisable, and the discussion of whether or not such disclosure necessitates a recusal may at times warrant discussion with board counsel.

Membership in Churches

Many people who serve on local boards belong to faith-based organizations and attend houses of worship in the community. Two recent New Jersey cases demonstrate how ethics allegations might arise based on this relationship. In both cases the court remanded the matters for further fact-finding. In the first case the NJ Supreme Court remanded the claim of conflict of interest in a zoning amendment vote by two municipal officials who held leadership positions in the applicant church. Specifically, the Plaintiff challenged the validity of an ordinance allowing the construction of an assisted-living facility next to a church due to the alleged conflicts of interest of two members of the Township Council.[2] The Plaintiff alleged that one member should have been disqualified for a direct personal interest in the outcome based on his comment that he might admit his mother to the proposed assisted-living facility one day.[3] Additionally, Plaintiff argued that this

same member and another member should have been disqualified because they were also members of the church and thus had indirect personal interests in the outcome.[4] As for the one member's comment that he might seek to admit his mother in the proposed assisted-living facility, the Court held that this alone did not create a conflict of interest that would disqualify him from voting on the ordinance because there was no evidence that the mother depended on the construction of the facility for her care, and the comment alone did not distinguish the member from any other person in the community who may or may not send their family members to the facility one day.[5] The court remanded this issue so that the trial court could develop the record as to whether the comment revealed an actual personal interest.[6] As for the other ground, the court noted that, ". . .public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified from voting on the application."[7] The court clarified that the church's interest in this ordinance is not automatically imputed to all its members but only to those members who occupied a position of substantive leadership.[8] The court remanded on this issue so that the trial court could determine whether the two members held substantive leadership positions in the church.[9]

In a second case from New Jersey, the Plaintiff sued to enjoin the Township and the Planning Board from considering a proposal to exchange municipal property with a church.[10] She argued that there was a conflict of interest because a majority of Township and Board members were also members of the church.[11] Specifically, she alleged that:

> the Council and Board were disqualified from acting on the proposed land exchange due to conflicts of interest; (2) the Township was required to exercise its power of reversion over the Church's property; (3) the Township breached its fiduciary duty to the residents in pursuing the property exchange in light of the conflict of interest; (4) the Township improperly spent funds in furtherance of the proposed exchange, which Township officials had already decided should occur; and (5) the transfer of land to the Church violated the New Jersey Constitution.[12]

The Court held that it could not determine whether there was a conflict of interest for the first, second, third, and fifth counts until the Township and Board took a final vote to approve the municipal property exchange with the church.[13] At the time of the decision, the Township and Board were merely investigating the value of the proposed exchange.[14] Therefore, the matter was not yet ripe for adjudication, and Plaintiff had not yet exhausted her administrative remedies "to make her opinion known of the land transfer."[15] However, Plaintiff alleged in her fourth count in her complaint that the Township passed three final resolutions in 2013 that were voted on by Township Council members who had conflicts of interest.[16] For this Count, the court noted that the church's interest in the outcome of the proceeding could be imputed to a Township Council member who also has a role in the church if that Council member "holds, or who will imminently hold, a position of substantive leadership in an organization reasonably is understood to share its interest in the outcome of a zoning dispute."[17] In order for a conflict to disqualify a member from voting on a resolution, the conflict must be "distinct from that shared by members of the general public."[18] The court held that the record did not provide enough information regarding the substantive roles of the Township Council members in the church.[19] Therefore, it was impossible to determine whether

Zoning and Planning Law Report (USPS 013-890), (ISSN 0161-8113), is published Monthly except August, 11 times per year, by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodicals Postage is paid at Twin Cities, MN.

POSTMASTER: send address changes to Zoning and Planning Law Report, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

ISSN 0161-8113
Editorial Offices: 50 Broad Street East, Rochester, NY 14614
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 800-340-9378

any of the members had a disqualifying conflict of interest, so the issue was remanded to enable a record to be developed.

Membership in Nonprofit Organizations

It is also common for members of local boards to be active or passive members of nonprofit organizations in the community. These might be civic groups, clubs and organizations, or educational and advocacy entities. Questions arise based upon where in the spectrum of activity in the organization the person is—for example, there may a difference between someone who is simply a dues paying member, and someone who holds an office within the organization.

The First Circuit Court of Appeals found no unethical conflict of interest on the part of board members who maintained membership in a conservation association that was opposed to the proposed project. Here the applicants acquired a leasehold interest in land on which they sought to build a wireless communications tower.[20] After the Planning Board denied the application, they brought a substantive due process claim alleging that certain Planning Board members, through their membership in the Belgrade Region Conservation Association (the "BRCA"), had a financial interest in conservation easements the BRCA held. The court found these vague allegations of conflicts of interest and financially motivated conspiracy were insufficient to show that the Planning Board acted in the kind of conscience-shocking fashion required for substantive due process challenges. Accordingly, the District Court's dismissal of the case was affirmed.

In another case arising in Connecticut, a member of the Planning and Zoning Commission was a former spokesperson for the local athletic foundation who had an application before the Commission to make changes to sports fields at a local high school.[21] Before the Commission made its decision, Plaintiff objected to the participation of a Commission member because he was a prior spokesperson for the Darien Junior Football League (DJFL) and a founding member of DAF.[22] Despite this objection, the Commission ultimately granted the application with the participation of the Commission member in question.[23] Plaintiff appealed, arguing that the application's approval was invalid due to the member's conflict of interest.[24] The Court held that the member's previous affiliations with the DAF and DJFL did not disqualify him because the record showed that his "open mindedness was not imperiled and that he considered whether the application conformed with the regulations in a fair and impartial manner."[25] Additionally, there was no evidence that the Commission member had a financial or pecuniary interest in the outcome of the application.[26] The Court reasoned that not every "conceivable interest" is sufficient to disqualify a zoning official.[27] If it were, many individuals, especially those who are active in their communities, would not be able to participate on zoning commissions.[28] Rather, courts must determine whether an interest disqualifies an official on a case-by-case basis, requiring a review of whether such interests indicate "the likelihood of corruption or favoritism."[29]

A recent lower court case in New York voided the enactment of a local law, agreeing that a town supervisor, "had an admitted conflict of interest, stated on the record that she was recusing herself from participating in the matter, was reminded and was well-aware of her conflict of interest and, yet, continued to participate in the public hearing for the Local Law."[30] The supervisor was a member of the homeowner association that was suing in another, but related, action, not only Plaintiff's, but also the Town's Zoning Board. The Court opined that the supervisor "arguably has a personal interest in the outcome of this litigation, not just as a member of the general public, but also as a plaintiff in the related litigation—a fact that she publicly acknowledged."[31] The Court was displeased with the fact that the supervisor "presided over the meetings and remained present during every discussion about this issue, contrary to her stated recusal. . ." noting that such participation has the potential to influence other board members who will exercise a vote with respect to the matter in question.[32] The Court said that while the supervisor:

> announced she was recusing herself from any voting regarding the matter, it was her presence at the meeting, as well as her engagement in discussions with the public about the issue, that makes her presence problematic. She admitted to having many conversations with community members about this

> issue and their concerns. She was vague about with whom she spoke, and it is unclear if she relayed the substance of those conversations to her fellow Board members while in executive session or outside of the public meeting. There is an appearance, or the threat of an appearance, that she proverbially "drove the bus" when it came to enacting the subject Local Law.[33]

The Court advised that, in this situation, the supervisor should have deferred to the deputy supervisor or to another Town Board member to run the meetings as her presence, "in front of her neighbors and the public, where it was well known that her homeowner association's lawsuit was pending, could have influenced her fellow Town Board members."[34] The Court concluded that, "Simply put, her continued presence gave her neighbors the impression that they had an 'in' with the Town Board, and Plaintiffs with the belief that they 'didn't stand a chance.' "[35]

Family Members and Friends

There are many reported cases that discuss potential conflicts of interest based on familial relationships. These arise in the context of family members who may be employed by the applicant (ranging from small businesses and organizations where everyone knows their employees, to large operations where the applicant appearing before the board may not have even known that a relationship existed) and family members who are in fact the applicant. In addition, the public may perceive conflicts when friends of board members appear before the board. This is also problematic from an ethics perspective since board members in small communities may personally know many applicants who appear before them, and exactly how close a friendship needs to be to constitute a conflict is an open question. For example, if an applicant appears as a connection on a board member's LinkedIn page or as one of hundreds of friends on Facebook, that alone should not necessarily be a disqualifying conflict. If, however, the board member was in the applicant's wedding party, that may signal a much closer relationship warranting further examination. Below are some examples of recent decisions and opinions involving family and friends. Over the years there have also been a fair number of reported decisions involving spouses who appear before boards in professional or member of the public roles, spouses who work for the municipality and appointed the board member and spouses who may serve on different boards within the same jurisdiction and may be in a position to cast votes regarding the spouse, or review decisions of the board their spouse sits on.

The Michigan Appeals Court suggested in dictum that there would be a conflict of interest where a board member's spouse wrote a letter and appeared at a hearing in opposition to a request. In this case the applicant purchased a building used for industrial purposes which was non-conforming since 1994. He requested that the Zoning Board recognize the prior nonconforming use and was denied. A member of the Board owned the adjacent property and had tried to purchase the subject property but was outbid, and then offered to purchase the property at the hearing. The Board member's wife both wrote a letter and appeared at the hearing as a member of the public in opposition to the application, and the Board member did not abstain from voting on the petition, but instead supported another member's motion to deny the petition. He was absent at the next meeting of the Zoning Board of Appeals when the minutes from the appeal hearing were approved. The applicant argued that this created a clear conflict of interest and that he was denied a fair, impartial hearing. The Board member was asked by the applicant's counsel to disqualify himself from voting on this matter in light of his conflict of interest, but he did not. The Michigan Court of Appeals decided the case on the merits in favor of the applicant and so did not issue a holding regarding the alleged conflict of interest. However, the Court stated that there did in fact seem to be a conflict of interest because of the reasons stated above.[37]

A New York trial court found no conflict of interest where a board member was related to a former attorney for the law firm representing the applicant.[38] In this case a Greek Orthodox Church and religious education center sought special exceptions and variances to build a 25,806 square foot two-story cultural center directly adjacent to the church. The Zoning Board of Appeals granted the permit with conditions attached following a full-day public hearing that lasted more than 12 hours, with

16 witnesses appearing in support of the application and 24 witnesses opposed. Three homeowners who lived across the street challenged the granting of the permit on a number of grounds, including irregularity in the conducting of the administrative hearing and an alleged conflict of interest of one of the members of the Board. Although the petitioners claimed that they were not given the ability to cross-examine the Church's witnesses, the Court said that this did not violate their due process rights as they clearly had notice and more than ample opportunity to be heard. The alleged conflict of interest was based on the fact that one member of the Board was the sister-in-law of an attorney who used to work for the law firm representing the Church. Further, the law firm's current managing partner was a campaign manager for the Board member's estranged husband. The Court noted that the petitioners failed to point to a specific violation of N.Y. General Municipal Law Article 18 (the state statute governing municipal ethics), and that they did not identify any pecuniary or material interest in the application by the Board member. Further, the Court noted that since the vote was unanimous, the Board member did not cast the deciding vote.[39]

The Rhode Island Ethics Commission opined that it was permissible for the spouse of a deputy zoning official to petition the town council for an amendment to the zoning use regulations to allow the deputy zoning official to open and operate an art studio and gallery on her spouse's property.[40] Under Rhode Island statute public officials are prohibited, among other things, from participating in any matter in which they have an interest and that is in substantial conflict with the proper discharge of their public duties.[41] Further, public officials may not represent themselves or any other person before an agency of which they are a member or by which they are employed.[42] They are also prohibited from authorizing another person to appear on their behalf in front of an agency of which they are a member or by which they are employed.[43] The Commission concluded that, because it was the spouse and not the deputy zoning official who wished to appear before the council; the zoning official was neither a member of the town council nor employed by it; and that the council did not appoint the zoning official, there would be no prohibition.[44]

The New Hampshire Supreme Court dismissed a conflicts claim alleging that the chair of the Zoning Board of Adjustment had a longtime relationship with applicant since the claim was untimely,[45] serving as another important reminder that where actual or perceived conflict exists, the complaint must be timely raised in the course of the administrative or quasi-judicial review process. In this case the City Council appealed the lower court's dismissal of their claims. The Plaintiffs updated a local zoning ordinance which eliminated manufactured housing parks. The Zoning Board of Adjustment heard a case in which a company, "Toys," requested a variance to expand their manufactured housing park. This variance was requested after the Plaintiff's instituted the change to the zoning ordinance. The Defendants granted the variance request seemingly without the addition of Toys meeting its burden of proving unnecessary hardship. The Plaintiffs claimed that the Board Chairman was a longtime friend and associate of Toys and that there may have been discussions about this transaction outside of an official meeting. The Court held that the Plaintiff did not raise the issue of a potential conflict in a timely manner, noting that, "The conflict of interest or potential bias issues must be raised at the earliest possible time in order to allow the local board time to address them."[46]

In an unreported case, a New Jersey appeals court agreed that no conflict of interest existed between the president of the township council and his spouse who worked in a township department.[47] The Committee to Stop Mahwah Mall was an informal group of residents that challenged the validity of an ordinance that permitted retail and commercial development on a 140-acre tract of land. Plaintiffs alleged, among other things, that since the ordinance included a provision for the construction of a six-acre recreational field within the 140-acre tract, and the Township Council president's wife was the director of the town's recreational department, a conflict of interest existed.[48] The trial court held that the President/Mayor did not have a conflict of interest based on his wife's position. On appeal, the court affirmed, finding that the Plaintiffs did not meet their burden of proving that the President's vote benefited his wife in a non-financial way.[49]

Physician-Patient Relationships

The New Jersey Supreme Court recently decided a novel relationship issue involving the physician-patient relationship, concluding that a "meaningful relationship" between a zoning board member and his or her immediate family member could support a finding of a disqualifying conflict of interest.[50] Because of the potential life-saving diagnosis that physicians may make for their patients, the Court opined that, "A person may have difficulty judging objectively or impartially a matter concerning someone to whom he would naturally feel indebted."[51] The court continued, ". . .we cannot expect Zoning Board members to have a disinterested view of a doctor with whom they, or immediate members of their family, have had a meaningful patient-physician relationship."[52] The Court went into a lengthy discussion of the relationship between individuals and their doctors. They said:

> Physicians are responsible for caring for and maintaining the physical and mental health of their patients so that they can enjoy productive and happy lives. In that light, the deep bonds that develop between patients and their physicians are understandable.
>
> Physicians every day diagnose and treat patients for the mild and malignant maladies that afflict the human body and mind. It would be natural for a patient to owe a debt of gratitude to a doctor who has removed a cancerous lesion from the skin, repaired a shoulder injury, replaced a knee, set a broken bone, performed heart or kidney surgery, delivered a child, prescribed life-enhancing or -saving medications, provided psychiatric therapy, or every year treated symptoms for the common cold or flu. It is not unusual for a physician to treat a family over the course of decades.
>
> A person may have difficulty judging objectively or impartially a matter concerning someone to whom he would naturally feel indebted. By any measure, under the conflict-of-interest codes previously discussed, we cannot expect Zoning Board members to have a disinterested view of a doctor with whom they, or immediate members of their family, have had a meaningful patient-physician relationship.
>
> We cannot here fully limn the contours of what would constitute a meaningful patient-physician relationship because that may depend on the length of the relationship, the nature of the services rendered, and many other factors. The determination will be fact specific in each case. A few examples, however, should provide some guidance. On one end of the relationship spectrum may be the physician who, once five years ago, merely inoculated the patient with a flu shot, and on the other end may be the physician who, ten years ago, performed a life-saving heart transplant. A primary-care physician who examines a patient annually and tends to the patient's health-care issues as they arise or the surgeon who performs a life-altering or -enhancing procedure will fall within the sphere of a meaningful relationship that should prompt disqualification.[53]

The Court next focused on just how the disqualification should occur. After all, there is also a special confidentiality that attaches to the physician-patient relationship. The mere existence of the relationship, especially if the physician is a specialist, can create an uncomfortable situation where the board member-patient may not want the existence of the relationship known. The Court acknowledged that, "The potential disclosure of highly intimate and personal health-care information raises legitimate privacy concerns and therefore must be addressed with great sensitivity."[54] However, the Court also noted that this must be weighed against the Board member's duty to the public interest, and concluded that, ". . .the nature of any disclosure relating to a patient-physician relationship must be weighed against the official's reasonable expectation of privacy."[55] Therefore, should the Court determine a meaningful patient-physician relationship exists, ". . . the nature of the disclosure will depend on, among other factors, the degree of need for access to the information, the damage excessive disclosure would cause to a patient's right to privacy, the adequacy of safeguards to prevent excessive disclosure, and the personal dignity rights of the official."[56] The Court continued:

> Every reasonable precaution must be taken to protect against the unnecessary release of a patient's health-care information. Certain sensible approaches should be kept in mind. A zoning board member who recognizes the applicant as one with whom he or she has a meaningful patient-physician relationship can simply disqualify himself or herself from the case, with nothing more being said. One would expect, in most cases, a zoning board member to know whether that type of meaningful relationship exists, after some explanation by the zoning board attorney. If in doubt, the member can consult with the board attorney and speak in hypothetical terms to gain an understanding whether recusal is appropriate. Erring on the side of disqualification when the board member has

had a patient-physician relationship with the applicant is the most prudent course.[57]

While voluntary disqualification may be the prudent course, it is certainly possible that Board members might conclude that disqualification is not necessary since they might not believe that a meaningful relationship exists. This presents a risk, however, that an objector who has knowledge of the existence of the physician-patient relationship with the Board member or a member of their family, might disclose it in a challenge to the member's participation in review of the particular matter at hand. The Court opined that, "In such cases, the board member should not be required to disclose anything more than that he or she, or a family member, was at one time a patient of the applicant or objector or someone with a property interest at stake in the outcome of the proceedings."[58] Should the objector contest the participation of the board member further, the Court opined that disclosures should be heard in camera and ex parte before a Law Division judge, and that "Only if the judge concludes that disclosure is necessary should some form of disclosure be mandated, and then only to the extent reasonably necessary, minimizing the invasion of privacy into such sensitive matters. A board member should not be required to reveal the precise nature of a medical condition or other intimate details of treatment. Any potential disclosure must be balanced against the sanctity of the privacy of the patient's health information."[59]

Conclusion

As always, the best course of action is to avoid even the appearance of impropriety. Despite the fact that there are only about two dozen ethics cases and opinions reported annually, and that the courts are often forced to find that the alleged unethical conduct rises to a legal violation to sustain the alleged conflict, the costs, even for those who prevail, can be significant economically and reputationally. Taken with the daily availability of news clips reporting on alleged unethical conduct in the land use decision-making process across the country, combined with the willingness of the public to take to social media to express their displeasure over the conduct and behavior of the players in the land use game, land use ethics has never been under a stronger microscope. Those who volunteer or who earn a living in the land use game should carefully consider the consequences of their actions and inactions.

ENDNOTES:

*Patricia Salkin is Provost of the Graduate and Professional Divisions of Touro College and a land use professor at the Touro College Jacob D. Fuchsberg Touro Law Center. Thomas Brown '20 and Aisha Scholes '20 are students at Touro Law Center. The authors also acknowledge the contributions Matthew Loeser, Esq., a contributing author to Provost Salkin's Law of the Land Blog, who authored some case summaries for the blog that are discussed in this article.

[1]Other topics such as bias and prejudgment, campaign promises and contributions, bribery and corruption, ex parte communications and dual office-holding to name just some examples where ethical issues arise in the land use game, are beyond the scope of this article. But see, Salkin, American Law of Zoning, 5th ed., Chapter 38.

[2]*Grabowsky v. Township of Montclair*, 221 N.J. 536, 115 A.3d 815 at 817 (2015).

[3]Id.

[4]Id.

[5]Id at 827.

[6]Id.

[7]Id. at 818.

[8]Id. at 829.

[9]Id. at 830.

[10]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *1 (N.J. Super. Ct. App. Div. 2015).

[11]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *1 (N.J. Super. Ct. App. Div. 2015).

[12]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *2 (N.J. Super. Ct. App. Div. 2015).

[13]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 2015).

[14]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 2015).

[15]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 2015).

[16]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 2015).

[17]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 2015).

[18]*Matula v. Township of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 2015).

[19]*Matula v. Township of Berkeley Heights*, 2015

WL 5009859, at *6 (N.J. Super. Ct. App. Div. 2015).

[20]*Global Tower Assets, LLC v. Town of Rome*, 810 F.3d 77 (1st Cir. 2016).

[21]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *1 (Conn. Super. Ct. 2015).

[22]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *1 (Conn. Super. Ct. 2015).

[23]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *2 (Conn. Super. Ct. 2015).

[24]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *3 (Conn. Super. Ct. 2015).

[25]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *14 (Conn. Super. Ct. 2015).

[26]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *13 (Conn. Super. Ct. 2015).

[27]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *12 (Conn. Super. Ct. 2015).

[28]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *12 (Conn. Super. Ct. 2015).

[29]*Michalski v. Planning and Zoning Com'n of Town of Darien*, 2015 WL 5976190, at *12 (Conn. Super. Ct. 2015).

[30]*Titan Concrete, Inc. v. Town of Kent*, 94 N.Y.S.3d 817 (Sup 2019).

[31]Id.

[32]Id.

[33]Id.

[34]Id.

[35]Id.

Trail Side LLC v. Village of Romeo, 2017 WL 2882554 (Mich. Ct. App. 2017), appeal denied, 501 Mich. 982, 907 N.W.2d 571 (2018).

[37]*Trail Side LLC v. Village of Romeo*, 2017 WL 2882554 (Mich. Ct. App. 2017), appeal denied, 501 Mich. 982, 907 N.W.2d 571 (2018).

[38]*Healy v. Town of Hempstead Board of Appeals*, 61 Misc. 3d 408, 83 N.Y.S.3d 836 (Sup 2018).

[39]Id.

[40]RI Ethics Commission, Advisory Opinion No. 2019-22 (March 29, 2019).

[41]Id. Citing R.I. Gen. Laws sec. 36-14-5(a).

[42]Id. Citing R.I. Gen. Laws sec. 36-14-5(e)(1).

[43]Id. Citing R.I. Regulation 520-RICR-00-00-1.1.4(A)(1)(b).

[44]RI Ethics Commission, Advisory Opinion No. 2019-22 (March 29, 2019).

[45]*Rochester City Council v. Rochester Zoning Board of Adjustment & a.*, 171 N.H. 271, 194 A.3d 472 (2018).

[46]*Rochester City Council v. Rochester Zoning Board of Adjustment & a.*, 171 N.H. 271, 194 A.3d 472 (2018).

[47]*Committee to Stop Mahwah Mall v. Township of Mahwah*, 2014 WL 10102328 (N.J. Super. Ct. App. Div. 2015).

[48]*Committee to Stop Mahwah Mall v. Township of Mahwah*, 2014 WL 10102328 (N.J. Super. Ct. App. Div. 2015).

[49]*Committee to Stop Mahwah Mall v. Township of Mahwah*, 2014 WL 10102328 (N.J. Super. Ct. App. Div. 2015).

[50]*Piscitelli v. City of Garfield Zoning Board of Adjustment*, 2019 WL 1371557 (N.J. 2019).

[51]Id.

[52]Id.

[53]Id.

[54]Id.

[55]Id.

[56]Id.

[57]Id.

[58]Id.

[59]Id.

Speaker Biographies

Wade Beltramo is General Counsel to the New York State Conference of Mayors and Municipal Officials (NYCOM), a voluntary membership association which represents villages and cities in the State of New York. As NYCOM General Counsel, he is responsible for general municipal legal matters as well as building code, property maintenance, justice court, parking and traffic regulations, community and economic development, and local government consolidation and dissolution issues. He has been with NYCOM since April 2002.

Mr. Beltramo joined NYCOM after serving as Assistant Corporation Counsel in the New York City Law Department, where he litigated both civil and criminal cases on behalf of the City's Department of Buildings, Department of Health, Taxi and Limousine Commission, Department of Environmental Protection, and Fire and Police Departments. Prior to working for New York City's Corporation Counsel, he was an analyst in the New York City Mayor's Office of Operations.

Mr. Beltramo graduated from Grinnell College, with a Bachelor of Arts degree in Political Science. He received his Juris Doctorate from Brooklyn Law School

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James D. Bilik is an arbitrator and mediator with a statewide practice in labor and employment matters. Prior to his career as a neutral, he provided legal counsel to New York State United Teachers for over 26 years, first as a staff attorney and later as Assistant General Counsel. Before that, he was a member of the firm of Gordon & Gordon, P.C. in New York City. As a practicing attorney, he represented public and private sector employees and their unions, and unions as private sector employers, before state and federal courts and administrative tribunals.

Mr. Bilik is Co-chair of the Employment Relations Committee of the Local and State Government Law Section of NYSBA. He graduated from the University of Wisconsin-Madison and Rutgers School of Law.

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Andrea is a Senior Counsel in the Legal Counsel Division of the New York City Law Department. Andrea provides advice and counselling to the Mayor's Office and to City agencies on questions relating to the Establishment Clause, state and local lobbying laws, FOIL, consumer protection laws, and smoking and health policy. In addition, Andrea helps prepare the City's State and local legislative agendas, reviews state legislation that could affect the City, and works with New York City Council staff on Council initiatives. Before joining the Legal Counsel Division, Andrea worked in the General Litigation Division of the Corporation Counsel's Office, and clerked for Magistrate Michael Dolinger in the Southern District of New York. She is a graduate of Columbia Law School and Harvard College.

PAUL S. KARAMANOL
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NEW YORK STATE LIQUOR AUTHORITY, OFFICE OF COUNSEL

Paul Karamanol has been a Senior Attorney with State Liquor Authority Counsel's Office since January, 2007, and has worked primarily with the Wholesale Bureau since January, 2008 - overseeing investigations into wholesaler and supplier misconduct in the New York alcoholic beverage market. Paul's other legal responsibilities at the SLA include drafting legal memoranda in support of every disapproved license application in the state, bill drafting and legislative tracking, drafting and promulgation of regulatory reform proposals, and responding to industry as well as general public regulatory inquiries.

Before coming to the State Liquor Authority, Paul spent several years as a general practice attorney with the firm of Kurz & Karamanol, LLC, in Guilderland, New York. Paul also worked in the New York State Governor's Office, Executive Chamber, as Counsel to the Appointments Secretary, for both Governors Pataki and Spitzer. Paul also served as a commissioned officer in the United States Navy Reserve, Information Dominance Corps, retiring as a Lieutenant and receiving an Honorable Discharge in February, 2016.

Born in New Jersey, and raised in the Albany, N.Y. area, Paul graduated from Schenectady County Community College in 1993 with an Associate's degree in Humanities and Social Sciences, from the University at Albany in 1995 with a Bachelor's degree in Political Science with a minor in History, and from Albany Law School of Union University in 2002 with a Juris Doctor degree. Paul currently resides in Clifton Park, N.Y. with his wife Nicole and their 2 year old son Brandon.

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Chuck concentrates his practice on environmental law, energy law, land-use law, municipal law, and real estate development. He has experience working with both private and public clients on issues involving both state and federal environmental statutes, and he assists municipalities with a wide range of legal issues, including environmental review and zoning.

A primary part of Chuck's work focuses on the State Environmental Quality Review Act (SEQRA) where he has extensive experience guiding municipalities and developers through its requirements. Successful projects include environmental assessments for large-scale telecommunications projects, power generation projects (including some of the largest wind farms in the eastern United States and both utility and small-scale solar projects), infrastructure improvements, and public and private developments, from project inception through successful litigation. He has assisted in drafting scoping documents, environmental impact statements, findings statements, decisions, and guiding public review. Chuck also counsels clients on local, state, and federal permitting processes, including compliance with historic preservation laws, the Clean Water Act, the Clean Air Act, and other federal environmental statutes and regulations.

Chuck frequently gives presentations and provides training programs for local government officials across the State on SEQRA, zoning, environmental law, land-use law, and ethics. He regularly presents at the Summer School and Annual Meetings of the Association of Towns and provides training for the New York Planning Federation. He has trained code enforcement officers and town and village justices on zoning and building code enforcement, and has published articles on investigating and prosecuting violations. In addition, Chuck has provided training to planners and local government officials on NYS Agriculture and Markets law, and the protections applicable to farm operations, including the limitations on municipal regulations.

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As part of his municipal practice, Chuck serves as the attorney for an upstate New York municipality addressing the full-range of general municipal issues. He regularly counsels municipal clients on leasing, ethics, environmental matters, zoning, assessment, eminent domain, and procurement. Chuck represents clients engaged in farm operations in County-adopted, State-certified Agricultural Districts and have assisted in securing municipal approvals for operations, including renewable energy projects. He has also defended lawsuits challenging municipal approvals to farm operations. His further litigation experience includes tax assessment matters, land use issues, environmental enforcement, and other issues before administrative and judicial forums. He has drafted laws for municipalities on a variety of subjects.

Chuck also counsels clients in the oil and gas industry on a variety of matters, including environmental compliance and administrative enforcement defense. Chuck and his colleagues represent several oil and gas companies in defending lawsuits alleging pollution resulting from drilling activities.

Chuck has represented clients with matters pending before the State Liquor Authority, including applications for licenses. Specifically, he has provided guidance to wineries and distilleries with respect to licensing issues and compliance with Federal and State laws regulating the sale and consumption of alcohol.

In addition, Chuck is conversant in Russian.

Honors

- Listed, *Upstate New York Super Lawyers* Rising Stars, 2014 - 2019

Experience

Hodgson Russ represented an intervenor supporting a ZBA's interpretation, in a matter requiring an understanding of the interplay of amendments to a municipal zoning ordinance over the last 50 years. The ZBA rendered an interpretation that certain height limitations (imposed as conditions to a prior rezoning) were no longer applicable, but did not issue formal written findings. Hodgson Russ argued, successfully, that the ZBA's decision was a matter of "pure legal interpretation" and that no written findings were required. Supreme Court, Erie County conducted a de novo review and upheld the ZBA's determination. The Fourth Department affirmed.

The Ghent Planning Board issued a Negative Declaration, the Ghent ZBA granted area variances, and the Claverack Planning Board granted site plan approval. Although Hodgson Russ represented the applicant, it took the lead in defending the actions of the municipal boards and prevailed in all three proceedings. Each matter involved the preparation of a certified record, drafting pleadings, and preparing memoranda of law. One required approval, a special use permit from the Ghent Planning Board, was denied. Hodgson Russ successfully challenged this denial as arbitrary and capricious and not supported by the evidence in the record. Supreme Court, Columbia County ordered the approvals be granted. These matters involved the construction of a proposed refrigerated warehouse facility across the border of two towns in Columbia County.

CHARLES W. MALCOMB

A Developer commenced an Article 78 proceeding challenging, among other things, members of a village board of trustees' right to deliberate and vote on a project about which the members expressed personal opinions. The project was a controversial development project and prior to their election, board members had expressed their views on the project, both before and during their campaigns for office. Hodgson Russ represented the board of trustees and its members when the developer argued that the expression of opinions and signing a petition against a project were examples of bias requiring the board members to recuse themselves. Supreme Court, Monroe County agreed and annulled the determination, finding that the board members had a prohibited conflict of interest, and enjoined them from any deliberations or voting with respect to the project. The Fourth Department reversed, holding that mere expressions of opinion, absent more, are not enough to demonstrate bias. Elected, public officials should be free to express their views to their constituents, especially during their run for election. This is a seminal case that clarifies that the mere expression of opinion does not require disqualification of board members.

A petitioner obtained a special use permit and site plan approval for a wind project. Due to delays, the Petitioner applied for the first extension, which was granted. They then changed the project and applied for a second extension, which was denied. The applicable standard is whether there was a change in circumstances that would justify denial of an extension request. The project changes proposed by Petitioner warranted denial. Petitioner then argued that no extension was necessary because the approvals were challenged and the doctrine of equitable tolling extended the durational limits. Hodgson Russ argued successfully that the doctrine of equitable tolling is inapplicable in the State of New York. This decision made new law in the State of New York, specifically, whether the doctrine of "equitable tolling" extended durational limits of permits while litigation challenging those approvals is pending.

Hodgson Russ successfully defended the ZBA before the Supreme Court, Erie County and the Fourth Department. The applicant sought a use variance to permit commercial parking in a residential area, across the street from his commercial operation. The ZBA applied the factors for granting a use variance and issued a written decision. After nearby residents challenged the ZBA's determination granting the use variance on several grounds.

Hodgson Russ represented a citizens group opposed to the development of a casino resort. The town board issued a negative declaration without setting forth its determination, in a written form, providing a reasoned elaboration. Instead, the board's special counsel prepared rationale after-the-fact. Supreme Court, Seneca County approved of this approach, but the Fourth Department reversed. The Fourth Department determined that SEQRA requires the lead agency to set forth its determination in writing to allow intelligent judicial review. After-the-fact rationale should not be considered by the reviewing court. This matter set significant precedent in the Fourth Department.

Hodgson Russ advised the developer on all legal aspects of the permitting and IDA financing of multiple wind energy projects in Western New York providing power for more than 50,000 homes. The projects include over a hundred turbines, over 20 miles of access roads, electric collection systems, an operations and maintenance building, and a substation. Our work included guiding the environmental impact review processes, representing the company at public hearings, obtaining land use permits, defending the company in lawsuits from opposing neighbors, and negotiating road use and host community agreements. We served as local finance counsel in obtaining benefits from the IDA, and all real estate matters related to the project, including survey due diligence and acting as the title examiner for the projects.

Since 2012, a Hodgson Russ team led by Mr. Gilbride has represented the Buffalo Sabres and its affiliate, HARBORCENTER, in conjunction with the development of HARBORCENTER, an approximately $200 million, 600,000-square-foot sports, retail, entertainment, parking, and hospitality complex. This first-of-its-kind mixed-used facility includes two ice rinks; a 19-story, full-service Marriott hotel; a sports-themed nightclub and restaurant; retail space; and an 800-car parking facility, all of which are connected to the existing Key Bank Center via skywalk. Hodgson Russ has worked with the Sabres on all aspects of this project from its inception, including environmental review, contract negotiations, permitting, construction, economic development incentives, financing, and tax planning.

Hodgson Russ has represented many local businesses and developers across New York State, including an 18-hole golf course, a winery, a family-owned meat market, and a developer of a large mixed-use business/residential park. This representation has included state and local code interpretation, analysis of permitting requirements, the preparation and presentation of environmental and zoning applications, and defending approvals and permits in litigation.

After a 13 year battle, the petitioners ultimately failed in their efforts to challenge a law and negative declaration issued by a local town board which prevented them from any mining and excavating to create a stone quarry in a zoning district designated as agricultural/residential. New York's appellate court for the 4th Department determined that the petitioners did not prove a clear conflict between a 2017 town law and the town's comprehensive plan. Charles Malcomb and Dan Spitzer handled this matter on behalf of the town.

Our firm serves as key outside counsel to a California-based energy company regarding their solar development projects. The Hodgson Russ team including Elizabeth Holden, Andrea Gervais, Betsy Mills and Jennifer Anthony provide advice, review and guidance on real-estate based development issues in a time-sensitive and consistent manner for the client's development team across four states. Dan Spitzer, Ryan Cummings, Chuck Malcomb, Mila Buckner and Jennifer Schlumberger provide permitting, PILOT Agreement, contract assistance and litigation support, including a successful Public Service Commission petition on their behalf.

The Appellate Division for the 4th Department unanimously held that the petitioner had no standing to sue in his attempts to challenge a negative declaration issued under the SEQRA by a municipality's Planning Board regarding the demolition and reconstruction of an apartment complex with that city. He did not show the requisite environmental injury that differs from that of the public at large in order to challenge the Planning Board's SEQRA determination. His interest in historic preservation, his interest in photographing the apartment building and his position on the Preservation Board of the municipality were all insufficient to confer standing to sustain the lawsuit. Nor did the petitioner have standing on behalf of the apartment complex tenants. Charles Malcomb and Adam Perry handled this matter on behalf of the property developer.

News

Sixty Hodgson Russ Attorneys Named to 2019 Upstate New York Super Lawyers
Press Release, August 12, 2019

Sixty-One Hodgson Russ Attorneys Named to 2018 Upstate New York Super Lawyers
Press Release, August 20, 2018

Hodgson Russ Announces Five Newly Elected Partners, Nine Attorneys Promoted to Senior Associate
Press Release, January 2, 2018

Seventy Hodgson Russ Attorneys Named to 2017 Upstate New York Super Lawyers, Hugh Russ Listed Among Top 50
Press Release, September 6, 2017

Sixty-three Hodgson Russ Attorneys Named to 2016 Upstate New York Super Lawyers, Hugh Russ Listed Among Top 50
Press Release, August 31, 2016

Sixty-Four Hodgson Russ Attorneys Named to 2015 Upstate New York Super Lawyers, Hugh Russ Listed Among Top 50
Press Release, August 19, 2015

Hodgson Russ Announces Five Newly Elected Partners
Press Release, December 30, 2014

ECC Seeks Dismissal of 'Frivolous' Giambra Lawsuit
Buffalo News, December 23, 2014

Oil and Gas Trade Group Sets Agenda for Buffalo Meeting
Buffalo Business First, November 6, 2014

63 Hodgson Russ Attorneys Named to *Super Lawyers* Listing
Press Release, August 14, 2014

Presentations

Zoning & Land Use Fundamentals for Municipal Officials
Millennium Hotel, 2040 Walden Avenue, Cheektowaga, NY, June 13, 2019

Niagara Frontier Section Air & Waste Management Association 2019 Annual Enrichment Seminar
Templeton Landing, Buffalo, NY, January 24, 2019

34th Annual School Client Conference
Millennium Hotel Buffalo, January 18, 2019

New York State Bar Association, Local and State Government Law Section Fall Meeting
Buffalo, New York, September 28-29

WSTBOA Educational Conference
Mayville, New York, September 11, 2018

NYS Economic Development Council 2018 Annual Meeting
NYS Economic Development Council, Otesaga Resort Hotel, May 23 - 25, 2018

Municipal Law Seminar
Millennium Hotel, 2040 Walden Avenue, Cheektowaga, NY 14225, May 17, 2018

New York Magistrates Annual Meeting - Zoning Code Enforcements
Verona, NY, October 20, 2017

Are Changes Coming for Environmental Law Under Trump Administration? Exploring Recent Updates
May 2, 2017

Tug Hill Commission Annual Local Government Conference – Ethical Considerations for Planning and Zoning Boards
Watertown, NY, March 30, 2017

Publications

New York Legislature Considering Bill Requiring Prevailing Wage for "Public Work" that has Far-Reaching Implications on Brownfield Development and Other Incentivized Projects
Brownfield Redevelopment Alert & Renewable Energy Alert, June 18, 2019

Appellate Division Upholds IDA Denial of Application and Confirms Attorneys' Fees Award
Municipal Law Alert, May 22, 2019

Federal Court Rules Refunded NYS Brownfield Tax Credits Are Taxable Federally
Environmental Law Alert, May 7, 2019

New York Supports Energy Storage Efforts With $280 Million Allocated by New York State for Energy Storage Projects
Renewable Energy Alert, May 6, 2019

New Jersey Economic Development Authority Creates New Brownfields Loan Program
Environmental Law Alert, April 22, 2019

$8 Million in Supplemental Funds Made Available by the U.S. Environmental Protection Agency for Brownfields Revolving Loan Grant Funds
Environmental Law Alert, April 18, 2019

Small Cell Aesthetic Regulation Deadline
Municipal Law Alert, February 27, 2019

Public Service Commission Clarifies Calculation of 5 MW Limitation Rules
Renewable Energy Alert, February 13, 2019

New York State Drinking Water Quality Council Recommends Strictest Regulations of PFOA, PFOS, and 1,4 dioxane in Drinking Water
Increased Regulatory Requirements and Water Infrastructure Investment Likely in 2019
Environmental Alert, December 21, 2018

NYSERDA's *Municipal Solar Procurement Toolkit* Promotes The Development Of Solar Projects On Brownfields And Landfills
Renewable Energy Alert, November 20, 2018

Social Media

Chuck contributed to Hodgson Russ's Clean and Green Law blog. His entries included:

- "Cuomo Announces State Investment of $225 Million Toward the Buffalo High-Tech Manufacturing Innovation Hub," November 25, 2013
- "Solar Balance of System (BoS) Cost Continues to Be the Focus of Cost-Reduction Strategy," August 20, 2013
- "Will President Obama's Climate Change Policy Impact the 2014 Midterm Elections?," July 3, 2013
- "Proposed Amendments to New York's State Environmental Quality Review Act Do Little More Than Provide Lip Service to Sustainability," January 28, 2013
- "Will the Wind Energy Production Tax Credit Play a Major Role in the 2012 U.S. Presidential Election?," August 15, 2012

Professional Affiliations

- Environmental Law Institute
- New York State Bar Association
- Bar Association of Erie County

Community & Pro Bono

- Rivershore Foundation, Inc. board member

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BIOGRAPHY

James T. McClymonds is the Chief Administrative Law Judge for the New York State Department of Environmental Conservation. Judge McClymonds has held that position since March 2003. Prior to that, Judge McClymonds served almost ten years at the New York State Court of Appeals, where he worked as a staff attorney and supervising staff attorney on the Court's Central Staff, and later as principal law clerk to Associate Judge Howard A. Levine and, briefly, to Associate Judge Susan P. Read. Judge McClymonds is a graduate of New York Law School, where he received a J.D. magna cum laude in 1993.

In addition to other professional activities, Judge McClymonds is a member of the Local and State Government Law Section of the New York State Bar Association (NYSBA), and is co-chair of that section's Committee on the Administrative Law Judiciary. Judge McClymonds was also a member of NYSBA's former Committee on Attorneys in Public Service (CAPS), and was a co-chair of that Committee's Subcommittee on the Administrative Law Judiciary from 2004 to 2009. In that capacity, Judge McClymonds coordinated the development of the Model Code of Judicial Conduct for State Administrative Law Judges, which was adopted by the NYSBA House of Delegates in April 2009.

Judge McClymonds is a regular presenter of Continuing Legal Education programs for State agencies and bar associations, including NYSBA. Judge McClymonds has presented on topics such as ethics for administrative law judges, the State Administrative Procedure Act and administrative adjudicatory processes, adjudicatory proceedings before the Department of Environmental Conservation, mediation and alternative dispute resolution, and civil practice before the New York State Court of Appeals. In 2018, Judge McClymonds presented the New York Law Course on Administrative Law for the New York State Board of Law Examiners.